

**ALASKA STATE LEGISLATURE  
HOUSE JUDICIARY STANDING COMMITTEE**

April 14, 2003

1:10 p.m.

**MEMBERS PRESENT**

Representative Lesil McGuire, Chair  
Representative Tom Anderson, Vice Chair  
Representative Jim Holm  
Representative Dan Ogg  
Representative Ralph Samuels  
Representative Les Gara  
Representative Max Gruenberg

**MEMBERS ABSENT**

All members present

**COMMITTEE CALENDAR**

HOUSE BILL NO. 151

"An Act relating to claims and court actions for defects in the design, construction, and remodeling of certain dwellings; limiting when certain court actions may be brought; and amending Rules 79 and 82, Alaska Rules of Civil Procedure."

- MOVED CSHB 151(JUD) OUT OF COMMITTEE

HOUSE BILL NO. 244

"An Act relating to the Code of Criminal Procedure; relating to defenses, affirmative defenses, and justifications to certain criminal acts; relating to rights of prisoners after arrest; relating to discovery, immunity from prosecution, notice of defenses, admissibility of certain evidence, and right to representation in criminal proceedings; relating to sentencing, probation, and discretionary parole; amending Rule 16, Alaska Rules of Criminal Procedure, and Rules 404, 412, 609, and 803, Alaska Rules of Evidence; and providing for an effective date."

- HEARD AND HELD

**PREVIOUS ACTION**

BILL: HB 151

SHORT TITLE: DWELLING DESIGN/CONSTRUCTION CLAIMS

SPONSOR(S): REPRESENTATIVE(S) MEYER

Jrn-Date	Jrn-Page		Action
03/05/03	0396	(H)	READ THE FIRST TIME - REFERRALS
03/05/03	0396	(H)	L&C, JUD, FIN
03/05/03	0407	(H)	FIN REFERRAL REMOVED
03/26/03		(H)	L&C AT 3:15 PM CAPITOL 17
03/26/03		(H)	-- Meeting Canceled --
03/28/03		(H)	L&C AT 3:15 PM CAPITOL 17
03/28/03		(H)	Moved CSHB 151(L&C) Out of Committee MINUTE(L&C)
03/31/03	0707	(H)	L&C RPT CS(L&C) 7DP
03/31/03	0707	(H)	DP: LYNN, GATTO, CRAWFORD, GUTTENBERG,
03/31/03	0707	(H)	DAHLSTROM, ROKEBERG, ANDERSON
03/31/03	0708	(H)	FN1: ZERO(H.L&C/CED)
04/11/03		(H)	JUD AT 1:00 PM CAPITOL 120
04/11/03		(H)	Heard & Held
04/11/03		(H)	MINUTE(JUD)
04/14/03		(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 244

SHORT TITLE: CRIMINAL LAW/SENTENCING/PROBATION/PAROLE

SPONSOR(S): RLS BY REQUEST OF THE GOVERNOR

Jrn-Date	Jrn-Page		Action
04/04/03	0770	(H)	READ THE FIRST TIME - REFERRALS
04/04/03	0770	(H)	JUD, FIN
04/04/03	0771	(H)	FN1: ZERO(LAW)
04/04/03	0771	(H)	FN2: (COR)
04/04/03	0771	(H)	GOVERNOR'S TRANSMITTAL LETTER
04/04/03	0771	(H)	REFERRED TO JUDICIARY
04/14/03		(H)	JUD AT 1:00 PM CAPITOL 120

**WITNESS REGISTER**

REPRESENTATIVE KEVIN MEYER

Alaska State Legislature

Juneau, Alaska

POSITION STATEMENT: Sponsor of HB 151.

JOHN NOVAK, Chief Assistant District Attorney

Third Judicial District (Anchorage)

Criminal Division

Department of Law (DOL)

Anchorage, Alaska

POSITION STATEMENT: Presented HB 244 on behalf of the administration and responded to questions.

ANNE CARPENETI, Assistant Attorney General  
Legal Services Section-Juneau  
Criminal Division  
Department of Law (DOL)  
Juneau, Alaska

POSITION STATEMENT: Responded to questions during discussion of HB 244.

MATTHEW C. LEVEQUE, Lieutenant  
Field Operations Coordinator  
Division of Alaska State Troopers  
Department of Public Safety (DPS)  
Anchorage, Alaska

POSITION STATEMENT: Testified in support of HB 244.

GLENN KLINKHART, Detective  
Anchorage Police Department (APD)  
Municipality of Anchorage (MOA)  
Anchorage, Alaska

POSITION STATEMENT: Provided comments and responded to questions during discussion of HB 244.

#### **ACTION NARRATIVE**

#### **TAPE 03-38, SIDE A**

Number 0001

**CHAIR LESIL MCGUIRE** called the House Judiciary Standing Committee meeting to order at 1:10 p.m. Representatives McGuire, Anderson, Holm, Ogg, and Gruenberg were present at the call to order. Representatives Samuels and Gara arrived as the meeting was in progress.

#### HB 151 - DWELLING DESIGN/CONSTRUCTION CLAIMS

Number 0025

CHAIR MCGUIRE announced that the first order of business would be HOUSE BILL NO. 151, "An Act relating to claims and court actions for defects in the design, construction, and remodeling of certain dwellings; limiting when certain court actions may be brought; and amending Rules 79 and 82, Alaska Rules of Civil Procedure." [Before the committee was the proposed committee

substitute (CS), Version 23-LS0499\V, Bannister, 4/10/03, which was adopted as a work draft on 4/11/03.]

Number 0095

REPRESENTATIVE KEVIN MEYER, Alaska State Legislature, sponsor, announced that he's had a chance to review the amendment drafted by Legislative Legal and Research Services and he's in agreement with it.

REPRESENTATIVE GRUENBERG pointed out that the committee should have two amendments on the same page.

CHAIR MCGUIRE determined that there were no objections to keeping the two concepts together under one amendment.

Number 0141

REPRESENTATIVE GRUENBERG moved that the committee adopt Amendment 1, labeled [23-LS0499\V.1, Bannister, 4/14/03], which contained handwritten changes and which originally read:

Page 2, following line 2:

Insert a new subsection to read:

"(b) The 10-year limitation imposed under (a) of this section is tolled between the time the claimant serves notice under AS 09.45.881 and the time the claimant should reasonably understand that settlement under the procedures in AS 09.45.881 - 09.45.899 will not succeed."

Reletter the following subsection accordingly.

Page 5, lines 30 through 31:

Delete "may be included as part of the contract, must be conspicuous, and must be in substantially the following form:"

Insert "must be included on a separate page attached to the contract and must contain a title at the top of the page that reads "Potential Claim."

(c) The notice required by (a) of this section must be conspicuous and must be in substantially the following form:"

[The handwritten changes in Amendment 1 involved replacing, from the third line from the top, "The 10-year limitation imposed under (a) of this section" with "A limitation imposed under AS

09.10 for an action under AS 09.45.881 - 09.45.899"; and replacing, from the fourth line from the bottom, "'Potential Claim'" with "'Notice and Opportunity to Repair'".]

