

**ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE**

March 29, 2001

10:45 a.m.

MEMBERS PRESENT

Representative Norman Rokeberg, Chair
Representative Jeannette James
Representative John Coghill
Representative Kevin Meyer
Representative Ethan Berkowitz

MEMBERS ABSENT

Representative Scott Ogan, Vice Chair
Representative Albert Kookesh

COMMITTEE CALENDAR

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

PREVIOUS ACTION

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
02/22/01		(H)	MINUTE(TRA)
02/27/01		(H)	TRA AT 1:00 PM CAPITOL 17
02/27/01		(H)	Moved CSHB 4(TRA) Out of

			Committee
02/27/01		(H)	MINUTE(TRA)
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		(H)	JUD AT 1:00 PM CAPITOL 120
02/28/01		(H)	Heard & Held
02/28/01		(H)	MINUTE(JUD)
03/09/01		(H)	JUD AT 1:00 PM CAPITOL 120
03/09/01		(H)	Heard & Held
03/09/01		(H)	MINUTE(JUD)
03/12/01		(H)	JUD AT 2:30 PM CAPITOL 120
03/12/01		(H)	Heard & Held
03/12/01		(H)	MINUTE(JUD)
03/14/01		(H)	JUD AT 2:15 PM CAPITOL 120
03/14/01		(H)	Scheduled But Not Heard
03/16/01		(H)	JUD AT 1:00 PM CAPITOL 120
03/16/01		(H)	Heard & Held
03/16/01		(H)	MINUTE(JUD)
03/19/01		(H)	JUD AT 1:00 PM CAPITOL 120
03/19/01		(H)	Heard & Held
			MINUTE(JUD)
03/21/01		(H)	MINUTE(JUD)
03/23/01		(H)	JUD AT 1:00 PM CAPITOL 120
03/23/01		(H)	Heard & Held
			MINUTE(JUD)
03/26/01		(H)	JUD AT 1:00 PM CAPITOL 120
03/26/01		(H)	Heard & Held
03/26/01		(H)	MINUTE(JUD)
03/28/01		(H)	JUD AT 1:00 PM CAPITOL 120
03/28/01		(H)	Heard & Held
			MINUTE(JUD)
03/29/01		(H)	JUD AT 10:40 AM CAPITOL 120

WITNESS REGISTER

BLAIR McCUNE, Deputy Director
Central Office
Public Defender Agency (PDA)
Department of Administration

900 West 5th Avenue, Suite 200
Anchorage, Alaska 99501-2090

POSITION STATEMENT: During discussion of HB 4, answered questions relating to proposed Amendment 31.

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 of HB 4, answered questions relating to proposed amendments.

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 4, answered questions relating to proposed Amendment 31.

JANET SEITZ, Staff
to Representative Norman Rokeberg
Alaska State Legislature
Capitol Building, Room 118
Juneau, Alaska 99801

POSITION STATEMENT: During discussion of HB 4, answered questions relating to proposed amendments.

MIKE FORD, Attorney
Legislative Legal Counsel
Legislative Legal and Research Services
Legislative Affairs Agency
State Capitol

Juneau, Alaska 99801-1182

POSITION STATEMENT: During discussion of HB 4, answered questions about proposed Amendments 34 and 25.

DAVID STANCLIFF, Staff
to Representative Scott Ogan
Alaska State Legislature
Capitol Building, Room 108
Juneau, Alaska 99801

POSITION STATEMENT: During discussion of HB 4, answered questions on behalf of Representative Ogan relating to proposed Amendments 34 and 35.

LAUREE HUGONIN, Director
Alaska Network on Domestic Violence and Sexual Assault (ANDVSA)
130 Seward Street, Room 209
Juneau, Alaska 99801

POSITION STATEMENT: During discussion of HB 4, testified on proposed Amendment 25 and responded to questions.

