

**ALASKA STATE LEGISLATURE  
HOUSE JUDICIARY STANDING COMMITTEE**

May 8, 2003

3:45 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

**MEMBERS ABSENT**

Representative Max Gruenberg

**COMMITTEE CALENDAR**

HOUSE JOINT RESOLUTION NO. 20

Proposing amendments to the Constitution of the State of Alaska repealing the prohibition on dedicated funds.

- MOVED CSHJR 20(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

HOUSE JOINT RESOLUTION NO. 4

Proposing an amendment to the Constitution of the State of Alaska relating to the duration of a regular session.

- SCHEDULED BUT NOT HEARD

HOUSE BILL NO. 157

"An Act eliminating the Alaska Public Offices Commission; transferring campaign, public official, and lobbying financial disclosure record-keeping duties to the division of elections; relating to reports, summaries, and documents regarding campaign, public official, and lobbying financial disclosure; providing for enforcement by the Department of Law; making conforming statutory amendments; and providing for an effective date."

- BILL HEARING POSTPONED

HOUSE JOINT RESOLUTION NO. 9

Proposing amendments to the Constitution of the State of Alaska relating to an appropriation limit and a spending limit.

- BILL HEARING POSTPONED

**PREVIOUS ACTION**

BILL: HJR 20

SHORT TITLE: REPEALING PROHIBITION ON DEDICATED FUNDS

SPONSOR(S): REPRESENTATIVE(S) MASEK

Jrn-Date	Jrn-Page		Action
03/28/03	0671	(H)	READ THE FIRST TIME - REFERRALS
03/28/03	0671	(H)	JUD, FIN
05/02/03		(H)	JUD AT 1:00 PM CAPITOL 120
05/02/03		(H)	Bill Hearing Postponed to 5/5
05/05/03		(H)	JUD AT 1:00 PM CAPITOL 120
05/05/03		(H)	Scheduled But Not Heard
05/06/03		(H)	JUD AT 5:30 PM CAPITOL 120
05/06/03		(H)	-- Meeting Canceled --
05/07/03		(H)	JUD AT 1:00 PM CAPITOL 120
05/07/03		(H)	Scheduled But Not Heard
05/08/03		(H)	JUD AT 3:30 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
04/14/03		(H)	JUD AT 1:00 PM CAPITOL 120
04/14/03		(H)	Heard & Held MINUTE(JUD)
04/25/03		(H)	JUD AT 1:00 PM CAPITOL 120
04/25/03		(H)	<Bill Hearing Postponed>
05/07/03		(H)	JUD AT 1:00 PM CAPITOL 120
05/07/03		(H)	Scheduled But Not Heard
05/08/03		(H)	JUD AT 3:30 PM CAPITOL 120

**WITNESS REGISTER**

ERIC MUSSER, Staff  
to Representative Beverly Masek  
Alaska State Legislature  
Juneau, Alaska

POSITION STATEMENT: Presented HJR 20 on behalf of  
Representative Masek, sponsor.

LAUREE HUGONIN, Executive Director  
Alaska Network on Domestic Violence & Sexual Assault (ANDVSA)  
Juneau, Alaska

POSITION STATEMENT: During discussion HB 244, testified in  
support of Sections 7 and 14; expressed hope that Section 26  
will be helpful; and expressed concern with parts of Sections  
[1-5] and with Sections 16.

JEFFREY DUNCAN  
Big Lake, Alaska

POSITION STATEMENT: During discussion of HB 244, expressed  
dislike for Sections [1-5] and some of the terms in Section 7,  
and indicated approval of Sections 6, 8, and 26.

CAS GADOMSKI  
Wasilla, Alaska

POSITION STATEMENT: During discussion of HB 244, said that his  
feelings paralleled those of Mr. Duncan, and expressed concern  
with Section 1.

JOSHUA P. FINK  
Anchorage, Alaska

POSITION STATEMENT: During discussion of HB 244, relayed his  
concerns with the bill in general and specifically with Sections  
[1-5], 7, and 12, and responded to questions.

JAMES H. McCOMAS, Attorney at Law (of counsel)  
Friedman, Rubin & White

Anchorage, Alaska

POSITION STATEMENT: During discussion of HB 244, relayed his concerns with the bill in general and specifically with Sections 7, 12, 21, and 26, and responded to a comment.

BARBARA BRINK, Director  
Public Defender Agency (PDA)  
Department of Administration  
Anchorage, Alaska

POSITION STATEMENT: During discussion of HB 244, relayed her concerns regarding the bill and responded to questions.

DEAN J. GUANELI, Chief Assistant Attorney General  
Legal Services Section-Juneau  
Criminal Division  
Department of Law (DOL)  
Juneau, Alaska

POSITION STATEMENT: Testified on behalf of the administration in support of HB 244 and responded to questions.

#### **ACTION NARRATIVE**

#### **TAPE 03-55, SIDE A**

Number 0001

**CHAIR LESIL McGUIRE** called the House Judiciary Standing Committee meeting to order at 3:45 p.m. Representatives McGuire, Anderson, Ogg, Samuels, and Gara were present at the call to order. Representative Holm arrived as the meeting was in progress.

#### HJR 20 - REPEALING PROHIBITION ON DEDICATED FUNDS

Number 0050

CHAIR McGUIRE announced that the first order of business would be HOUSE JOINT RESOLUTION NO. 20, Proposing amendments to the Constitution of the State of Alaska repealing the prohibition on dedicated funds.

Number 0058

ERIC MUSSER, Staff to Representative Beverly Masek, Alaska State Legislature, on behalf of Representative Masek, sponsor, said that HJR 20 was introduced to ask the voting public to support a change in Article IX, Section 7, of the Alaska State Constitution. Specifically, if adopted by the legislature and

passed by the electorate at the next general election, the amendment to the Alaska State Constitution would require all motor fuel taxes generated through the sale of motor fuels only to be placed in a constitutionally protected fund for the express purpose of maintaining Alaska's roads and highways.

MR. MUSSER noted that the Alaska State Constitution prohibits dedicated funds except for the Alaska permanent fund, when required to receive federal funds, or for dedicated funds in existence prior to the adoption of the constitution. Amending Alaska's constitution should not be taken lightly, he remarked, and is considered with great trepidation. However, as state revenues continue to decline, the sponsor believes that Alaskans would be more amenable to contributing to the effort of maintaining the road and highway infrastructure if they had assurances that the motor fuel taxes levied were utilized for that express purpose, he relayed.

MR. MUSSER said that motor fuel taxes in all states are dedicated in some fashion for road and highway maintenance. In Alaska, motor fuel taxes are currently deposited in a special highway-fuel-tax account within the general fund (GF). However, the legislature may appropriate these funds for other purposes, and the sponsor feels that such would happen with increased motor fuel taxes, he additionally relayed. He asked the committee to support the proposed committee substitute (CS).

Number 0239

REPRESENTATIVE SAMUELS moved to adopt the proposed CS for HJR 20, Version 23-LS0889\D, Kurtz, 4/2/03, as amended by handwritten changes, as the work draft. There being no objection, Version D, as amended, was before the committee.

CHAIR McGUIRE, after ascertaining that no one else wished to testify on HJR 20, closed public testimony.

REPRESENTATIVE SAMUELS asked: "How much do we spend in road dollars now, as opposed to what we collect? Is it a moneymaker, above and beyond?"