Number 0141

CHAIR McGUIRE ascertained that there were no objections. Therefore, Amendment 1 was adopted.

REPRESENTATIVE GRUENBERG noted that he offered Amendment 1 on behalf of Representative Gara.

Number 0153

REPRESENTATIVE ANDERSON moved to report the CS for HB 151, Version 23-LS0499\V, Bannister, 4/10/03, as amended, out of committee with individual recommendations and the accompanying fiscal note. There being no objection, CSHB 151(JUD) was reported from the House Judiciary Standing Committee.

HB 244 - CRIMINAL LAW/SENTENCING/PROBATION/PAROLE

Number 0229

CHAIR McGUIRE announced that the final order of business would be HOUSE BILL NO. 244, "An Act relating to the Code of Criminal Procedure; relating to defenses, affirmative defenses, and justifications to certain criminal acts; relating to rights of prisoners after arrest; relating to discovery, immunity from prosecution, notice of defenses, admissibility of certain evidence, and right to representation in criminal proceedings; relating to sentencing, probation, and discretionary parole; amending Rule 16, Alaska Rules of Criminal Procedure, and Rules 404, 412, 609, and 803, Alaska Rules of Evidence; and providing for an effective date."

Number 0258

JOHN NOVAK, Chief Assistant District Attorney, Third Judicial District (Anchorage), Criminal Division, Department of Law (DOL), explained that he is one of the people that goes into court and "actually tries these cases," and he is also the one who has to sit down with the victims or their families and explain why their case can't be prosecuted because of the current status of the law. He noted that he has tried cases in Anchorage, Bethel, Kenai, King Salmon, Palmer, and Unalaska. Since the mid-'90s, he relayed, he has worked "gang cases" along

with the federal task force, and offered that this experience relates to the aspects of HB 244 dealing with self-defense.

MR. NOVAK said that HB 244 came about in large part by talking to prosecutors and law enforcement officials statewide. The governor's office asked for input on how to make communities safer and more peaceful places. He said that HB 244 is not about making his job easier; instead, he remarked, "it's about making our community a safer and better place for everybody." He surmised that most members would like him to testify in detail on the self-defense aspects of the bill - the first five sections of HB 244; with that in mind, he said he would first be talking about the latter sections of the bill.

MR. NOVAK turned attention to Section 6, and offered the following as an example. A person has been brought to the police station and has been advised of his/her rights - that he/she doesn't have to talk to the police, that he/she can have a lawyer present if he/she wishes - but the person has decided to go ahead and talk to the police. He asserted that current law allows a lawyer showing up at the front counter to go back to the person that is being interviewed even though he/she never asked for a lawyer.

Number 0538

MR. NOVAK said:

We don't think that's right. We think that if the person wants to talk to a lawyer, that's their right. If they don't want to talk to the law enforcement personnel, that's their right. But the current statute giving somebody a right to interrupt police interviews on their own accord, we don't think that that aids in the truth-finding function of law enforcement to solve what's going on. And so we don't see how that is of assistance, especially when this lawyer's essentially thrusting himself or herself into the situation despite the wishes of the person being interviewed. And so that's the change that we're proposing there: not to limit, at all, or restrict any of the person-being-interviewed rights, but rather to delete this right of an attorney, who's not representing this person at this point in time, to interrupt a police interview.

CHAIR McGUIRE said that her concern surrounding this issue is that if someone is incapacitated but has not yet been legally declared such - for example, someone who has a head injury, suffers from mental retardation, or has some other sort of disorder - and the person's family and friends are aware of this incapacitation, under this provision, neither his/her family nor friends could arrange for an attorney to intercede even though they know that the person is not capable of making a fully cognizant decision.

MR. NOVAK remarked that any statement provided has to be voluntary; in other words, it has to be "knowingly, intelligent, and voluntary." That's aside from any of these other rights, he added. Therefore, in order for law enforcement personnel to use anybody's statement, or even to question that person, they have to be satisfied that the person knows what he/she is doing. He mentioned that they'd recently had a situation in which, during the course of an interview, it became clear that the person was having mental issues. That interview was discontinued and the person was admitted to the Alaska Psychiatric Institute (API).

MR. NOVAK stressed that [prosecutors] can't ever use someone's statement unless it is voluntary. If someone is so intoxicated or mentally challenged or impaired that he/she didn't know what he/she was doing, "that protection is always going to be there," he added. He noted that interviews are always recorded, either on audiotape or videotape, and so prosecutors always have to be fair with people because the jury will see whether an individual was treated fairly. In conclusion, he said the requirement that a statement be voluntary would not be affected by HB 244.

Number 0761

CHAIR McGUIRE said she assumes that this provision has arisen from perceived abuses. She remarked that it sounds like it's a case of attorneys just barging in whenever an interview is in progress, rather than a case of family members or friends contacting attorneys.

MR. NOVAK replied:

Well, ... when this first came about, we were all surprised that this law was on the books, I can tell you that, as prosecutors. And a number of years ago, there was a case, it was a sexual assault case - last name was Smith - where the context was, the lawyer just showed up. After about an hour or two of the

interview, [a] lawyer shows up at the front counter, hadn't been retained, and says, "I want to go talk to the guy." And the advice he got at that part in time was, "No; if the suspect says, 'I want to talk to lawyer,' we'll let the lawyer back, but if he's not asked for a lawyer, we're not going let him come back."

And what happened in that case, this statute got pointed out; law enforcement as well as prosecutors, frankly, were surprised it was on the books. And in that case, what the court did, not only did they suppress - or not allow us to use the statement from the time the lawyer showed up - but they also suppressed the ... the two hours before the lawyer showed up.

And so, basically, it was a statute that I think was not well known for certain, and it really is a problem of, ... are we going to limit the ability to find out what the truth is, particularly at the investigation stage. And if somebody wants to have their lawyer and talk to them, I think that's very different from letting a lawyer interject or get in the way of the investigation - figuring out what's going on.

MR. NOVAK, in response to a question about the four rights listed in proposed AS 12.25.150(b), said that the person [being detained and interviewed] has all four rights. In other words, that person doesn't have to choose just one of those rights listed to the effect of giving up the other three; he/she can choose to exercise all four rights. He offered his understanding that the current statute also gives a lawyer the right to interrupt an interview, and suggested that this proposed provision merely takes away a lawyer's right to intervene.

Number 1051

REPRESENTATIVE GRUENBERG pointed out, however, that the current language actually says:

(b) Immediately after an arrest, a prisoner shall have the right to telephone or otherwise communicate with the prisoner's attorney and any relative or friend, and any attorney at law entitled to practice in the courts of Alaska shall, at the request of the

prisoner or any relative or friend of the prisoner, have the right to immediately visit the person arrested. This subsection does not provide a prisoner with the right to initiate communication or attempt to initiate communication under circumstances proscribed under AS 11.56.755.

REPRESENTATIVE GRUENBERG posited that the purpose of Section 6 is to reverse the holding in Farrell v. Municipality of Anchorage.

MR. NOVAK offered that the purpose of Section 6 is to clarify that the rights listed therein are the rights of the person under arrest, and to delete the right of a lawyer to intervene.