ACTION NARRATIVE

TAPE 01-46, SIDE A
Number 0001

CHAIR NORMAN ROKEBERG called the House Judiciary Standing Committee meeting (which had been recessed on 3/28/01) back to order at 10:45 a.m. Representatives Rokeberg, James, Coghill, Meyer, and Berkowitz were present at the call to order. Chair Rokeberg called an at-ease from 10:46 a.m. to 10:55 a.m.

HB 4 - OMNIBUS DRUNK DRIVING AMENDMENTS

Number 0037

CHAIR ROKEBERG announced that the committee would take up amendments for 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).]

Number 0073

REPRESENTATIVE BERKOWITZ made a motion to adopt Amendment 27, which read [original punctuation provided]:

Page 16, lines 11 - 31, following "convicted"

Delete all material

Page 17, lines 1 - 4

Delete all material

REPRESENTATIVE BERKOWITZ asked that this motion include a technical amendment such that Amendment 27, as amended, would read:

Page 16, lines 11 - 31, following "convicted"

Delete all material

Page 17, lines 1 - 10

Delete all material

Number 0090

CHAIR ROKEBERG asked whether there were any objections to Amendment 27, as amended. There being no objection, Amendment 27, as amended, was adopted.

REPRESENTATIVE BERKOWITZ announced he would withdraw Amendments 28, 29, and 30. He warned, however, that there was still need for conforming changes to Section 27.

CHAIR ROKEBERG noted that he would be giving the drafter instructions regarding confirmation and conformance.

Number 0193

REPRESENTATIVE BERKOWITZ made a motion to adopt Amendment 31, which read [original punctuation provided]:

Page 24

Delete "Lines 19 - 21"

Renumber sections accordingly

REPRESENTATIVE BERKOWITZ then referred to language which said: "Nothing in this section shall be construed to restrict searches and seizures under a warrant issued by a judicial officer."

Number 0201

REPRESENTATIVE COGHILL objected for the purpose of discussion.

Number 0255

BLAIR McCUNE, Deputy Director, Central Office, Public Defender Agency (PDA), Department of Administration, testified via teleconference and said that "this" involves the Sosa case. He noted that [the PDA] feels that the Sosa decision was correct, and that the decision reaffirmed what the legislature had said a number of years ago, that the way to punish people who refuse to take a breathalyzer test is via the refusal statute. He paraphrased what the state said as: "You have implied consent; you have to take the breathalyzer. If you refuse to do that, you're guilty of refusal, which is a crime that's of equal punishment as driving while intoxicated [DWI]."

MR. McCUNE explained that the reasoning behind this was to avoid requiring police officers and corrections officers to strap people down in order to take blood tests. He added that this was a dangerous thing for everybody concerned, particularly in light of blood-borne pathogens. He noted that the state currently has the authority to get search warrants for blood when an accident involves serious injury or death. He concluded by saying that this is the current state of the law, and that [the PDA] thinks the law should stay that way, rather than change back to allowing search warrants in DWI cases [via Section 37 of CSHB 4(TRA)].

Number 0424

DEAN J. GUANELI, Chief Assistant Attorney General, Legal Services Section-Juneau, Criminal Division, Department of Law (DOL), argued that in a lot of areas of the state, there are practical problems with collecting evidence - sometimes the intoximeter machines don't work, and sometimes those machines are just not available. He related a situation in the Bethel area where, in place of a breath test, the officer attempted to get a search warrant [for a blood test] but was denied because of the way the statute was written. He said he thought that when law enforcement officers face the difficult situation of being unable to collect evidence due to a lack of functioning equipment, they should have the latitude to get search warrants.

MR. GUANELI said that for 200 years, search warrants have been the traditional means used in this country to gather evidence. It requires that an application be presented to the judge whereby he/she then determines whether a search can occur, and under what conditions. He added that one of the conditions for drawing blood is that it needs to be done by someone with medical training. [Section 37] simply allows officers to use the traditional method for gathering evidence, and the only

reason it can't be done is because of the court's interpretation [via the Sosa decision] of current statute regarding implied consent. He opined that [Section 37] is a good fix for the practical problems that officers have to deal with on a day-to-day basis, and that it is not fair to say that the refusal statutes are adequate - if a breathalyzer is not available, then neither is the charge of refusing to take a test.