MR. MUSSER replied:

Presently, no. Actually, there's serious deficiencies to the tune of ... \$30 million, based on the Department of Transportation's annual maintenance needs versus what we fund currently. As submitted in

the governor's bill ... increasing the ... fuels tax, the estimated revenue ... would generate about \$69 million, about \$9 million over what the department had estimated were the annual maintenance needs. And I understand an amendment was made in the House Finance Committee that reduced that ... anticipated revenue.

CHAIR MCGUIRE asked, "Philosophically, what would be the rationale for dedicating funds in this area when we don't do it for many other well-deserving areas such as public safety or education?"

MR. MUSSER replied:

The sponsor feels that ... that is a very ... philosophical and difficult issue. Typically, motor fuel taxes are designed for that purpose. And in fact ..., currently, the revenue does go into a highway revenue fund within the GF and typically allocated to the department to meet our needs. But it's a substantial change; ... she feels that because it is more than a doubling of tax receipts ... for that, and because of the volume of traveling between the valley and Anchorage and the commuters and the amount that would be paid, that the public should have some assurances that that's what it's going to be used for, that the legislature would not come in and determine that other needs may exist and want to short fund our highway maintenance program.

Number 0502

CHAIR MCGUIRE asked why not do it for alcohol or tobacco taxes, so that those user fees are dedicated specifically for purposes of cessation or treatment of health problems that stem out of those substances?

MR. MUSSER replied:

That question was raised and even discussed, and that was ... an example. As you know, when the tobacco tax was substantially increased just a couple of years ago, during that debate and adoption of the increase, a percentage ... [of] about 20-22 percent or so was to be expressly utilized for tobacco-cessation programs, for ... youth education and efforts, and what have you. And, obviously, there are those within the anti-

tobacco area that feel that the legislature is not living up to an agreement, which led to the support of that increase.

And the same was said just last year with the alcohol tax increase, that levels of funding would be used. ... And that sort of gets, really, to the issue ... [of] this debate: ... should perhaps the legislature consider changing ... prior ... policy ... decisions and say, "Yes, we want to ensure that highway maintenance (indisc.) are met, and ... we're going to do this." And that really is the heart of the question.

REPRESENTATIVE ANDERSON offered his belief that the Alaska State Constitution isn't so sacred that it can't be changed. He said he does not know why funds aren't dedicated; he indicated a desire to have dedicated funds, and relayed that he'd been opposed to the increase in alcohol tax because it goes into the "pot" and not to help related programs.

MR. MUSSER, in response to questions, relayed that 39 states currently expressly dedicate motor fuel receipts to highway maintenance and operation, and that all 50 states have the intent to dedicate those funds. He noted that the delegates to the constitutional convention extensively debated the issue [of dedicated funds], and looked at Texas, which at the time had 90 percent of its revenue dedicated, as an example. The question is whether to begin dedicating funds, or to continue with what the framers of the constitution intended, that the legislature have the flexibility to "make the annualized policy calls." He relayed that the sponsor feels very strongly that the constitution should be amended for this particular purpose.

Number 0825

REPRESENTATIVE SAMUELS, after noting that some departments don't generate revenue sufficient to meet their needs, asked Mr. Musser whether he thought that other departments should have their revenues dedicated.

MR. MUSSER said he could not speak for the sponsor on that issue, which, he added, is at the heart of the debate. He remarked, however, that it appears as though, to date, the legislature has felt that funds should not be dedicated, that there is a greater diversity of needs that warrant allocation of funds.

REPRESENTATIVE GARA said that this issue raises a concern:

That there's some programs where there's a parallel tax, and we can say, "Okay, well let's put all of the revenue from that area into these programs." But there are some programs where there's no relevant tax - no relevant source of money. ... So, let's say we dedicate all motor fuel money to highways and all cigarette tax money to health care, ... but then we have all these other unfunded things like ... the hiring of social workers and foster care or the funding of schools.

... Should we not be concerned that if we start dedicating money to specific programs, not enough money will be left for the areas where we don't dedicate? I think that was largely the concern of the [framers] when they said, "Look, in Texas, 90 percent of their money is dedicated; with the ten percent of the money that's left, [they] don't have the discretion to fund all the things that aren't dedicated." ... What are your thoughts [on these points]?

MR. MUSSER replied:

Again, I can only come back to, "That's the heart of the debate." Our [framers] ... felt expressly that it would be poor public policy to hamstring the legislature's authority to allocate or appropriate funds deemed appropriate by the legislature. Dedicating this revenue takes that authority and decision-making ability away from this body. ... I can't speak to whether that's right or wrong; ... that is certainly up to the committee ... to look at that.

Number 1100

REPRESENTATIVE GARA asked whether the funds HJR 20 proposes to dedicate would also be spent on road construction.

MR. MUSSER said the funds would only be for "maintenance and operation."

REPRESENTATIVE GARA, remarking that the legislature wouldn't want to dedicate more money than is spent for a particular

purpose, asked whether any calculations have been done regarding the estimated revenues from the governor's proposed increase in motor fuel taxes and the estimated spending for operation and maintenance.

MR. MUSSER reiterated that the estimate is \$69 million in revenue and \$60 million in operation and maintenance costs. He suggested that the legislature could decide to reduce the tax so as not to have a surplus in a dedicated fund.

REPRESENTATIVE OGG asked about taxation of marine fuel and aviation fuel.

MR. MUSSER said that including those taxes was considered, but [the sponsor] decided against doing so. He mentioned that the marine fuel tax account was meant to augment marine highway operations, but that the sponsor would be amenable to including "all consumptive fuel taxes ... except aviation."

REPRESENTATIVE SAMUELS noted that there are a lot of federal guidelines regarding what can and cannot be done with aviation [fuel] taxes. In addition, if a local community taxes aviation fuel, the taxes must be spent on its municipal airport rather than a state-owned airport. On the issue of whether to take away the legislature's authority to appropriate funds from the motor fuel tax account, he indicated that if the oil revenues continue to decline, the legislature might have to choose between funding schools or fixing roads. He pondered whether creating a dedicated fund as proposed by HJR 20 would be good public policy.

Number 1440

MR. MUSSER said that it is because of declining revenues that the sponsor feels it is important for the legislature to consider the express use of these funds for the operation and maintenance of highways and roads, which are used by all Alaskans. In response to a question, he indicated his understanding that the funds specified in HJR 20 would not be used for capital costs.

CHAIR McGUIRE suggested that such would be a detriment, and that there ought to be at least some leeway to spend funds for capital costs. Notwithstanding that point, she indicated that she would support advancing the legislation from committee.

Number 1522

REPRESENTATIVE ANDERSON moved to report the CS for HJR 20, Version 23-LS0889\D, Kurtz, 4/2/03, as amended by handwritten changes, out of committee with individual recommendations and the accompanying fiscal note. There being no objection, CSHJR 20(JUD) was reported from the House Judiciary Standing Committee.

The committee took an at-ease from 4:14 p.m. to 4:15 p.m.

HB 244 - CRIMINAL LAW/SENTENCING/PROBATION/PAROLE

Number 1582

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."

CHAIR McGUIRE noted that amendments to HB 244 were being drafted, and indicated that the committee would be considering the deletion of the "affirmative defense" provisions. She asked that folks testifying specify which sections of the bill their comments pertain to.