REPRESENTATIVE GRUENBERG offered that apparently Farrell holds that the express language of subsection (b) provides for an immediate visit with counsel following an arrest, which, he added, seems to be reversed by Section 6.

MR. NOVAK said that if the person under arrest requests to meet immediately with a lawyer, then he she is entitled to meet with a lawyer. Section 6, he reiterated, takes away a lawyer's right to intervene, but does not take away any of the rights of the person under arrest.

REPRESENTATIVE OGG pointed out, however, that Section 6 is removing the right of any friend or relative to get a lawyer for the person arrested. Those two categories of people would no longer have the right to assist the arrested person in getting an attorney.

MR. NOVAK noted that under current law, family and friends cannot walk back and interrupt an ongoing interview, only a lawyer can do so.

CHAIR McGUIRE, after some discussion regarding the meaning of current law as compared to what is proposed by Section 6, clarified that Section 6 will take away the right of friends or family to request an attorney for an arrestee. She said that there is no question that that is a policy change.

Number 1443

MR. NOVAK next turned to Section 7 of HB 244. He offered that Section 7 addresses principally felony DWI (driving while intoxicated) cases. He relayed to members that conviction of a

DWI crime is a felony if the individual has two or more prior DWI convictions within "the last five years and that's expanding out now with time." Thus, he remarked, he has to prove that a person is guilty of DWI and that the person has two prior DWI convictions within the last five years. A recent court case has said that there should now be two trials, rather than one, in those situations. The first trial will take up the issue of whether the person was DWI, and the second trial will take up the issue of whether the person has had two or more prior DWI convictions within the last five years. Section 7 clarifies that all the evidence regarding the prior convictions will be presented in the one trial pertaining to the current offense.

REPRESENTATIVE GRUENBERG suggested, however, that in the case referred to by Mr. Novak - the 2002 Alaska Court of Appeals case, Ostlund v. State - the court came to it's decision because of constitutional issues.

MR. NOVAK said that according to his interpretation of Ostlund, the court made its decision based on a "403 analysis." He opined that the consideration of Rule 403 of the Alaska Rules of Evidence implies that trial jurors cannot be trusted to properly consider the prior convictions. He said, "I think we can trust the jurors; I think we can have them consider the evidence as they're instructed to do so, and not have this double trial." Having one trial avoids the jurors' wondering among themselves whether information is being kept from them, he concluded.

CHAIR McGUIRE concurred that the jurors do get instruction on what aspects to disregard.

Number 1606

REPRESENTATIVE GRUENBERG sought confirmation that the court used Rule 403 of the Alaska Rules of Evidence, which reads:

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

MR. NOVAK confirmed that according to his interpretation, the court's decision in Ostlund was based, not on the issue of

constitutional due process, but on a Rules of Evidence analysis. In response to a question, he said that via Section 7, they were attempting to mandate, on [felony] DWI cases, that the jury hear all the information. In this way, all the elements that must be proven - that the person was drunk and driving, and that there were two or more prior convictions - can be done in one case.

MR. NOVAK next turned to Sections 8-12 and 17, and said that these provisions pertain to when a witness claims a Fifth-Amendment privilege not to testify. Currently, when a witness makes that claim, the prosecutor has to choose between not calling that witness at all or granting blanket immunity without knowing what crimes the witness is seeking immunity for. He said that in such situations, he is reluctant to simply grant blanket immunity - transactional immunity - without knowing more of the specifics. For example, if the witness had a bundle of cocaine in his/her pocket at the time he/she witnessed whatever circumstance has led to the trial, the prosecutor would be willing to "take a pass on that" and agree not to prosecute for possession of cocaine; however, if the witness murdered somebody two weeks beforehand, the prosecutor won't want to give immunity for that crime.

MR. NOVAK said that these provisions of HB 244 will allow the prosecutor to be present when the witness tells the judge what he/she is seeking immunity for. In this way, the prosecutor would be able to make an informed decision regarding whether to grant transactional immunity to a witness seeking a Fifth-Amendment privilege.

Number 1823

CHAIR MCGUIRE asked Mr. Novak whether, instead of having the prosecutor present when the witness speaks to the judge about immunity, he has considered just requiring the judge to specify which things the immunity will be granted for. She opined that if claiming the Fifth Amendment really is a privilege, then there ought to be a tremendous amount of privacy associated with that privilege. She said that her concern is that in revealing to the prosecutor what crimes a witness may have committed, it could later lead to that person being prosecuted. She asked whether other states provide something other than transactional immunity.

MR. NOVAK explained that most other states offer "use immunity." Under use immunity, a prosecutor only has to tell the witness that anything he/she says will not later be used to prosecute

him/her. Under transactional immunity, a witness can never be prosecuted regarding anything he/she reveals, even if there is independent evidence that he/she committed a particular crime. However, in Alaska, he said, the Alaska State Constitution has been interpreted to mean that use immunity is not sufficient.

CHAIR McGUIRE asked whether it would be possible to simply change from transactional immunity to use immunity; that way they could avoid having prosecutors insert themselves into the private conversations between witnesses and judges.

MR. NOVAK argued that they had to live with transactional immunity because the Alaska Supreme Court has interpreted that the Alaska State Constitution mandates it. He said that they, as prosecutors, needed to know that the claims for Fifth Amendment immunity are valid and for what crimes the immunity is being sought. Otherwise, he stated, "we can't make a decision whether or not to grant somebody a deal, so to speak."

REPRESENTATIVE GRUENBERG acknowledged that it is to the witness's advantage to seek transactional immunity and then, if granted, confess all.

MR. NOVAK agreed.

CHAIR McGUIRE indicated that although she understands the problem, she was simply trying to find a solution other than what is being proposed via Sections 8-12 and 17.

Number 2056

MR. NOVAK indicated that those provisions would allow a witness's lawyer to offer either written or oral proof to the court; it doesn't have to be the witness himself/herself. He opined that the proposed language would protect witnesses' rights and get prosecutors the information they need. In response to a question, he explained that currently, when speaking to a witness about the Fifth Amendment privilege, a judge must make a determination regarding whether the defense attorney is likely to bring up the issues that the witness is seeking immunity for.

REPRESENTATIVE HOLM referred to Section 12, page 5, line 19, and asked what "in camera" means.

MR. NOVAK explained that it refers to a closed hearing.

REPRESENTATIVE HOLM referred to subsection (h) on page 5, and asked about the meaning of the phrase, "The proffer is privileged and inadmissible for any other purpose".

MR. NOVAK said that language stipulates that when the witness's lawyer submits - or proffers - information regarding what the witness is likely to speak to during testimony, the prosecution cannot then use the information that is in that proffer to prosecute the witness. In response to a question regarding the difference between transactional immunity and use immunity, he said that he is unaware of any difference other than what he previously spoke to.