REPRESENTATIVE BERKOWITZ said that essentially what he was hearing was that if the state resource, that is, the intoximeter, is broken, and the state hasn't made the effort necessary to ensure that equipment is functioning, then it is OK to perform a very invasive procedure against an individual. He remarked that laws are complicated and involve a weighing and balancing of different features. One of the most critical features of a criminal trial, he continued, is the burden of proof; it is the state's responsibility to come forward with the evidence and with the resources necessary to acquire evidence. And if the state has not ensured that the intoximeters are functioning correctly, that is poor justification for sticking a needle in somebody, or doing that kind of invasive procedure, he opined. He noted that commonly, the examples used are the ones in which the suspect is guilty, but, he suggested, "think of the case where the suspect isn't guilty." He added that one of the hard things to explain to people about criminal law is that it protects the innocent, and by ensuring that innocent people are not subject to undue invasions of their privacy, guilty people sometimes go free. Saying "because the intoximeter is broken, it's OK to invade people's privacy" is a step away from the direction he feels comfortable going in, he asserted.

Number 0703

REPRESENTATIVE COGHILL noted that, certainly, there were timeline issues, but an officer would still have to go before a judge [for a search warrant]; thus, he suggested, the rights of the accused would still be protected. He asked what type of criteria the judge considers before issuing a search warrant.

MR. GUANELI explained that the primary standard used is whether there is probable cause to believe that a crime has been committed and that there is evidence of that crime that exists such that the state should be allowed to seize that evidence. He acknowledged, however, that in situations where the evidence can be collected by other alternatives, the court generally requires the state to use them instead of a search warrant. Thus the courts look at: one, are there sufficient grounds to

believe that an individual was driving drunk; two, is there evidence to be obtained; and three, are there other ways to obtain that evidence. Another point to consider, he said, notwithstanding Representative Berkowitz's comments about sticking needles in people, is that perhaps thousands of times a year, DWI offenders make use of provisions under Alaska law that allow an independent test to be conducted by having blood drawn when they do not trust the results of the intoximeter/breathalyzer machine.

MR. GUANELI said he thought there were adequate safeguards [to peoples' privacy] under the law. He also noted that it is real easy to think of "the state" as having resources to spend on equipment, when in most situations it is really the municipal police departments that are picking up the financial burden of acquiring and maintaining these machines. He added that it is not a case of police departments' simply allowing the machines to fall into disrepair and remain so; it is much easier on everybody concerned to have functioning equipment, but sometimes that is just not possible. He reiterated that [Section 37] fixes situations wherein equipment cannot be used because of a malfunction.

REPRESENTATIVE COGHILL mentioned that some types of search warrants were easier to obtain than others.

MR. GUANELI reported that the courts in Alaska have recognized that it is often difficult to get before a judge to obtain a search warrant, and thus there are provisions for telephonic search warrants to be issued through a judge who is on call and who listens to the facts of the case in the form of an officer's sworn testimony. If all of the aforementioned criteria are satisfied, the search warrant can be issued in a routine manner. He reiterated that it is not that machines that are in order are not being used in favor of obtaining a search warrant - it is simply that there are situations in which the machines break down.

Number 0996

REPRESENTATIVE BERKOWITZ, on the point of the independent tests, said it is a red herring when used in the context of this argument [regarding Amendment 31]; an individual who is a suspect at that time and who requests the independent test is voluntarily choosing to get a blood sample drawn, and he argued that was very different from being in the circumstance where the state (or law enforcement of the municipality) is compelling

someone to take a test. He said it is very important that when the state obtains evidence, it do so by the least intrusive means possible. In looking at the necessity for acquiring this evidence, whenever a DWI is charged it is charged under two theories: one is the presumptive blood alcohol level, and the other is the "impaired" theory, which is based on the totality of circumstances. Thus, in every DWI case, while it is very nice to have the blood alcohol level, it is not a necessity to have it in order to make the case; therefore, it doesn't seem appropriate for [the state] to take the extremely intrusive step of withdrawing blood by compulsion.