Number 1690

LAUREE HUGONIN, Executive Director, Alaska Network on Domestic Violence & Sexual Assault (ANDVSA), said that the ANDVSA supports Sections 7 and 14. She elaborated, "Section 7 talks about admissibility of prior convictions; Section 14 talks about consecutive terms of imprisonment if you have, under a separate judgment, any term of imprisonment imposed in a later judgment, amended judgment, or probation revocation." She said that the ANDVSA has concerns with some parts of the self-defense sections, Sections 1-5, and would support their deletion. Additionally, the ANDVSA has concerns with Section 16, which places into statute a mitigator in sexual assault cases; if the person were to "plead" within 30 days, there would be a

statutory mitigator to the sentence merely for owning up to the crime.

MS. HUGONIN said that regardless of the fact that in practice, the latter is currently being treated as a non-statutory mitigator, and that Section 16 is merely an attempt to reduce the time during which this mitigator might be available, the ANDVSA still has concerns about having this mitigator at all. To elaborate, she offered the following example:

[In] a recent [sentence] that was handed down in April, a person was charged originally with two counts of sexual assault in the third degree, which is a felony; he plead no contest to one misdemeanor count of attempted sexual assault in the third degree, and his sentence was 365 days in jail with 275 suspended. And if you read the facts in the case, it was an egregious sexual assault. So it seems like, in our experience in the field, that something that should be charged as a sexual assault in the first degree often ends up being a much lesser count, and so the sentence is reduced accordingly.

MS. HUGONIN then turned to Section 26 and said that the ANDVSA is hopeful that this provision will be helpful; Section 26 broadens the timeframe in which something could be considered an "excited utterance" for the purpose of prosecuting the crime of domestic violence. In response to a question, she indicated that the ANDVSA has no opinion on the sections of the bill that she has not specifically mentioned.

Number 1884

JEFFREY DUNCAN said that as a private citizen, he dislikes Sections [1-5]. He remarked that Section 6 looks like a good provision, but that he dislikes some of the terminology used in Section 7, particularly that which refers to a jury consisting of six members. Section 8 looks real good, he opined, adding that he also likes Section 26 because he believes that domestic violence needs to be reported.

Number 1961

CAS GADOMSKI, after relaying that his feelings on HB 244 parallel those of Mr. Duncan, said that he is a private citizen and a retired police officer. He then went on to say:

Looking at the sectional analysis of all this, my main concern, as far as what I don't like, lies in Section 1. This section would change "heat of passion" from a defense that the state must disprove beyond a reasonable doubt to an affirmative defense that the defendant must prove by preponderance of the evidence. That in itself gives me a problem, and I see no reason for it. I feel it's wrong, and I would like to see it struck; I feel it's totally wrong. ... The entire [HB 244] is fairly complex. I wouldn't be brokenhearted to see the entire bill struck, but my main problem, as far as what is left, is here in Section 1 - the heat of passion [for] a defense.

There's been rumors that [it] ... was introduced [at the] urging of prosecutors to address gang situations. But it doesn't say that [anywhere] in the bill; it doesn't refer to, quote, "gang members" or "gang situations." If one is carrying his pistol and suddenly is confronted with a problem that he must handle, well, there he finds himself in a situation where he has to defend himself, but he doesn't know in advance that that's going to happen. One does not make an appointment for an emergency. And so it's a very complex and troublesome thing here. I don't like it at all.

CHAIR McGUIRE mentioned that there is a proposed amendment to delete that section of the bill.

Number 2103

JOSHUA P. FINK stated that although he is an assistant public defender with the Public Defender Agency (PDA), he would be testifying on his own behalf. He said:

Generally, this legislation is a broad and unwarranted attack on citizens' rights. And their rights that we've cherished for centuries; their history with our jurisprudence goes way back, from the beginning. We're talking about the right to self-defense; I understand you've addressed that, and I'm thankful for that. We also have the right to not be forced to testify against yourself or incriminate yourself. This bill really empowers government at the expense of individual rights - and I don't think criminals' rights, because these are rights that protect all of

us. I mean, you are ... presumed innocent in our judicial criminal-justice system, and these are rights that we all enjoy.

So it actually, frankly, surprises me that this legislation was proposed by a conservative Republican governor, the governor who I supported and continue to support but [who], I'm convinced, was not fully briefed or staffed on this legislation. I don't believe people that share conservative philosophy about government's role and individual rights could support this legislation. Having said that, I think that this bill needs to be thoroughly worked through, ... thoughtfully considered and debated, and I'm concerned that there is not enough time left in the waning days of the session to adequately address these substantial changes in the law this bill proposes. ...

MR. FINK sought confirmation that there is a proposed amendment that would delete Section 4. He then went on to say:

On Section 7 - the admissibility of prior convictions - my concern there, in a general way: ... juries will convict based on someone's prior history regardless of the evidence before them on the crime for which they're [at] trial. It's propensity evidence, and almost all jurisdictions in the United States set limits on when priors can come in and under what circumstances - very strict limits - because it has been shown, time and time again, ... [when] the state [has] no evidence against an individual, you can produce priors ... [and] the trial is over. ...

Number 2269

You've denied that individual a fair trial - he's going to be convicted on his priors. And I would just caution the committee, and look into changes to the law which allow, essentially, prior bad acts that are going to put the defendant in very unfavorable light, that the committee think about that; that really undercuts, in a very fundamental way, the fairness of the trial. And there are reasons that every jurisdiction, including ours, has very strict limits on when that can come in - when prior convictions or prior bad acts can come in. And I would ask the committee to take a hard look at this section and

really think about whether [it detracts] ... from the integrity of our judicial system, knowing we could be getting convictions on lots of people based on old conduct that has nothing to do with the current offense as charged.

MR. FINK, turning to Section 12, continued:

On Section 12, dealing with the Fifth Amendment, this section essentially eviscerates - guts - the Fifth Amendment. I don't think it will stand constitutional scrutiny. ... The Fifth Amendment, the right not to testify against yourself dates back to the Magna Charta. And the reason they put it, initially, in the Magna Charta - and we have kept it in common law ... statutory law, [and] constitutional law since - is because the government used to have this nasty habit of getting confessions out of people through less than legitimate means: (indisc.) torture, psychological-type methods. People were falsely confessing. That's where the right to ... not self incriminate came from.

This section says that if a witness claims the privilege not to incriminate himself, it would force him to divulge to the prosecuting attorney back in the judge's chambers. You've got no privilege if you do that. ... You've been forced to divulge the information that's incriminatory to the prosecuting authority. ... It eviscerates the Fifth Amendment; it guts it. And I don't think it would withstand constitutional muster, and I don't think this committee or the legislature wants to go on record as saying ...: "The Fifth Amendment is not important"; "We don't believe this bedrock, fundamental principle of our system serves a purpose anymore"; or, "We don't believe in it." ...

MR. FINK concluded:

This bill is really riddled with problems, and I would love the opportunity to work with the committee and follow up with some comments, more specifically, on each section. But I will end my testimony there, and thank the committee ... for allowing me this opportunity to testify.

CHAIR MCGUIRE asked Mr. Fink to comment on Sections 14 and 26.

MR. FINK offered to submit written comments on those sections after he'd had a chance to review them.

**TAPE 03-55, SIDE B**

Number 2380

REPRESENTATIVE GARA asked Mr. Fink to explain to the committee the current rule pertaining to allowing evidence of a prior conviction.