**TAPE 03-38, SIDE B**

MR. NOVAK, in response to further questions, said he didn't think that adoption of the proposed language would affect, either way, a witness's willingness to disclose information to the judge or in the proffer. The only difference would be that prosecutors would then know what the information being divulged is. He noted that commonly, the ground rules regarding what issues the defense lawyer can raise are laid out up front. Both sides must have a good-faith basis for asking a witness a particular question. In conclusion, he reiterated that the proposed sections under discussion will allow prosecutors to make informed decisions, rather than being kept in the dark, regarding whether to grant immunity.

Number 2226

REPRESENTATIVE GRUENBERG observed that often, when witnesses for the prosecution have shady pasts, a defense attorney will do what he/she can to discredit those witnesses by going into their pasts, including their juvenile records. Defense attorneys are granted this latitude by both the Alaska State Constitution and the Sixth Amendment to the U.S. Constitution. Unless this latitude is allowed, he added, the defendant's right of cross-examination is infringed upon. That's why the issue of immunity becomes such an important one.

MR. NOVAK next turned to Sections 13, 14, and 18-20, and said that those sections address the issue of consecutive sentencing. In 1982, the legislature enacted a law with the clear intent of wanting consecutive sentences. He used the example of a drunk driver running into a car carrying a family of three, with both of the adults in that car being killed and the child being injured. Under the legislation enacted in 1982, the legislature

intended the sentences for each of those three offenses to be added on top of each other, consecutively. However, he remarked, the legislation was not well drafted and, thus, the court interpreted the legislation to mean that consecutive sentencing was simply a legislative preference, not mandatory.

MR. NOVAK said that although these provisions of HB 244 are not intended to take the law back to what was intended with the 1982 legislation, they will require mandatory minimum sentences to be consecutive. Thus, in the example used, assuming the drunk driver was convicted of murder in the second degree, he/she would have to serve 10 years for each of the adults killed and at least 1 day for the crime of assaulting the child, for a total of 20 years and 1 day. These provisions of HB 244, he said, are a way to recognize the importance of each individual person. In response to a question, he said, "It's one day, or the mandatory minimum"; thus, because there is no mandatory minimum on an assault conviction, the drunk driver would have to serve at least one day for injuring the child.

CHAIR McGUIRE agreed that when it comes to sentencing someone for the crimes he/she is convicted of, the injury to each individual victim should be recognized.

MR. NOVAK, in response to questions, clarified that the term "consecutive" means that sentences would be added together to make for a longer time period, and that the term "concurrent" means that sentences could run at the same time.

Number 1958

MR. NOVAK next turned to Section 15. He explained that prior felony convictions trigger mandatory sentences and "presumptively correct" sentences. Section 15 provides that those prior convictions - oftentimes they are very old convictions and occurred out of state - will not be relitigated. Instead, it will be sufficient for the prosecutor to have a certified copy of the prior conviction, and to be able to show that it was for an offense similar to a felony offense under Alaska law and that the person had a right to a jury trial and a right to counsel. Section 15 will limit the scope of attack on prior convictions, he concluded.

REPRESENTATIVE GRUENBERG asked whether Section 15 would reverse any existing cases.

MR. NOVAK said he didn't believe it reversed any cases. Currently, however, the defense could attack the validity of [a prior conviction]. As a practical matter, he said, Section 15 will prohibit the defense from relitigating cases in which the defendant "pleads out."

REPRESENTATIVE GRUENBERG asked whether Section 15 would preclude the defense from bringing up the issue of having new evidence regarding a prior conviction, for example DNA testing, for the purpose of having that prior conviction discounted from the current case.

MR. NOVAK said no. What would happen, he added, is that that prior conviction "would go away" if the defendant is exonerated in that prior case. However, Section 15 would preclude that new evidence from being litigated in the current case; instead, the defense would have to reopen the prior case in order to present the new evidence.

REPRESENTATIVE GRUENBERG noted that in civil litigation, one can always do a collateral attack for lack of jurisdiction, for example. He asked if there was a similar attack for criminal litigation.

MR. NOVAK said he was unaware of such.

Number 1627

MR. NOVAK next turned to Section 16, and said, "This is [an] 'acceptance of responsibility' mitigator." It would apply in sexual assault cases and sexual-abuse-of-a-minor cases; if a defendant were to plead to the charge - or accept responsibility - at an early stage in the case, the court would be able to factor that in, in issuing a lesser sentence. For example, if the defendant plead to the charge early in the case, the court might view that as being a sign that the person is on the way to rehabilitation. It would also ensure that the victim does not have to go through a court trial. He offered the example of a case in which a little boy refused to provide testimony in court that he was molested, and opined that it is appropriate to "reward somebody for pleading out and not dragging these little kids through [a court case]." He acknowledged, however, that some could argue that Section 16 is punishing someone for exercising his/her constitutional right to go to trial.

REPRESENTATIVE HOLM indicated that because of the high recidivism rate of those who commit sexual assault crimes and/or

sexual-abuse-of-a-minor crimes, he disagrees that a sentence should be minimized on the premise that pleading to the charge means the perpetrator is on the road to rehabilitation. He noted, however, that he did see the advantage of doing it for the victim's sake.

MR. NOVAK added that Section 16 provides a way, by giving the defendant some incentive to plead to the charge, to resolve cases in which the victim isn't going to come to the trial. He agreed with Representative Holm that those who commit sexual offenses commonly reoffend.

CHAIR MCGUIRE offered that Attorney General Renkes has said that in cases of child abuse and sexual abuse of a minor, "We will not plead down." If that's the case, she asked, isn't this provision watering that down?

MR. NOVAK said he did not think so. He opined that the state is appropriately aggressive with such offenses, and that Section 16 merely provides prosecutors with another tool in order to continue to be aggressive. He mentioned that in order to make deals, prosecutors have to get approval from those with very high levels of authority.

Number 1365

CHAIR MCGUIRE asked whether prosecutors would use this provision regularly or only in rare cases. She mentioned frustration with the practice of "plea bargaining things down."

MR. NOVAK pointed out that adoption of Section 16 would provide the defendant with the choice. In other words, it would not be up to the prosecutors to decide whether the provision is taken advantage of; the defendant would choose whether he/she wanted to go to trial, and if instead he/she chooses to plead to the charge, then he/she can also choose to do so early in the case and thus save a victim from having to go into court. In response to a concern, he noted that ultimately, it is up to the judge to decide whether to actually give a lesser sentence. For example, if the defendant is a recidivist offender, the judge may not give any weight to the fact that the defendant plead to the charge and did so early in the case.

MR. NOVAK, in response to questions, explained that there are presumptive sentences, and that mitigators and aggravators give the court the discretion to deviate up or down, as much as 50 percent of the presumptive sentence, for good reason. He

concluded by saying that for sexual assault cases and sexual-abuse-of-a-minor cases, Section 16 would give a defendant the incentive to plea to a charge.

REPRESENTATIVE GRUENBERG pondered whether such a provision might be useful for other types of offenses, to save a victim from cross-examination. He asked whether the administration would be amenable to expanding Section 16 to include other offenses.

MR. NOVAK said yes, it would be useful to expand Section 16 in that manner.