CHAIR ROKEBERG noted that while the refusal statute could be used in situations where there was a functioning intoximeter, if that machinery were broken and could not be used, all that would be left for prosecution purposes would be the impairment statute.

REPRESENTATIVE BERKOWITZ said that was correct. He said that while the burden of proof is one of the defining features of a criminal trial, the other defining feature is the presumption of innocence. It is a very dangerous thing, he warned, when people are compelled to give evidence against themselves. He explained that although blood is called evanescent evidence because, over time, the alcohol level disappears, there are already provisions that allow for the compulsory taking of samples - hair clippings, fingernail clippings, and DNA samples - under the appropriate circumstances. But, usually, those types of samples are only taken in circumstances surrounding very serious offenses, and he noted that Mr. Guaneli had indicated that there are already provisions that allow for the compulsory taking of blood samples in instances of serious accidents. He then reminded the committee that this discussion was in relation to misdemeanor offenses, and he offered that it is a big step to say that in misdemeanor cases, offenders are going to be compelled to give blood, even against their will, even though there is an alternative theory under which cases can be brought, and even though the state has not taken the necessary steps to maintain the instruments that perform the blood/breath alcohol test in the least intrusive manner possible.

REPRESENTATIVE COGHILL asked at what point a search warrant would be issued for a misdemeanor offense.

Number 1218

MR. GUANELI explained that there were many misdemeanor [offenses] that result in search warrants being issued. He remarked that it is unfair to simply say that [Section 37] will apply only in misdemeanor cases; it may be used in felony cases as well. He relayed that both the constitution and statutes say that when there is evidence of a crime, be it misdemeanor or felony, a judge, after reviewing the evidence and taking all the considerations into account, can issue a warrant. Notwithstanding the images called forth by Representative Berkowitz of an individual strapped to a gurney and struggling [to avoid the needle], as a practical matter that is simply not the way these situations unfold; in most instances, he continued, after the search warrant is issued, the person just voluntarily gives blood. But, he added, in those rare instances when somebody is combative, no medical professional would be willing to take blood under those circumstances, and this is fine with the prosecutor; this reluctance to give blood under a search warrant is simply used as evidence in favor of the prosecution.

Number 1311

ALVIA "STEVE" DUNNAGAN, Lieutenant, Division of Alaska State Troopers, Department of Public Safety, said he agreed with Mr. Guaneli's presentation: If a suspect refused to comply with a search warrant authorizing that a blood sample be taken, there would not be a fight in the emergency room to force compliance. In response to the question of whether a search warrant would be sought only in cases where the intoximeter in an area is not working, he acknowledged that there may be occasions in some of the smaller jurisdictions that do not have an intoximeter of their own, where it would be more feasible to get a search warrant from the local magistrate rather than fly the suspect into an area that has an intoximeter.

MR. McCUNE argued that taking blood from a reluctant individual who is intoxicated, even with a court order (which is what a search warrant is) directing that this be done, is probably not the best idea in the world. He further argued that the legislature had already taken this into consideration when it enacted the implied-consent laws; if there is no serious injury or death, [the state] should rely on the refusal statutes. He recalled testimony from a prior meeting [3/9/01] indicating that DataMaster machines would be replacing intoximeters and that the DataMasters were hardier machines, and he suggested that the equipment used for the purpose of measuring blood alcohol concentration (BAC) will only be getting better and easier to

calibrate as technology advances. He posited that where the state has road systems, the state should keep its analysis equipment working, for everybody's good. One of the unintended consequences of allowing search warrants in DWI situations, he added, is that [law enforcement agencies] might not be so vigilant about maintaining their equipment. He advocated again for maintaining the current law [via adoption of Amendment 31].