MR. FINK said:

Well currently, prior bad acts that are relevant in some way may be admissible; for instance, where you've got domestic violence or sexual assault. The rules allow [it], in certain circumstances, if a prior bad act is similar in that you've got a similar-type victim [and] you have similar-type behavior; those are specific exceptions the legislature has made against the general rule that they can't come in because of the prejudice. Also, prior bad acts can come in if they're going to show motive, a scheme or design, [or] opportunity. [There are] very limited and specific exceptions to the general prohibition that prior bad acts may not come in because of the prejudicial effect.

Here, this section is specifically ... dealing with the [DWI, driving while intoxicated]. ... Because ... a felony DWI requires a certain number of priors, right now ... that information is kept from the jury, and the jury determines the guilt or the innocence of the person in the first phase of the trial without any reference or knowledge of these past offenses. Then, if the jury convicts ..., [in] the second part of the trial the jury would then be made aware of those convictions - the state would have to prove them up - and that would establish the felonious nature, for instance, of a third DWI in five years.

But it is specifically prevented from coming in at the first part because it's common knowledge and it's common experience [that] the jury will likely convict based on those prior acts rather than the current behavior. So there is a strong tradition and strong public policy - judicial policy - against the prior

bad acts, and very limited exceptions have been carved out. This Section 7 just blows a hole through someone's ability to get a fair trial on a felony DWI.

REPRESENTATIVE SAMUELS, referring to the comment that the state has to prove the prior convictions in the second part of the trial, asked how that occurs.

MR. FINK said that oftentimes the defense will simply stipulate - agree - that the prior convictions occurred. If the defense does not do so, however, the prosecutor can produce the conviction, either through a transfer of court records, if the prior conviction occurred in Alaska, or via a certified copy of the judgment, if the conviction occurred out of state. He remarked that the second portion of such a trial is generally a quick process.

Number 2247

JAMES H. McCOMAS, Attorney at Law (of counsel), Friedman, Rubin & White, noted that he has been a criminal defense lawyer for the last 25 years, the last 15 of which have been in Alaska. He said:

I want to commend the committee for making short work of the "heat of passion" and self-defense provisions [Sections 1-5]. But I think you should also ask yourself this question: Why in the world was anything so radical ever even proposed in the governor's bill? I mean these were massive changes that are utterly indefensible. And the purported factual basis for them consisted of anecdotes apparently collected by a Mr. Novak. When you start examining the cases that he actually identifies, and I understand that there was some discussion of this before, you find out that they are very different, in fact.

And that concerns me about the entire bill. And I join in Mr. Fink's recommendation; I don't think that anything in this bill should move on this year. And I think what the committee really should do is go out of its way to solicit even more input on the sections of the bill that it's not going to summarily, or after the consideration already given, delete.

MR. McCOMAS then spoke to specific provisions of HB 244:

The provision [Section 26] that would permit, in domestic violence cases, hearsay statements to be introduced beyond what the rules of evidence provide now is extremely unwise, number one, and almost certainly unconstitutional. One has to start with the question: Why DV [domestic violence] cases? Why not sexual assault or sexual abuse cases? Why not murder cases? Why not serious armed robberies? Why not attempted murders?

[Tape 03-55, Side B, contains nothing further.]

**TAPE 03-56, SIDE A**

Number 0001

MR. McCOMAS went on to say:

What you have to understand, of course, is that the exceptions to the hearsay rule, all of them, are not case-type specific. Instead, all the exceptions to [the] hearsay rule are based on the fact that there's some reliability that inheres or is attached by circumstance: ... business records, public records, excited utterances because they happen so close in time when people are under the stress of the event and they don't have a moment to think about and style their answers.

That concept, which is fundamental to the hearsay rule, is completely voided here and creates a situation where an individual can make statements, very deliberate statements, thought-out statements, even collusive statements, and then have them admitted. And remarkably enough, under this legislation as I understand it, the person doesn't even have to testify at trial. So that prosecutors could decide, "Well, you know, this complainant's not going to make a good impression [on] the jury," or, "She's going to have to answer some hard questions about [what] she was doing with the defendant before she says this allegedly occurred; our case will be better off if we just use the tapes of her interviews, or if we just call the neighbors and friends to whom she told her side of the story." And I just don't see, frankly, any court permitting that kind of obviously unreliable hearsay evidence to be admitted

given the confrontation clauses of the state and federal constitutions.

Number 0193

MR. McCOMAS continued:

Section 12, I guess, is the one that deals with immunity. This is plainly unconstitutional, but ... I'm not even sure if I should point this out or not, or just let it get passed. ... If what happens is that the court compels the defense attorney to proffer, in the presence of the prosecutor, what the client would say if immunized, then either there's been a gross violation of ... [state and federal privileges] against self-incrimination - having the lawyer say it instead of the client is constitutionally meaningless because the attorney is the agent of the client and is relating what the client would say - ... or it may be that the effect of that would be, judicially, to trigger transactional immunity for the person whose lawyer was forced to make the disclosure to the prosecution as to all transactions that were revealed, and that that would be the only way of curing the compelled disclosure that had been required. This one doesn't pass, frankly, first-year law school analysis, and it's remarkable to me that something like this is actually in the bill.

There's a requirement [Section 21] that the defense give notice of defenses. That already exists. There is a suggestion that the notice of defenses should be earlier than it is now, and I don't think the difference between 7 days and 21 days or even 30 days is a big deal. I don't think it's necessary to expand the time frame, but I don't think that that's a big deal.

CHAIR McGUIRE noted that testimony during the bill's prior hearing indicated that a victim's family and potential witnesses had taken time off from work and flown up to Alaska, only to be told that a trial was not going to take place as scheduled, and that therefore [the current statutory notice provision] has been abused.

Number 0354

MR. McCOMAS replied:

Well, I understand, but you see, it's not like there's a problem. What you heard was, I think, one chief anecdote. And it's really bad public policy, especially since there's almost nobody left to speak on behalf of the criminally accused; I mean, politically, there isn't a political party that will even take these positions regularly as a matter of the internal principles of their party. But if we start legislating now, not on real need but on the basis of individual case anecdote -- ... and that's what the prosecution seeks. I mean what they want is for every rule to be fixed in a way so that they never lose a case, and [so] that there's never another acquittal in the state of Alaska. I don't think that's the kind of system you want to have.

It's not just their side that's prejudiced. I mean, the big joke about this provision is, I have never tried, ... in 15 years in Alaska, a murder or any other serious case in which there hasn't been at least one discovery violation by the prosecution and we didn't get, until during trial, material we should have had months or years ago. And yet there's no provision in this bill to suddenly ... have some kind of drastic result in the event the prosecution fails in ... its burden. Instead, the presumption is that ... there's a continuance.

The other thing I have to tell you is that even the U.S. Supreme Court isn't going to tolerate a statute that creates an automatic preclusion sanction. ... They've already made that clear in their cases that have dealt with alibi notice, that you cannot, automatically, preclude all alibi witnesses simply because a rule of 7 days or 30 days has been violated. There has to be a case-specific assessment of whether there actually was any prejudice and, if there was any prejudice, ... then what. So I don't really see the need there, and I know that the sanction is unconstitutional.

Number 0495

MR. McCOMAS then turned to Section 7 and said:

I would say it would be a very rare case in which the prior crimes were a contested issue. And I think that in the vast majority of these cases ... - assuming that the prompt discovery is given by the prosecution of certified copies of prior convictions - that the so-called second phase of the trial is either going to be stipulations by the defense that those prior convictions exist or 20 minutes' worth of testimony that, yes, these are certified copies and a perfunctory 5 minutes of the same jury finding that that meets the standard. The suggestion to the committee, which I understand was that there would have to be two trials and two separate juries, is just totally fabricated. That wouldn't be the situation at all. That doesn't happen now, and there's no reason for it to [happen].