MR. NOVAK next turned to Section 21-23, and said those provisions deal with expert [witness] disclosure and notices of defenses. The concept is to ensure that both the state and the defense get notices of defenses and expert [witnesses] "at least 45 days before trial." In addition, to ensure that parties comply, failure to do so may result in continuances being granted or sanctions being imposed. He used the example of a case on Saint Paul Island pertaining to the murder of the Coast Guard commander, and noted that the logistics involved in that case were extensive. In that case, he asserted, three days prior to the court date, the defense gave notice regarding what kind of defense would be used and that an expert witness would be used; as a result, the prosecutors had to ask for a continuance and cancel all the reservations and the other arrangements that were made for the trial. The goal of these provisions, he added, is to ensure that notices and disclosures happen before the eve of trial.

REPRESENTATIVE GRUENBERG asked whether Section 21-23 provides the court with any discretion "to allow defenses later."

Number 1020

MR. NOVAK, in response, said that the bill says that if [notice] isn't given at least seven days before trial, then "you don't get to run the defense or call the expert." The concept he added, is to clarify that neither the state nor the defense can wait until the last minute [to provide notice].

REPRESENTATIVE OGG asked how Sections 21-23 would affect a defendant's right to a speedy trial and "the 120-day time limit."

MR. NOVAK replied that the purpose of those sections is to avoid continuances and surprises; hopefully, he added, it will result

in trials going as scheduled rather than there being delays. He said that the continuance granted in the Saint Paul case counted against the defense. In response to a further question, he said that under HB 244, the defense could no longer wait, in order to gain a tactical advantage, until the eve of trial to provide notice. In the Saint Paul case, the defense would have been told that it could not use that particular defense because notice was not given in a timely manner. He remarked that in that case, the defense wound up not using either the defense or the expert witness that were noticed. He confirmed that if a defense is taking longer to get its facts and experts together, it might have to waive the "120-day rule."

MR. NOVAK, in response to further questions, said that under HB 244:

They have to lay their cards on the table 45 days before trial. ... And then it says if they don't lay their cards on the table 45 days before trial, there's various things a court can do. If they don't lay their cards on the table 7 days before trial, they just can't run that defense, they can't call that expert. I mean, 7 days is kind of the bright-line test, and you either have to give notice or not run that defense. We're not going to let you, on the day before trial, spring this on the prosecution. Or, for that matter, the state springs something on the defense. ... They have to give notice of their experts; we have to give notice of our experts as well.

Number 0782

REPRESENTATIVE SAMUELS remarked that it is also important to consider what a victim's family must go through when trials get delayed.

MR. NOVAK agreed.

MR. NOVAK next turned to Section 24. He said that currently, if a person gives a voluntary statement that is nevertheless given in violation of his/her Miranda rights, that statement cannot be used for any purpose, at all, during cross-examination at a trial, unless it is during a later perjury prosecution. Section 24 would allow such a statement to be used during cross-examination to impeach the person making the statement. He noted that this provision would bring Alaska in accord with "the

vast majority of other jurisdictions that allow this same use of information." He opined that Section 24 takes away a person's license to lie. He added:

I think trials should be about a search for the truth, and not a search about gamesmanship between the lawyers. And I don't see how suppressing or not allowing the state to use knowing, voluntary, and intelligent statements at trial is assisting the search for the truth.

MR. NOVAK next turned to Section 25, and said it pertains to the length of time that the crime of dishonesty can be used to impeach a witness that testifies. Current law says the time period is five years from the date of conviction; Section 25 would make the time period begin from the date of unconditional discharge from the conviction, and thus it will extend the time period.

MR. NOVAK next turned to Section 26. He said that in domestic violence cases, this provision would allow the prosecution to use the original statements given to the police if they are given within 24 hours of the alleged crime. It broadens the timeframe in which something could be considered an "excited utterance" for the purpose of prosecuting the crime of domestic violence.

Number 0440

MR. NOVAK then returned to Sections 1-5, which, he said, pertained to the defenses of self-defense, heat of passion, and defense of others. These provisions of HB 244 seek to have those defenses presented in the same fashion as the defenses of duress and insanity, that being that it is up to the defendant to come into court and present that evidence - he/she would have the burden of proof. When asked how communities could be made safer and less violent, he said, prosecutors offered the language in Sections 1-5 as a solution.

MR. NOVAK offered two examples to illustrate the perceived problem. He said that one was a 1996 case involving Vasco Vea (ph), and that at trial it was determined that Mr. Vea was involved in gang activities. Mr. Novak said that Mr. Vea had said that he carried a gun because of the threat of rival gang members. One night, Mr. Vea came across some rival gang members and shot at them 15 times and killed somebody. Mr. Vea's reasoning, Mr. Novak relayed, was that he didn't want his rivals

to get the drop on him and so he shot at them first. Mr. Novak said that Mr. Vea was acquitted by a jury, which held that the state had not disproved, beyond a reasonable doubt, that the crime was committed in self-defense.

MR. NOVAK said the second example was another 1996 case, which, he offered, was also gang-related, involving two teenagers standing on opposite sides of the street who started shooting at each other. Another teenager who happened to step out of a building at that moment was shot and killed. Mr. Novak said that [his office] couldn't do anything because both teens said that the other teen started shooting first, and so nothing could be proven. He relayed that it is very difficult for him to have to sit down with families and tell them that his office cannot do anything. He added, however, that his office does try to get "drugs and guns cases" to the U.S. attorney's office.

MR. NOVAK opined that HB 244 only changes "the law of self-defense" to the extent that if people arm themselves and go looking for a fight - recklessly disregarding the fact that they will be engaging in mortal combat - then they don't get to claim self-defense. He offered that current law says that if someone can walk away from a situation, he/she has a duty to do so; HB 244 is intended to clarify that duty. He assured the committee that Sections 1-5 will not change a homeowner's right to defend himself/herself from someone who breaks in. He said that these provisions are not intended to make law enforcement's job easier.

MR. NOVAK remarked that if people think that the outcome of the two examples given is acceptable, and that the violence in those situations is at an acceptable level, then there is no need to change the law. However, if people think that that is not acceptable and that it is too much violence, then the law does need to be changed. He relayed that his office has determined that from the mid-'90s to the present time, there have been 16 cases in which his office has been unable to effectively intervene in situations which he opined subjected the community to too much violence.

**TAPE 03-39, SIDE A**

Number 0001

MR. NOVAK said that he is tired of meeting with parents, particularly in Mountain View [in Anchorage], who say that they teach their children, "When the gunfire erupts, ... lay down on the floor." He said that he didn't think that the people in any

neighborhood in Alaska should have to live like that. "I think we need to change the law of self-defense; we've thought long and hard, and we believe strongly that this would make our state a better place to live.

MR. NOVAK, in response to questions, said that HB 244 does not change the law with regard to people who are defending themselves on their own property, which is defined as a building or land. However, someone claiming self-defense cannot have been the initial aggressor nor can the altercation be with a family member. If it is against a family member, then HB 244 does change the law for that type of situation, and a claim of self-defense would be an affirmative defense. In addition, if someone with a concealed carry permit gets into an altercation, then the claim of self-defense would be an affirmative defense in that circumstance as well. He noted that the claim of self-defense is an affirmative defense in a number of states, for example, Washington and Ohio.