CHAIR ROKEBERG posed the scenario wherein somebody has been arrested for DWI and expresses willingness to take an intoximeter test but refuses to give a blood sample. He asked whether the refusal statutes would apply in this example.

MR. GUANELI responded that the refusal statute only applies in cases where somebody has refused to take a breath test; it does not apply to refusals relating to other types of tests. He confirmed that when there is no equipment available to perform a breath test, prosecution can only continue under the impairment statute. He warned that the argument could be made that the state's case is weak because it did not care enough to maintain the necessary equipment when, in fact, it might simply be a matter of the machinery breaking down. He suggested that it is incorrect to say that the legislature somehow considered "this" as part of the statutes involving refusal; "we" as prosecutors have always believed that if the machine were broken down, "we" could always go to court and get a search warrant, and it wasn't until the Sosa case that the court said it would interpret the statute contrary to past practice. He said he did not believe that the legislature ever intended that search warrants could not be used in these circumstances; [the legislature] set up a scheme to encourage use of the breath machine because it is the easiest way to go about it, but sometime the hard way - via a search warrant - is the only way. He offered that keeping [Section 37] in CSHB 4(TRA) comports with [the DOL's] interpretation of the law [notwithstanding the Sosa case] that search warrants could be used in these circumstances.

Number 1696

REPRESENTATIVE BERKOWITZ suggested that they put themselves in the position of somebody who is not guilty because that is whom the laws are designed to protect. He noted that "we" always jump to the assumption that "we're" letting guilty people go, but, he reminded the committee, "we're" also protecting the rights of innocent people. He added that "we" go too far when allowing such an intrusive method when it is not absolutely necessary in order to make a case (it may not mean being

strapped to a gurney, he noted, but most people he knew did not like having their blood drawn).

REPRESENTATIVE MEYER said he disagreed. From his experience, which he gained while riding with the Anchorage Police Department (APD), most DWIs occur between the hours of 2 a.m. and 5 a.m., and the calls are stacked up. He reminded the committee of prior testimony indicating that the chances of getting caught for DWI/DUI (driving under the influence) were 1 out of 100, and he added that he would hate to see somebody "get off" because of a technicality, or because the intoximeter was not working. He noted that APD is not going to go through the time and effort to call up a judge and request a search warrant unless there is good reason to believe that a suspect has been drinking and is impaired. He remarked that he has the attitude that DWI offenses should be considered felonies, and he advocated that "they" should give law enforcement as many tools as possible to keep intoxicated people off the roads.

CHAIR ROKEBERG mentioned that "they" also had the probable cause standard. He noted that the objection to Amendment 31 was maintained.

Number 1900

A roll call vote was taken. Representative Berkowitz voted for Amendment 31. Representatives Meyer, James, Coghill, and Rokeberg voted against it. Therefore, Amendment 31 failed by a vote of 1-4.

CHAIR ROKEBERG noted that Amendment 32 has been incorporated into CSHB 4(TRA) as part of Amendment 11, [which was amended and adopted on 3/26/01]. He also noted that Amendment 22 was addressed via Amendment 20 [which was adopted 3/28/01], with the exception of [deleting lines 18-19, on page 4], which contains language requiring a person use first, middle, and last name or a business name when registering a vehicle. He suggested that by not deleting this language, the Division of Motor Vehicles (DMV) would be able to perform cross-matches more easily.

REPRESENTATIVE BERKOWITZ agreed to withdraw Amendments 32, 22, and 23.

Number 2010

CHAIR ROKEBERG referred to Amendment 24, which read [original punctuation provided]:

Page 9

Delete, lines 7 - 24

Renumber accordingly

CHAIR ROKEBERG noted it related to limited licenses and ignition locks. He inquired why Representative Berkowitz, in bringing forth Amendment 24, did not wish to include the reference to ignition locks in CSHB 4(TRA).

REPRESENTATIVE BERKOWITZ, noting that reference to ignition locks was fine, went on to explain that there was provision, in the language that would be deleted via Amendment 24, for a probationary period resulting from a section that has since been deleted. Because of a time constraint, he agreed to set Amendment 24 aside and discuss it later.