MR. McCOMAS concluded his testimony by saying that he'd be happy to answer any questions.

CHAIR McGUIRE mentioned that it is her intention to not alter the provisions regarding consecutive sentencing.

Number 0635

BARBARA BRINK, Director, Public Defender Agency (PDA), Department of Administration, after mentioning that she has been a public defender in Alaska for 21 years, noted that her deputy director, Linda Wilson, prepared written testimony that has been provided to the committee.

CHAIR McGUIRE assured Ms. Brink that she needn't address the self-defense provisions of the bill.

MS. BRINK turned, then, to Section 6:

Section 6 has to do with an accused person's right to consult with counsel when they are at the police station. And this amendment that's proposed in the bill would limit the rights of an accused to consult with the attorney, and I haven't heard any explanation, or belief, or rationale to justify this provision. It just seems to be a misguided effort to keep a prisoner without counsel as long as possible, although, of course, by the mere fact that the person is in custody and accused of a crime, his right to counsel ... [begins] immediately.

What happens, usually, when a person is arrested is that if the family and friends of that person have any financial wherewithal at their disposal, they will make arrangements for an attorney to represent that person, and then that attorney will go down to the police station. The practical effect is that with this amendment, only if the person in custody knows that a person has been retained to represent them will they make the specific request to ask to speak to that person, and because that person is now being held incommunicado and doesn't have the ability to speak to their family and friends, they're not going to know that.

So, in the first case, I don't see what problem is trying to be fixed with this [provision of the] legislation. And what you also have to understand is that many accused people, people who are in custody and being interrogated, have mental disabilities or they're young and inexperienced or, frankly, not very smart. And we all know that the police have at their disposal a wide variety of means to extract confessions or statements from people including the fact that it is perfectly okay for police to lie to people to get them to make statements.

And, as Mr. Fink pointed out, we have a very real problem with people who are held incommunicado confessing to things that they haven't done or being misled, and so an arrested person really ought to get the benefit of the lawyer that his or her loved ones have secured. So we don't agree with Section 6, and we don't really see what problem is attempting to be fixed.

Number 0799

MS. BRINK turned to Section 7:

Section 7 of the bill [is] trying to make evidence of prior convictions admissible in a case where it's an element of the offense. ... There's been a lot of testimony by Mr. Fink and Mr. McComas about that. I have to agree with everything they've said and particularly Mr. McComas's statement that it isn't that we hold two trials, now, in order to determine

this. This instance comes up in two types of cases: DWI cases where what type of charge depends on how many prior DWIs you have, and shoplifting cases where there is a felony shoplifting provision that depends entirely on how many prior shoplifting [convictions] you have as well.

And, as both the previous witnesses testified, you eviscerate due process when you try to get convictions based on what someone's done in the past as opposed to good, hard evidence of whether they've done this particular crime. And a person doesn't get two separate trials; it's just a simple "order of proof" situation. If a person is found to have committed this new offense, whether it's a DWI or a shoplift, and they still wish to contest whether or not these prior convictions are valid, then the same jury in the same courtroom during the same course of the afternoon is given information about the prior convictions. And, as Mr. Fink pointed out, it's pretty easy to prove a prior conviction.

But that brings up the second part of this [provision], ... which changes the burden of proof to challenge the validity of the prior conviction. As it currently stands, the prosecutor is able to easily prove prior convictions. And why is that? Because they have access to information nationwide. There [are] some national law enforcement organizations that have computerized databank systems that are not accessible to the defendant, that are not accessible to defense counsel, but ... [that] certainly are accessible to any prosecutor to find a prior conviction in any location in any other state, be it federal or state.

Number 0901

MS. BRINK continued:

So shifting the burden of proof, which Sections 7 and 15 do, ... really imposes ... a hardship on a person who's accused of a crime. The defense, the defendant, the accused person, doesn't have access to that kind of information, that kind of ability to find out, nationwide, what's out there and what isn't out there. And secondly, the bill changes what you can challenge

a prior conviction for. It says you can only challenge a prior conviction if a person was denied the right to counsel or they were denied the right to a jury trial.

... But there are many, many ways in which a conviction can be unconstitutional. What if the jury was instructed improperly on what the law was? What if a client who plead to a crime wasn't informed properly of what the elements of the offense were? What if a person was convicted by using perjured testimony? I really don't think we want to be a state that says none of those things matter and all of those things are going to be valid prior convictions. So that's why I have problems with those sections of the bill.

REPRESENTATIVE SAMUELS, turning back to Section 6, asked Ms. Brink if she is suggesting that once someone has been read the Miranda warning, just because that person is "young and stupid," he/she should have extra protection and not be questioned until a lawyer is present.

MS. BRINK replied:

Well, frankly, ... if a person is [read the Miranda warning], then they're on notice that if they want to have an attorney, they can have one right then. And in fact, if they want to have an attorney, all questioning must stop until that attorney is provided. What we're talking about is a situation where there's an attorney already there, waiting to speak to that person, that has been retained, in fact, to represent that person, [but] the person who's being questioned doesn't know that, and so they can't ...

REPRESENTATIVE SAMUELS interjected to say, "But they've been [given the Miranda warning] and they've turned it down."

Number 1035

MS. BRINK countered: "Well, they haven't turned it down. What if they have said, 'Well, I can't hire one' or 'I don't have the money on me right now.'"

REPRESENTATIVE SAMUELS remarked: "Then one would be provided by the state. Isn't that part of the [Miranda] warning?"

MS. BRINK replied:

Well, it doesn't really say one will be provided by the state; it says one will be provided to you immediately. But here's the situation: What about the middleclass people, who know that they might not qualify for appointed counsel, but lo and behold, their family has counsel already there at the jailhouse door wanting to talk to them. Should we treat those people differently than poor people? A poor person could say, "Yes, appoint one to me." But for that person who knows they won't qualify for appointed counsel, should we treat them differently, and not give them access to the lawyer that's ready, willing, and waiting to help them ...

REPRESENTATIVE SAMUELS interjected to say:

I assume if I say whether I'm rich, poor, or indifferent - and your original point was most of them are young and stupid - so I'm assuming, then, that if I want a lawyer, that ... the rest of it's going to get sorted out, and if my family has one for me outside, then the process stops. I think the point of the bill was that if a lawyer or a family member shows up, that they don't have a right to go talk to somebody that's been [given the Miranda warning] and turned it down.

Number 1078

MS. BRINK replied:

I think a lot of people don't affirmatively turn down a lawyer, because, frankly, it isn't that clear to you when a lawyer will be appointed to you. A lot of times during questioning, a person will say, "When will I get a lawyer?" and the police, rightfully so, will say, "Well, we can't get one in here now; when you go to court, when you get arraigned, that's when one will be appointed to you." And so the person in the police station is left feeling like, "Well, I should talk to the police because I want to clear this up, and if I decide to wait for a lawyer, the police won't talk to me."

So, I appreciate that you're feeling like these people are turning down a lawyer, but in fact, it's most often based on confusion of how soon a lawyer can be provided for them and their desire, truly, to cooperate with the police and tell them what they might know about the situation. So it's not so much an affirmative turning down of counsel as a misunderstanding of how the process works, and how they could access an attorney quickly.