REPRESENTATIVE GRUENBERG noted that the person watching his house in Mountain View reported a shootout in the neighborhood last weekend.

MR. NOVAK mentioned that he has been told that eight people have been shot in Anchorage during the last one or two weeks.

REPRESENTATIVE GARA noted that his neighborhood, Fairview, also suffers from a high rate of crime. He said that the sentiment of those active in the community of Fairview is that there aren't enough police officers, and that the remedy for the high rate of crime in that neighborhood is to bring in more police officers to fight crime. He said he tends to agree with that perspective, and is not so sure that tweaking rules that only lawyers know about is going to have a huge impact on the rate of crime.

Number 0394

REPRESENTATIVE GARA, with regard to changing the burden of proof for self-defense, said:

It seems to me, if you hurt somebody because you're engaging in self-defense, you haven't committed a crime. Right? And if the prosecution wants to prosecute you for conduct where you say that what you did was in self-defense, I guess I don't have a problem with making the prosecution prove all elements

of the crime beyond a reasonable doubt. And so what is -- can you offer me again the logical basis for saying that that aspect of the crime, the self-defense part, shouldn't be proven beyond a reasonable doubt.

MR. NOVAK offered the following example in response:

There was a case where - it was at King Career Center, and it was a number of years ago, now - Denarius Lockhart was the defendant. And what it was is, they were at school, and Denarius Lockhart testified at trial, said, "I was afraid this guy was going to punch me." And so what he did is, he went in and grabbed a hammer and then beat this guy over the head and severely damaged him for the rest of his life. ... And under the current law, the jury said, "Not guilty - the state didn't disprove self-defense beyond a reasonable doubt."

I guess I look at that case and I say the law needs to be changed. I think that's an unacceptably high level of violence in our community. I guess if you or this body disagrees with that, that that's acceptable conduct, that ... that's okay, it shouldn't be a crime, that's fine, but I mean ... that's what I guess my answer is. This body decides what a crime is and what a crime is not, and, under that scenario, I believe that had the defense had the burden to show that that action of him picking up the hammer and beating him over the head had to be justified by a preponderance of the evidence, I think the jury would have convicted him.

I think that would have been justice in that case. If, on those facts, you or somebody else believes that that's okay, and the current law says that's okay, ... we don't have to change it. It's just a matter of how much violence is acceptable to this body, and, like I said, this is the body that decides what the law is and what are those elements that I have to prove.

Number 0602

REPRESENTATIVE GARA responded:

With all due respect, Mr. Novak, some of the facts in that case were that the person who the defendant was

in fear of was a hockey player who had exhibited violence towards that defendant in the past, and who had called him "nigger" in the past. ... Weren't those facts also - that the jury took into account in saying, "Gosh, that was self-defense" - ... weren't those important facts that maybe we should consider before we change the law?

MR. NOVAK said that he did not take issue with the facts of the case; instead, the issue is whether the legislature thinks that that level of violence, in response to a racial slur or violence in the past, is acceptable. He opined that it is not, that, instead, such action should be considered criminal.

REPRESENTATIVE GARA replied:

We're not going to change the [Denarius] Lockhart verdict. And, frankly, there were a lot of facts that the jury considered that none of us have before us. And - I'm not pointing (indisc. - coughing) to you - I take it very seriously when people ask us to re-decide cases when they only tell us part of the story. ... So I think that there was a lot that went on in that case that we don't have before us. I tend to agree with you about the verdict, from what I know about the case. But what we're doing is changing the law so we could convict [Denarius] Lockhart on less than proof beyond a reasonable doubt.

That's the part that concerns me. I mean, let's apply it to a different person, because his case is never coming before us again; it's somebody else's case that maybe involves somebody much more sympathetic. ... What is the logical rationale, apart from the fact that we don't like violence - which none of us like violence - apart from the fact that we don't like violence, what is the rationale, the logical rationale, behind making it so that we can convict people in a case involving self-defense with less evidence than proof beyond a reasonable doubt?

Number 0772

MR. NOVAK, in response, remarked that the legislature decides what the elements of self-defense are and when it can be used. For example, in Alaska, the self-defense law holds that if someone is off his/her [property], he/she has a duty to retreat

[rather than harm someone]. He mentioned that "in the old west," there was no duty to retreat; instead, someone could "stand toe to toe" and shoot the other person. Therefore, he concluded, the legislature can decide what self-defense is, when it can be used, and who has to prove or disprove it.

REPRESENTATIVE GARA said he understands what the legislature's duty is. However, he remarked, he is just trying to figure out why the legislature should make the changes proposed by Sections 1-5 of HB 244, to enable prosecutors to convict somebody with less proof than proof beyond a reasonable doubt.

MR. NOVAK replied that the law says prosecutors must prove certain things beyond a reasonable doubt. As is now the case with duress and insanity defenses, Sections 1-5 would require that the defenses of self-defense, heat of passion, and defense of others must be proven, by the person committing the act, by a preponderance of the evidence.

CHAIR MCGUIRE, after acknowledging that Sections 1-5 are changing the burden of proof from beyond a reasonable doubt and are requiring that the aforementioned defenses would be affirmative defenses, predicted that with such a change, there will be cases in which someone will be unable to prove an action was justified. The question, she said, is why would the legislature want to make such changes. On that point, she noted that the Denarius Lockhart example does not provide as compelling a reason to change the current law as do the gang-related examples.

Number 1037

CHAIR MCGUIRE posited that gang-related cases are really the impetus for the proposed changes, and asked what other states have done to solve the underlying problem of gang members arming themselves, getting in fights, claiming self-defense, and getting away with killing people. The point, she surmised, is to stop that type of behavior, and pondered whether there is another solution, other than what is proposed via Sections 1-5, that would accomplish that.

MR. NOVAK said that the problem with drafting a law which only applies to gangs is that there are people who say there aren't any gangs in Alaska. In addition, defining what a gang is [and determining who belongs to a gang] would prove difficult. He noted that in the mid-'90s, the legislature enacted a law addressing gangs; to date, however, the courts have not found

"that there is a gang" as defined by statute. He mentioned that Alaska does not have the type of well-established, "rooted" gangs that other jurisdictions have to deal with. He elaborated:

We don't have territorial-based gangs that claim "this" area. We don't have, in large part, racially based gangs. And my effort as a prosecutor is to avoid us ever going down the road to be in a position where we're like Tacoma, Washington, or we're like ... Los Angeles or [places] like that. And so I think it would be very difficult to use [in Alaska] ... some of the tools used in other jurisdictions now ....

MR. NOVAK said that the idea is to prevent the situation from ever degrading to what it's become in some of the big cities in the Lower 48. In response to a question, he said that according to his knowledge, of the states that do make self-defense an affirmative defense, it applies to all situations; there is no singling out of situations related to gangs.