Number 2096

CHAIR ROKEBERG made a motion, on behalf of Representative Ogan, who was absent, to adopt Amendment 34, which read [original punctuation provided]:

Page: 27

Lines: 24 and 25

Change as follows: purpose of determining [the amount of alcohol in that person's blood or to determine] the presence of a controlled substance in the person's [blood] or urine.

Number 2114

JANET SEITZ, Staff to Representative Norman Rokeberg, Alaska State Legislature, explained that the language affected by Amendment 34 is part of a new subsection that involves the Sosa case. She said that according to her reading of Amendment 34, the references to blood and to alcohol will be deleted from this subsection.

Number 2166

MIKE FORD, Attorney, Legislative Legal Counsel, Legislative Legal and Research Services, Legislative Affairs Agency, added

that his interpretation of Representative Ogan's intent is to change the language in Section 45 of CSHB 4(TRA) so that it only applies to [testing for] controlled substances.

Number 2201

DAVID STANCLIFF, Staff to Representative Scott Ogan, Alaska State Legislature, explained that via Amendment 34, Representative Ogan was attempting to restrict [Section 45] to controlled substances only, because he did not believe that people should [be subjected to] any type of invasive procedure without their permission.

MR. FORD, in response to the question of whether Amendment 34 would accomplish this, said:

Section 45 applies in a particular situation. The person's under arrest for DWI, there's some exigent circumstance precluding the administration of the chemical test - ... the breathalyzer is broken - the "chemical test may be administered without the consent of the person arrested for the purpose of determining the amount alcohol in [that] person's blood", in other words, a blood test. I believe this is another example of where, for some reason, they can't do a breath test.

MR. FORD also noted that there is a statute that allows specific exceptions for taking blood - AS 28.35.035 - and Section 45 adds another exception to that [statute], but would not be in conflict with the language in [Section 37 of CSHB 4(TRA), which was discussed with regard to Amendment 31]. He added that Amendment 34 would simply narrow the application of Section 45.

MR. GUANELI, with regard to the differences between Sections 37 and 45, said that because of the Sosa decision, which said warrants could not be issued for blood when the intoximeter was not available, [the DOL] has sought remedy via [Section 37 of CSHB 4(TRA)], which would allow for a search warrant, and Section 45 [of CSHB 4(TRA)], which would allow, under exigent circumstances, for a blood sample to be taken without either the suspect's consent or a search warrant. He said he believes that the search warrant provision is the important provision and is preferred because it will work in most circumstances, but he acknowledged that the exigent circumstances provision might also be applied in rare instances. He noted that the latter is more risky, legally, because [law enforcement] would need to prove

that the exigent circumstances exist. He added that [the DOL] strongly supports Section 37 but does not feel as strongly about Section 45.

CHAIR ROKEBERG surmised, then, that while [the DOL] would like to see Section 45 kept in CSHB 4(TRA), it would not strongly object to deletion of that entire section.

MR. GUANELI said that was an accurate characterization.

REPRESENTATIVE COGHILL said he was wondering whether the compelling argument for a urine test for controlled substances is worth the effort [of maintaining Section 45].

MR. GUANELI responded that when dealing with [the presence] of drugs, it is always difficult to test for them, and he was not certain there was enough compelling interest [to maintain Section 45] simply for the purposes of a urine test. Drugs tend to show up in body for long periods of time and for this reason, among others, tests for drugs do not make for the best evidence, he noted.

REPRESENTATIVE COGHILL said he would support deleting [Section 45] entirely.

CHAIR ROKEBERG asked if Mr. Guaneli would support adoption of Amendment 34.

MR. GUANELI said he thought that adoption of Amendment 34 was preferable to deleting [Section 45] entirely, but he did not have a strong objection to its deletion, if that were the will of the committee.

Number 2477

REPRESENTATIVE COGHILL made a motion to amend Amendment 34 such that Section 45 of CSHB 4(TRA) would be deleted entirely.