REPRESENTATIVE GARA posed a situation in which the person in custody has not yet asked for an attorney and there is no attorney present at the police station. He asked whether the police are currently precluded from talking to that person.

MS. BRINK said that under that scenario, the police can talk to the person. In response to another question, she said: "I don't think it's so much [that] we're saying ... we're going to prohibit the police from talking to him, but we're going to allow that prisoner to talk to the attorney who's there waiting to talk to him."

MS. BRINK turned next to Section 8 and said she has no problem with it because it seeks to conform Alaska's immunity statute to the Alaska State Constitution with regard to witnesses who testify in a criminal proceeding after establishing, to the judge, a valid privilege against self-incrimination. She relayed that the 1993 case, State v. Gonzalez, interpreted Article 1, Section 9, of the Alaska State Constitution to require what is called full transactional immunity, meaning complete immunity from prosecution any time the prosecution wants to force a witness, with a legitimate claim of privilege, to testify.

Number 1307

MS. BRINK pointed out, however, that Sections [9-12] allow the prosecutor to participate in the proceedings in which the court determines whether there is a valid claim of privilege. She said that she agrees with previous witnesses on the point that one cannot preserve a privilege while "spilling" all the information to the prosecutor. She added that those are two completely inconsistent goals, and allowing the prosecutor to hear that proffered testimony would violate statutory guarantees against self-incrimination.

MS. BRINK turned next to Section 13, 14, and 18-20, which, she posited, propose to amend the sentencing statutes to require consecutive sentencing in more circumstances and to eliminate the court's ability to determine the appropriate amount of consecutive time for certain crimes. She went on to say:

Frankly, I don't think this legislation is needed. I think that the trial courts are well aware of the legislative preference for consecutive sentences, and they give that preference great weight in imposing sentences. They do impose consecutive time when it's required by statute. The whole question is, though, because we have presumptive sentencing, ... if you're in a car accident and you get convicted on two counts of assault, let's say, in the second degree, if you have [a] prior felony, each one of those counts requires a four-year presumptive term.

Now, it's kind of fortuitous that because you have two people in the car, all of a sudden you have two counts of assault and all of a sudden your sentence is going to be eight years, whereas if [a] person was fortunate to only have one person in the car, they'd be looking at a four-year sentence. The bottom line is that it isn't always appropriate, in every single circumstance, to impose the entire second sentence consecutively, particularly given the fact that we have presumptive sentencing that can range 10, 15 years, and be required. So you're going to end up increasing a lot of sentences, doubling some sentences, and having huge, serious fiscal impacts on the amount of jail time that people are required to serve based on kind of fortuitous circumstances.

Number 1417

MS. BRINK continued:

Additionally, it's kind of inconsistent to automatically impose these consecutive jail-time sentences when a judge is supposed to take into account a lot of different things when he's giving a sentence, including the seriousness of the present offense, what the prior criminal history of the defendant is, the likelihood of rehabilitation, the need to combine them to prevent harm to the public, [and] whether the sentence is appropriate to deter

this person from future crime or deter other people from future crime. And just imposing a consecutive sentence in toto doesn't let a judge consider all those other circumstances.

I mean, one of the goals of presumptive sentencing was to try to get uniformity in sentencing, and if you take away all the judge's discretion and their ability to look at all those other circumstances, you're actually creating less uniformity in sentencing because it will depend on fortuitous circumstances like the car example. Or what if the [district attorney] decides to indict somebody in separate indictments on a number of counts? If all of these counts are in the same indictment, and they get sentenced at the same time, then there's a different result than if each count is listed in a separate indictment and the person is sentenced in separate sentencing proceedings. So, it just doesn't make a whole lot of sense to me in promoting uniformity in sentencing and in allowing judges to consider all the things they need to consider in setting a sentence.

MS. BRINK then addressed Section 16:

Section 16 adds a mitigator for consideration at sentencing if a person pleads within 30 days of being arraigned on the charge. I certainly understand the public policy implications behind that. I don't think it's a bad idea, but I have to say, 30 days after an arraignment it would be unusually rare in a sex offense for us to have the discovery complete from the prosecutor's office .... And you certainly don't want a client, a defendant, a person accused of a crime, pleading out to a sex offense, which in most cases has serious presumptive sentencing, without having all the information necessary in their case.

Number 1511

I don't think the state has the ability, or they certainly aren't showing the ability, at this time, to get discovery to us in a timely fashion; it's certainly not within 30 days on an arraignment of a felony. So it might be a better solution to have the triggering ... be not a specific period of time, but maybe before an event, [for example], 30 days before

trial, or before motions are filed, or some other trigger that would inspire the case to settle early, because, believe me, we also have an interest in settling cases early but still [making] sure we have all the information we need to have before we advise somebody to plead.

REPRESENTATIVE GARA, turning back to the consecutive sentencing provisions, asked Ms. Brink to explain what she meant regarding multiple indictments.

MS. BRINK replied:

Well, as I understand it, under proposed subsection (a) [of Section 14], the mere existence of what they call a separate judgment eliminates any prospect for concurrent sentencing. So ... let's say the person is driving from Anchorage to the Mat-Su valley and is in more than one accident, and is indicted once by a Palmer grand jury and indicted in the other instance by an Anchorage grand jury; these are separate judgments. And I'm not saying this could happen frequently. But, frankly, I have to tell you charging practices throughout the state vary greatly.

In some jurisdictions the prosecutor will charge a person's cases all in one grand jury, whether these cases are related or not. In other jurisdictions the prosecutor will charge them in separate grand juries, even if they seem to be related. And so the question of whether there is a separate judgment, which eliminates the prospect for concurrent sentencing, ... the odds of that happening can vary widely depending on where in the state you might be.

Number 1637

REPRESENTATIVE GARA asked for a synopsis of what would happen under the proposed legislation for a different example, that of a bar fight in which the defendant hits three people. Would that result in three consecutive sentences and the judge would have no discretion to cap the sentence [and/or] make it partially concurrent?

MS. BRINK responded:

I think the reason this portion of the bill is kind of confusing is, it tries to impose consecutive sentencing in a wide variety of situations. The example I was talking about was under proposed subsection (a), where the mere existence of a separate judgment can eliminate any chance of concurrent sentencing. But as I understand it, ... I think the earlier sections of the bill require fully consecutive sentences for each separate crime. And so I think under your example, yes, ... it would be a forced consecutive sentence mandated.

Right now, particularly in cases like sex offense cases or sex assault cases, where consecutive sentencing is required, it doesn't have to be the full amount of the consecutive sentence; there has to be some consecutive time, but it's left up to the court's ... [discretion] how much is consecutive and how much is concurrent.

... What I see is, ... [Section 14, subsection (c)(2)] says that if there are two or more crimes under [AS] 11.41, which is your bar-fight scenario, ... a consecutive active term of imprisonment shall be imposed for at least the mandatory minimum term for (indisc.) terms. So, in this action, it kind of depends on the degree of injury suffered by those people in your bar fight. So they have to at least get the mandatory term or two years of active jail, depending on the degree of the assault. ...

CHAIR MCGUIRE remarked that she believes that "every life deserves the respective sentence that comes with it."

Number 1784

MS. BRINK, turning to Section 21-23, said:

Sections 21-23 concern notice of defenses and experts, and require the defense to give notice sooner than under current law, and also, as Mr. McComas noted, adopts a mandatory serious sanction of actual preclusion of the witnesses testimony if there is failure to timely notify the prosecution. And I have to agree with Mr. McComas; my staff, we're involved in litigation, trials, all the time, and it is the rare case where ... we're not surprised with witness

statements, even our clients' statements, actual physical evidence, [or] lineups in the middle of trial.