Number 1277

ANNE CARPENETI, Assistant Attorney General, Legal Services Section-Juneau, Criminal Division, Department of Law (DOL), added that what other states do is a rather complex question because it depends on the elements of homicide. For example, some states still have the old element of homicide of "malice aforethought," which is determined by what is present and what is absent in the situation, and one of the things that must be absent to find malice aforethought is self-defense. So, in states where malice aforethought is an element of homicide, the state has to disprove self-defense beyond a reasonable doubt. In states with a more modern code, or with a code that doesn't have malice aforethought as an element of homicide, such as Alaska, it's possible to have self-defense as an affirmative defense because the state's burden to prove, beyond a reasonable doubt, every element of the offense charged is not being taken away.

MS. CARPENETI went on to say:

I was reading a case ... from California, I think it's the main case from California, [People v. Rios], where their homicide statute ... requires the state to prove malice aforethought, so that the state must disprove self-defense beyond a reasonable doubt. But for other

offenses ..., for example, voluntary manslaughter and others where that element is not a part of the state's burden of proof beyond a reasonable doubt, then ... they do treat it as [an] affirmative defense and they require ... the defendant to carry the burden on that particular issue.

In other states, for example, Ohio, North Carolina, Virginia, Arizona -- there are other states that do put the burden on the defendant to establish - the burden of persuasion to establish - by a preponderance, self-defense. But in those states - and, actually, it's really interesting because a lot [of] states call it an affirmative defense - but when you look at the elements of their statute, it actually isn't, at least for homicide. So it's not a simple question. ... I think Ohio was the first state to make it an affirmative defense; it has been upheld by the United States Supreme Court against a challenge of due process of law.

MS. CARPENETI, in response to the same question asked of Mr. Novak, also said that states that do make self-defense an affirmative defense do not make a distinction for gang-related circumstances.

Number 1434

REPRESENTATIVE GARA agreed that they did not want someone who is looking for a fight to walk down the street, start a fight with another gang, and then claim self-defense. To be able to do so seems ludicrous, he added. He pondered, however, whether such gang-related self-defense claims really come up very often. Isn't it correct that if someone instigates the violence, then that person cannot claim self-defense? Thus, if a gang member is out looking for a fight, and then says the other guy shot first and so he/she shot second, isn't that person prohibited from using the claim of self-defense because he/she put himself/herself in the situation of essentially causing the violence to start? Does this gang-related self-defense issue ever really arise in the real world?

MR. NOVAK said it does arise. He offered to use a 2001 case as an example.

REPRESENTATIVE GARA asked Mr. Novak to instead address the basic principle of law. He elaborated, "I have in the ... far

recesses of my mind, that if you have somehow become responsible for the violence that you then claim self-defense for, you're not (indisc.) ..."

CHAIR MCGUIRE interjected to say: "And even at any point, too. ... Even if you aren't the initial aggressor, but if at some point during the fight, the person backs off and says, 'Okay,' and then you become the aggressor ..., you can't then later claim [self-defense]. Right?"

REPRESENTATIVE GARA asked, "What's the principle of law?"

MR. NOVAK said that a person can still make the claim, and then it would be up to him, as the prosecutor in the case, to disprove it beyond a reasonable doubt. He pointed out that the problem lies in him being able to do that, and indicated that that is why he'd offered the previous examples, to illustrate that prosecutors have not been able to disprove self-defense beyond a reasonable doubt. He mentioned an August 17, 2001, case in which two people agreed to go arm themselves, meet later, and have a shootout; in that case, the person who was more familiar with his firearm won the gun battle.

MR. NOVAK insisted that such cases happen with regularity, cases in which the prosecution is unable to disprove the claim of self-defense beyond a reasonable doubt. "[In] those cases, we can't convince 12 people beyond a reasonable doubt that self-defense doesn't apply," he added. He acknowledged, however, that in some cases, the prosecutors try to disprove self-defense and lose, but in other cases, they don't even try because they believe that they won't be able to prove to 12 people that self-defense doesn't apply.

Number 1635

REPRESENTATIVE GARA, in response, indicated that he still had a question. He said:

It's still the same question because I'm not sure that I understand the answer. So please just humor me and just pay attention to the strict aspects of the question that I'm asking. If you have a case where you have provoked a fight - you're a gang member, you show up with a bunch of guns - and then the prosecution shows that, beyond a reasonable doubt, you provoked this fight that then ensued. Is it or is it not true that once you've shown that this guy has

provoked the fight, beyond a reasonable doubt, he can't use the self-defense defense? Isn't that true?

MR. NOVAK said, "Right; self-defense is at issue and [if] I, on those facts, if I prove what you've said beyond a reasonable doubt, the jury should convict on those facts."

REPRESENTATIVE GARA then continued:

Okay. So you've proven that I instigated this ... by showing up with all this armor. I've instigated it; my lawyer can't stand up and say, "Yeah, he instigated it, but then this thing, this circle of violence started, and then he shot somebody in self-defense." That's just not available as a defense, right? If I instigated it, if it's clear that I instigated it?

MR. NOVAK replied:

If I prove it beyond a reasonable doubt. ... [But] doing what you've assumed are the facts, being able to prove that, is very difficult. But ... because of the fact of, many times, both sides in this shootout aren't available as witnesses because ... they're not wanting to come into court and testify about this stuff. I mean, one, they probably got Fifth Amendment privileges, they're dealing dope, and all this kind of stuff.

Number 1713

And, frankly, ... if these guys shoot each other, I think that's one issue. It's a greater concern to me when these bullets are flying and they're going into people's houses and into cars, and little kids are ... being taught to lay down on the floor. And so, ... I think you can -- I think it's a different issue on -- people can have different views on whether it's a loss to our community that these guys shoot each other. But ... people shouldn't have to live with shootouts ... in their community; they should be able to walk down the street of Fairview or Mountain View or anywhere else and not have this.

And the challenge is, how do we try to lessen this happening in our community. Rather than looking at the analysis being, "Can we win this one ... case and

trial," on the narrow view, I think it's a bigger question of, "How can we try to make our community more peaceful. And ... what this does is it restricts or limits the availability of self-defense. I mean that's what this is about: ... making it more difficult for people to claim or prevail on self-defense claims. ... I'm not here to say anything else. ... This makes it more difficult for somebody to benefit from the law of self-defense.

The committee took an at-ease from 3:20 p.m. to 3:37 p.m.

REPRESENTATIVE OGG pointed out that some cases just make bad law, adding that sometimes, when one reacts to certain cases or certain incidents and then tries to write a law, the law doesn't necessarily solve the problem. He said that in listening to some of the examples given, it does appear that current law is not sufficient, and that "Hamilton and Burr" could live in Alaska, either as individuals or as groups who want to stand across the street from each other and have a shootout. He said that in determining whether the proposed language will really accomplish the goal of making communities safer, it would be helpful to him if DOL representatives could provide statistics regarding whether having self-defense be an affirmative defense has really resulted in fewer cases of the type used as examples.