CHAIR ROKEBERG asked whether there were any objections to the amendment to Amendment 34. There being no objections, the amendment to Amendment 34 was adopted.

TAPE 01-46, SIDE B
Number 2480

CHAIR ROKEBERG asked if there were any objections to Amendment 34, as amended. There being no objections, Amendment 34, as amended, was adopted.

[These last two motions are not found in their entirety on the tape but were recorded in the log notes.]

Number 2470

CHAIR ROKEBERG made a motion, on behalf of Representative Ogan, to adopt Amendment 35, which read [original punctuation provided]:

Page: 11

Line: 8

Amend as follows: \$1000. [; and]

Lines: 9, 10, and 11

Amend as follows: Delete

CHAIR ROKEBERG noted that it would remove the requirement that enablers attend "alcohol school." He also noted that his staff did not like Amendment 35, but he himself was willing to concede on this section.

MR. STANCLIFF said that the foregoing was an accurate description of the effect of Amendment 35, and he relayed that Representative Ogan felt that there are some folks that can go through the system a dozen times, which gets expensive and is bureaucratically cumbersome; therefore, in a conservative vein, Amendment 35 is a more responsible way to go.

REPRESENTATIVE COGHILL spoke in favor of Amendment 35 because enablers may not have an alcohol problem, and thus do not need to be compelled to go to treatment.

Number 2426

REPRESENTATIVE MEYER objected to the motion to adopt Amendment 35, and referred to previously heard statistics that say that a person drives drunk approximately 80 times before getting caught; therefore, when that person is finally caught, going to alcohol treatment will be beneficial.

CHAIR ROKEBERG clarified that the provision affected by Amendment 35 pertained to alcohol treatment for the enabler - the person who allowed the offender to drive - after a second offense. He added that he had no objection to Amendment 35.

MS. SEITZ argued that if a person gets convicted a second time for enabling someone to drive drunk, there was no harm in requiring alcohol education for the enabler so that he/she can learn more about the effects of alcohol.

CHAIR ROKEBERG ventured that the current enabler statute is probably rarely used, and that the spouse who might get swept up by this requirement already knows about the effects. He also clarified that Representative Berkowitz has a forthcoming [Amendment 25] that would entirely delete the section [in CSHB 4(TRA)] pertaining to enablers.

Number 2267

CHAIR ROKEBERG noted that there were no longer any objections to Amendment 35. Therefore, Amendment 35 was adopted.

CHAIR ROKEBERG called an at-ease from 11:47 a.m. to 11:48 a.m.

Number 2260

REPRESENTATIVE BERKOWITZ made a motion to adopt Amendment 25, which read [original punctuation provided]:

Page 11

Delete, lines 2 - 11

Renumber accordingly

Number 2259

CHAIR ROKEBERG objected.

REPRESENTATIVE BERKOWITZ said that he appreciated the intent of this section to prevent access to vehicles by people with drinking problems, but Alaska has a very high incidence of domestic violence (DV), and, via the enabler provision, victims of domestic violence, which all too often is an alcohol-related crime, are being put in an untenable situation; victims would be required to tell their abusers, "No, I'm not giving you the car keys."

CHAIR ROKEBERG said he thought that the enabler provision had already been amended [via Amendment 9, adopted on 3/26/01] to allow for "a DV defense."

REPRESENTATIVE BERKOWITZ explained that that previous amendment allows for the "defense of justification," which is a defense that's available for any criminal charge, and he argued that was not enough.

Number 2198

LAUREE HUGONIN, Director, Alaska Network on Domestic Violence and Sexual Assault (ANDVSA), explained that when there has been a DWI arrest followed by an investigation regarding whether someone allowed the offender to have the keys to the car, if that person is a victim of domestic violence, the ANDVSA does not want the [DV] victim to be charged [for an enabler offense]. She said that to her understanding, the effect of Amendment 9, which allows for an affirmative defense, is something that would take place in the courtroom, and the ANDVSA would like something that takes care of the situation at the investigation level. [The ANDVSA] is concerned that victims of DV not be charged with violating [the enabler provision].