And the case law is very well settled; when the prosecutor makes an error like that, either through negligence or inadvertence or inattention or even deliberately, the normal remedy for a person in that situation is simply to get a continuance, and get the opportunity to deal with the new information and the new evidence. And why is that the rule? Because the court wants the jury to get all the information. The court wants the evidence to be presented to the jury, because a jury can't reach a fair decision and a verdict if we're hiding stuff from them.

And this proposal, frankly, is to hide evidence from the jury if either through neglect or "inadvertent" ... an attorney didn't get it together in time or because they made a mistake; we would then preclude the jury from hearing vital evidence in a case. And I have to agree [with Mr. McComas], I don't think that would pass constitutional muster because the whole point of having a jury trial is for them to get all the facts and evidence and reach their conclusions about what happened and what the charge should be.

REPRESENTATIVE SAMUELS mentioned the case on Saint Paul Island pertaining to the murder of the Coast Guard commander, and remarked that it certainly wasn't fair to the family of the victim to have to keep flying back and forth from Louisiana because the trial date was altered at the last minute, purportedly because the defense changed it's strategy.

Number 1881

MS. BRINK responded:

Well, I'm a little familiar [with] that Saint Paul [Island] case and, frankly, I have to say that I believe the error in that situation was on the part of the prosecution. I think that there was sufficient notice, so that travel could have been avoided. ... I appreciate the fact that it's a very traumatic experience to go through, and we try to give as much notice as possible. And in that situation, I think the travel could have been avoided

But ... I would like to address one other area that you bring up. In fact, it is the duty of a defense attorney to respond to the case as it proceeds and as it develops, and sometimes, yes, there will be changes in strategy or changes in witnesses. But, frankly, that's part of trial. A prosecutor changes his witnesses and strategy as he's going along, too, depending on how the witness testimony develops: is it necessary to call this witness, should we use this other person, can we efficiently prosecute this case without calling that person. ... Those kinds of adjustments are made all the time, both by the prosecution and the defense. And I appreciate that everybody would like to keep on a timely schedule and make sure that there aren't any surprises, and we try to comply with the rules as best we can.

MS. BRINK, turning to Sections 24 and 25, said:

Section 24 ... [amends the Alaska Rules of Evidence such that] evidence illegally obtained by the state would be admissible in a trial. This overrules years and years of jurisprudence. It's what people who engage in this practice regularly call the exclusionary rule. And it kind of runs like this: If the police or the prosecution ... violate somebody's rights [to] be free from unreasonable search and seizure - they search a home without a warrant, they frisk a person without probable cause, they invade somebody's car with no good reason - or they get someone to confess without advising them of their Miranda rights, that's all illegally taken evidence.

Number 1992

MS. BRINK continued:

And the rules have developed in this country over the last 200 years that that behavior will not be rewarded by allowing the prosecution and the police to use those pieces of evidence against someone who's accused of a crime. The exclusionary rule is designed to encourage police to engage in lawful practices and to encourage people's rights to be respected. And so [this is] a huge change, as Mr. Fink pointed out, once again empowering the government at the expense of the

individual's rights. It is a huge change to all of a sudden now condone illegal activity on the part of police and prosecutors, and say, "Well, this illegal evidence can come in, in the case in chief, if we think the defendant or the accused is not testifying truthfully." So, it's a huge sea change, and I don't think it's a good idea.

The second section, Section 25, I'm sort of ambivalent about. That amends [Alaska Rules of Evidence] Rule 609 to increase the opportunity to use prior convictions of dishonesty from five years from date of the conviction [to] within five years of the unconditional discharge of the conviction. And so, if you want to expand that time, I would just suggest to you that that rule applies to both parties equally.

If you want to impeach somebody with a prior conviction and you're going to extend the reach to ten years rather than five years, you'll have as many witnesses testifying for the defense ... [who] will have impeachable convictions show up in their history ... as you would for the prosecutor. It just kind of depends on how much information you want the jury to know. Do you think it's important that a person was convicted of a crime this long ago? Is that relevant to whether they're telling the truth today or not? It's hard to say.

Number 2048

MS. BRINK, turning to Section 26, said:

Section 26 ... seeks to amend the [Alaska Rules of Evidence] to provide another exception to the hearsay rule to ... [allow] statements [made] by an alleged victim of domestic violence within the last 24 hours, or [by] any other witness. Mr. McComas said it very well; most hearsay exceptions have come about over the years because it's been proven that the evidence that's hearsay is really, generally kind of reliable: business records, those kinds of things.

I have to say I would find ... the evidence in domestic violence cases less reliable than almost any other type of case. If you are going to carve out an exception, this would not be the [type of case to do

it for]. Domestic violence cases are universally running high with passion, emotion, and bias. And I think it's even more important in those situations to provide the actual witness so the jury can assess whether or not that person's telling the truth ....

REPRESENTATIVE GARA asked Ms. Brink to comment on Section 27.

MS. BRINK said that Section 27 relates back to the provisions regarding expert testimony. The court rule [currently requires] that the state's expert be noticed 45 days before trial, and that the defense's expert be noticed 30 days before trial. She surmised that Section 27 would conform the court rule to the "hard and fast exclusionary rule" proposed by other provisions of HB 244.

CHAIR MCGUIRE mentioned that there are several amendments, some of which propose to delete Sections 1-5, 9-12, 16, and 17.

Number 2208

DEAN J. GUANELI, Chief Assistant Attorney General, Legal Services Section-Juneau, Criminal Division, Department of Law (DOL), referring to the suggestion that the self-defense provisions [Sections 1-5] be deleted, said that these provisions are the law in other states and have been upheld by the U.S. Supreme Court. He offered that these provisions are in direct response to specific situations, which occurred primarily in Anchorage and purportedly involved gang shootings, and noted that these provisions provide an exception for self-defense in one's own home. In the interest of expediency, however, he relayed that it would be acceptable to the administration if Sections 2-5, which relate to the defense of self-defense, were deleted; Section 1, on the other hand, relates to the heat of passion defense pertaining to first or second degree murder, and should therefore be retained.

MR. GUANELI, in support of retaining Section 1 of the bill, offered the following about a case that was heard in the Alaska Supreme Court a number of years ago:

Someone ... had paid some money to buy some drugs. The runner went to the house and disappeared, and disappeared with the drug money. The person who paid to get the drugs pounded on the door, broke in, put a gun to the drug dealer's head, said, "Give me my money back or give me the drugs." A struggle ensued, he

ended up killing the drug dealer, and the defense was heat of passion: "I was so incensed, I was so enraged, that my reason overcame me." And his conviction was reversed because the jury wasn't allowed to consider that heat of passion defense.

MR. GUANELI opined that one ought have the burden of proving that one was so enflamed, so enraged, as to kill another person. He likened it to the defenses of insanity and duress. Heat of passion is significantly different than self-defense, he remarked, and urged the committee to retain Section 1.

MR. GUANELI, on the issue of whether to delete Sections 9-12 and 17, the provisions regarding immunity, suggested that "secret hearings" are occurring, during which information critical to the prosecution is being discussed. He opined that this situation is unfair to the state and to the public. In support of keeping these provisions in the bill, he offered the following about a case that occurred in Juneau.