Number 1872

REPRESENTATIVE OGG said, "Maybe Alaska does need something like a 'dueling law,' or maybe some of these other places have dueling laws that make that [activity] against the law." He suggested that perhaps approaching the problem in a way other than what is proposed in HB 244 would actually solve the problem in a better fashion. He also said it would be helpful to him if statistics could be provided that would show how many such cases occur in towns and areas outside of Anchorage. Is this an Alaskan problem or just a problem in some Anchorage neighborhoods, he asked. He pondered whether, wouldn't it be possible, and a bit more judicious, to "carve out" only what's needed to solve the problem, rather than using the blanket approach to change a whole spectrum of rights. He said he would like to be provided with the information he's requested by the time the committee next takes up this bill.

REPRESENTATIVE GRUENBERG, on the issue of making neighborhoods more peaceful, relayed that his neighborhood's community council and law enforcement officers have said that what they would like

the most would be to have more police officers on the beat; a change in the law is not necessarily going to do as much good as having more police officers in the neighborhood.

MR. NOVAK acknowledged that having more police would be a good thing and that police can do a lot. He pointed out, however, that if the people arrested aren't successfully prosecuted, they learn that they can get away with their actions and be back out on the streets shortly after their arrest.

REPRESENTATIVE GRUENBERG, on a different issue, mentioned that a friend of his who sits on the bench has relayed to him that there appears to be a conflict between two different statutes pertaining to the refusal to take a Breathalyzer test.

CHAIR MCGUIRE asked Mr. Novak to research whether that apparent conflict should be addressed in either this bill or in some other legislation. Chair McGuire then indicated that Linda Wilson, Deputy Director, Public Defender Agency (PDA), would provide testimony at the next hearing on HB 244.

Number 2176

MATTHEW C. LEVEQUE, Lieutenant, Field Operations Coordinator, Division of Alaska State Troopers, Department of Public Safety (DPS), said simply that the DPS fully supports HB 244.

The committee took an at-ease from 3:43 p.m. to 3:44 p.m.

Number 2275

GLENN KLINKHART, Detective, Anchorage Police Department (APD), Municipality of Anchorage (MOA), noted that in March, there was a seven-day period in which eight people suffered gunshot wounds, although he acknowledged that not all those incidents were gang-related. Some of those incidents were drug related or involved circumstances in which people were engaging in other crimes. He mentioned a case in which two groups of people, neither of which specifically claimed any gang affiliation, drove around at 3 a.m. shooting at each other from rental cars. In that case, it came down to who started shooting first, but no one was willing to help the police solve the crime. What the APD is now faced with, he remarked, is that "these guys" immediately start claiming self-defense and, oftentimes, the APD is unable to prove who shot first.

MR. KLINKHART pointed out, however, that in terms of what's important to the community, who shot first doesn't matter as much as why these people are roaming around launching rounds at each other. Regardless of the reason, though, the people involved in these shootouts are immediately claiming self-defense, he reiterated, adding that this is frustrating because the perpetrators are able to claim self-defense and get away with their actions.

MR. KLINKHART said he thinks the changes proposed in HB 244 are something to be considered and something to be commended.

**TAPE 03-39, SIDE B**

Number 2372

REPRESENTATIVE GARA remarked that although they are focusing attention on a real problem in the community, the question before the committee is whether the solution proposed by Sections 1-5 of HB 244 is the right solution or whether something else is. He asked whether the people being arrested in these incidents are also being found with drug paraphernalia or evidence of other crimes. Because if such is the case, then even though they might not be successfully prosecuted for intending to hurt somebody, they could, for example, be successfully prosecuted on a drug charge and weapon's aggravator. Are there additional crimes associated with these incidences, or are they just shooting at each other?

MR. KLINKHART acknowledged that the situations vary. He assured the committee that all the circumstances involved in these incidences are investigated and presented to the courts, but oftentimes that evidence is not enough. He mentioned the "J.C. Penny homicide" and said that that case has ended up going into the federal system. He said that it is hard to have to explain to family members of victims that the charges in these types of cases may be dropped.

REPRESENTATIVE GARA asked:

If somebody shoots a gun out of their car, you find out they have ... commercially relevant amounts of drugs on them, so that you can prove that ... they had the intent to sell, and then they had the weapon on them, isn't that a crime? Isn't that a felony right there, having commercially saleable quantities of drugs with a weapon on you? And then the fact that whether or not they intended to kill somebody, that's

a whole separate issue, but don't you still have them on that core crime?

MR. KLINKHART said yes, [that synopsis] is right on the money. In fact, when those elements are present, there are federal statutes that apply, and federal agencies like the Federal Bureau of Investigation (FBI) and the Bureau of Alcohol, Tobacco and Firearms (ATF) have special programs in which those cases can be put on a fast track in the federal system.

CHAIR MCGUIRE said she would like to know how many cases are really gang-related as opposed to just instances of Alaskans' protecting themselves.

Number 2199

MR. KLINKHART said that although instances of people really acting in self-defense do happen, they are rare. He added that there are laws on the books to protect those individuals, and that oftentimes the APD never really becomes involved in those cases. With regard to how many case are gang-related, he echoed Mr. Novak in saying that the problem with making that kind of determination is that it is still not clear how to define what a gang is, especially in Alaska, because gangs in Alaska don't have the same characteristics as gangs in the Lower 48. Often, it is easier to consider such groupings in Alaska as criminal enterprises rather than gangs because it is only by luck that someone will admit to belonging to an organized gang.

CHAIR MCGUIRE remarked that defining what a gang is would be one way of getting at the problem, and indicated that that would be preferable to requiring an affirmative defense from people who are legitimately acting in self-defense regardless of whether they are on their own property or just out minding their own business. She mentioned that people acquire concealed-weapon permits for a variety of reasons, one of which is self-defense, and it would be reasonable to consider that such a person might really have to use that weapon in self-defense. She indicated agreement with Representative Ogg with regard to the danger of making bad law based solely on a few egregious-sounding cases.

MR. KLINKHART remarked that sometimes police officers are involved in cases in which they have to defend themselves, and in those cases, the details are closely scrutinized. He then provided details of some of the incidents that occurred in March and some the problems the APD is facing with regard to charging people in those cases.

CHAIR McGUIRE, referring to one of those examples, opined that when someone drives by and shoots into another person's vehicle, that person should have the right to defend himself/herself. Why create a higher threshold for the person just minding his/her own business?

Number 1910

MR. KLINKHART countered by saying that that's just the problem: Is that person really minding his/her own business? As an investigator, he explained, it is part of his job to determine whether people are really minding their own business and are just innocent bystanders, or whether they, too, are engaging in some sort of criminal activity. Why should a person thus engaged be able to claim self-defense?

CHAIR McGUIRE remarked that Mr. Klinkhart has raised good points, and that she appreciated his comments. She said that the committee would continue to look at this issue.

REPRESENTATIVE GARA said:

If the evidence coming to us is really evidence of ... gang- and drug-related crimes, ... I'd be curious to see whether other states have approached this issue more narrowly by trying to enact statutes that relate to gang- and drug-related crimes. And so, to the extent that people have answers on that when we meet again, I'd be interested in hearing them.

CHAIR McGUIRE mentioned that between now and the time HB 244 is next heard, committee staff and DOL representatives will be working together to gather the information requested by members.

[HB 244 was held over.]

#### **ADJOURNMENT**

Number 1806

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 4:04 p.m.