CHAIR ROKEBERG offered that that was the intention of Amendment 9, and that it basically "does that."

REPRESENTATIVE BERKOWITZ argued that [Amendment 9] "doesn't do that." Essentially, all it does is tell a defendant that he/she can use an existing portion of the law. Even without [Amendment 9], defendants would still have access to "the defense of justification."

CHAIR ROKEBERG said he would not have any objections to the amendment if it had "brighter" language because the enabler statute is already on the books, though it is bare of "that" language. He added that he would prefer that another solution be found rather than simply deleting [the entire enabler provision from CSHB 4(TRA)].

REPRESENTATIVE BERKOWITZ said he would like to work on it. He then said that he had other criticisms of the way in which the enabler provision in CSHB 4(TRA) is set up. For example, if the enabler's driver's license, privilege to drive, or privilege to obtain a license is revoked for 30 days, there is no nexus to

the crime; the state would be taking away the driver's license of someone who has not engaged in bad driving [practices].

CHAIR ROKEBERG argued that that person has enabled a person with a history of DWI to "get back on the streets."

REPRESENTATIVE BERKOWITZ countered that that is why [the offense of enabling] is a class A misdemeanor, but, he continued, usually the penalty has to bear some causal relationship to that crime, which is not that the individual drove badly; the crime is that the individual let someone else do something he/she is not allowed to do, and he added that he simply did not see a link.

REPRESENTATIVE BERKOWITZ also expressed the criticism that a minimum fine of \$1,000 was being imposed for a class A misdemeanor [enabler] offense, and, as he recalled, the minimum fine for a first-time DWI offense at a BAC level of .08 was only \$500. He suggested that the \$1,000 fine for an enabler was rather draconian. He added that most of the people who come into criminal court for these types of crimes are disproportionately poor, and [the state] would be "squeezing blood from a turnip." He offered that this does not get at the problem; if "we're" going to criminalize enablers, let's just criminalize [the offense] and let the courts put the penalty where the courts see necessary.

Number 1950

REPRESENTATIVE COGHILL made a motion to amend Amendment 25 such that it would leave lines [2-5] up through - and place a period after - the word "misdemeanor" [in Section 18 of CSHB 4(TRA)]; this would still allow the offense to be class A misdemeanor without mandating what the courts shall do.

REPRESENTATIVE BERKOWITZ said, although he would be comfortable with that amendment to Amendment 25, it still does not address the domestic violence concern. In order to accomplish that, "we have to get in at investigation phase" because people can get caught up in the system who oughtn't be there.

CHAIR ROKEBERG said he did not object either to that point or to the proposed amendment to Amendment 25.

REPRESENTATIVE BERKOWITZ, on the point of whether the amendment to Amendment 25 would allow the courts to consider the issue of DV as a defense, said that [DV] would not necessarily be a

defense; the "battered spouse syndrome," which is usually associated with homicide trials, is an incredibly difficult and expensive defense to present, he explained, and he could not imagine the public defender having the wherewithal to present it in a class A misdemeanor charge.

MS. SEITZ, in response to Chair Rokeberg, explained that subsection (b) of the current enabler statute does not have a fine or penalty associated with it, and does not specifically say it is any particular class of crime.

MR. FORD clarified that anything that is not specified in Title 20 has the generic penalty of being a class A misdemeanor.

Number 1800

REPRESENTATIVE COGHILL, on that basis, withdrew his amendment to Amendment 25.

Number 1786

REPRESENTATIVE BERKOWITZ, with the intent of working on the DV problem, withdrew Amendment 25.

[There was committee discussion about the upcoming schedule, and a brief at-ease from 12:02 p.m. to 12:04 p.m. Following the at-ease Chair Rokeberg announced that HB 4 would be held over.]

ADJOURNMENT

Number 1754

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 12:05 p.m.