**TAPE 03-56, SIDE B**

Number 2400

A couple of guys ..., over a \$50 or \$60 debt involving marijuana, ... ended up killing somebody. They beat him to death. It turned out that a witness ... had some information about the case, and he got an attorney and basically came to us and said, "I'd really like to help you, but I'm a little bit worried about my own exposure." And so, after pressing the attorney a little bit, ... the attorney writes us a letter and says, "My good faith belief about what my client fears is, this guy came to him, broke into his house, said, 'I know you've got a gun, give me your gun,' ran out, did the killing, and came back and gave the client the gun back." So the client was afraid he was going to get accused of ... concealing evidence  
....

MR. GUANELI said that the forgoing is an example of a witness that wants to cooperate with the prosecution. He remarked, however, that in the aforementioned "secret hearings," the witness really doesn't want to cooperate with the prosecution and so hides behind the Fifth Amendment. He mentioned what he called a general maxim that says that the government is entitled to every person's evidence; in other words, every one who has information about a case is obligated to come forward and give

testimony. Hiding behind the Fifth Amendment in such a way that the prosecution is deprived of the information it needs in order to even know whether to grant immunity is really inappropriate, he opined.

MR. GUANELI suggested that all these provisions do is require that a person's attorney provide a good-faith statement regarding what that person is seeking immunity for. Currently, the prosecution gets no information. He asserted that by granting transactional immunity, the prosecution faces the risk that the person who is granted the immunity will simply confess to the crime in an effort to protect the defendant; the result of such a situation is that the person with the immunity won't be prosecuted and the defendant will be acquitted, and so they get away with the crime.

Number 2207

MR. GUANELI assured the committee that if the prosecution starts prosecuting the people that cooperate, it will soon lose that cooperation. He said:

If we believe that someone is only peripherally involved in a murder, and if their attorney's good-faith belief is that there is only peripheral involvement, then we have no interest in (indisc. - paper ripping); we want their testimony, we are going to immunize that person, and we're going to get their testimony. If it's something other than that, then I think that we might not provide immunity for them, but most people that we focus on, as wanting their testimony, we have some good-faith belief for thinking that they're not a principal actor. But we worry about those cases [in which someone wants to] protect the defendant in some way; they may be a relative, they may be friend, they may be an associate in some way, and we're worried about what would happen if we [give] immunity completely in the dark.

MR. GUANELI, in response to a question, explained the difference between transactional immunity and "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. He noted that the federal government grants use immunity, which

was what was given to Oliver North, and that the federal government bears a heavy burden of proving that any testimony for which use immunity was granted is not later used in any way to prosecute the person who was given the use immunity.

MR. GUANELI reiterated his belief that the provisions of HB 244 require only that a witness's attorney provide a good-faith statement regarding what the witness is seeking immunity for, and offered that the state would still have a heavy burden of showing that the information didn't lead to a future prosecution of the witness. He posited that the provisions being discussed are intended to craft a procedure that is in keeping with Alaska's transactional immunity while still giving the prosecution a minimal amount of information by which to form a decision regarding whether to grant somebody immunity. In response to another question, he relayed that most other states grant use immunity, but a few other states grant transactional immunity.

MR. GUANELI surmised that if, indeed, these proposed sections are found to be unconstitutional - as predicted by previous testifiers - prosecutors will be no worse off than they currently are. The question is, does the legislature believe that this is enough of a problem that it ought to try to craft a solution. "We believe it is; ... it happens to us all the time, and we believe that this is a solution that ... is designed to work well and ... be constitutional," he added.

Number 1868

CHAIR McGUIRE referred to the language Section 8 is proposing to delete: "no testimony or other information compelled under the order, or information directly or indirectly derived from that testimony or other information, may be used against the witness in a criminal case". She asked why not keep that language in and tinker with that language?

MR. GUANELI explained that the language being removed is from the federal law, and that Alaska's court has ruled, via the Gonzalez case, that the Alaska State Constitution provides a broader protection. In other words, the court has struck down, as unconstitutional, the language being deleted in Section 8, which is intended to reflect Alaska case law, he added.

REPRESENTATIVE GARA asked whether Section 8 adopts use immunity.

MR. GUANELI said it does not, reiterating that the court has ruled that use immunity is not sufficient under the Alaska State Constitution. Section 8 crafts a procedure by which the prosecution can obtain needed information about the type of offense that the witness wants immunity for, so that immunity is not being granted "in the dark."

REPRESENTATIVE GARA pointed out, however, that the language Section 8 proposes to insert in statute does not appear to be an accurate statement of transactional immunity.

MR. GUANELI suggested that Representative Gara's reading is not correct; Section 8 is designed to be from the Gonzalez case, and simply reflects what the [case] law is in Alaska regarding the constitutional rule.

CHAIR MCGUIRE asked why not simply insert a constitutional amendment in the bill to provide for use immunity. Why create a mechanism that is untested, particularly in light of the Gonzalez case? She suggested that rather than changing several statutes to allow the prosecution to interject itself in the judge's chambers, the administration should find a simpler way to achieve its goal. She opined that the current provisions in the bill infringe on the judge's power, discretion, and ability to communicate in private with an individual.

Number 1601

MR. GUANELI offered that it is the administration's preference to try to achieve its goals through statute, rather than through a constitutional amendment. He added: "Once you start going down the road of amending the constitution to overturn judicial decisions, there's really no end to that." He predicted that there are other Fifth Amendment rulings and Fourth Amendment rulings by Alaska's courts that prosecutors "would love to get rid of."

CHAIR MCGUIRE offered her belief that on this issue, if the administration is determined to make such a fundamental change, a constitutional amendment is needed. This isn't just a technical change; use immunity and transaction immunity are "two completely different animals," she remarked. In addition, a constitutional amendment will allow voters an opportunity to weigh in on the issue. Pondering how other states approach this issue, she asked whether immunity is typically addressed via statute or via constitution.

MR. GUANELI said that with respect to whether the type of immunity granted is use immunity or transaction immunity, that is probably a matter of judicial interpretation of a state's constitution. He offered to provide, at the bill's next hearing, more information regarding how states with transactional immunity deal with the issue.

CHAIR McGUIRE said she wants to know where the concept proposed in the bill originated. "How do we know this is going to work," and why go out on a limb if it's going to be thrown out anyway, she asked, and indicated that she does not like that approach. Going to court over this issue is a waste of people's time, she opined, particularly if there is no precedent that such language is going to work.

MR. GUANELI relayed that the procedure of accepting a proffer from an attorney - a good-faith statement of what he/she believes the client would say - does have precedent in the federal government, and is currently used in the granting of [federal] use immunity. He suggested that the proposed changes are in response to the "secret hearings" that judges currently hold in determining whether a witness has a valid privilege against self-incrimination.

REPRESENTATIVE GARA asked that at the bill's next hearing, the committee be provided with an excerpt from the Gonzalez case.

MR. GUANELI agreed to provide that information.

REPRESENTATIVE GARA said that his main problem with HB 244 is that it includes "six months' worth of criminal law class." The concepts encompassed in HB 244 are so varied and so complex, he remarked, that he is concerned that he will be voting in an uninformed manner.

CHAIR McGUIRE indicated that although she has made a commitment to move the bill out of committee after deleting some of its more controversial sections, it might not be a bad idea to work on the bill over the interim.

[HB 244 was held over.]

## **ADJOURNMENT**

Number 1195

The House Judiciary Standing Committee was recessed at 5:58 p.m. to a call of the chair. [The meeting never was reconvened.]