

**ALASKA STATE LEGISLATURE**  
**HOUSE JUDICIARY STANDING COMMITTEE**

March 30, 2004

1:05 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**

CS FOR SENATE BILL NO. 30(JUD) am

"An Act relating to information and services available to pregnant women and other persons; and ensuring informed consent before an abortion may be performed, except in cases of medical emergency."

- MOVED HCS CSSB 30(JUD) OUT OF COMMITTEE; ADOPTED A HOUSE CONCURRENT RESOLUTION ALLOWING THE TITLE CHANGE

HOUSE BILL NO. 353

"An Act relating to jury duty; and amending Rule 15(k), Alaska Rules of Administration."

- MOVED CSHB 353(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

SENATE BILL NO. 344

"An Act relating to the Uniform Probate Code and trusts, including pleadings, orders, nonprobate assets, estates of decedents, minors, protected persons, incapacitated persons, guardians, conservators, trustees, foreign trusts, principal and income, and transfer restrictions; relating to corporate voting trusts; and providing for an effective date."

- SCHEDULED BUT NOT HEARD

HOUSE BILL NO. 439

"An Act relating to the authority to take oaths, affirmations, and acknowledgments in the state; relating to notaries public; relating to fees for issuing certificates with the seal of the state affixed; and providing for an effective date."

- SCHEDULED BUT NOT HEARD

HOUSE BILL NO. 484

"An Act imposing a correctional facility surcharge on persons convicted of a crime under state law, and on persons whose probation is revoked; relating to fees and expenses for interstate transfer of probation or parole; and providing for an effective date."

- SCHEDULED BUT NOT HEARD

HOUSE BILL NO. 474

"An Act relating to civil liability associated with aircraft runways, airfields, and landing areas."

- SCHEDULED BUT NOT HEARD

HOUSE BILL NO. 339

"An Act relating to negative option plans for sales, to charges for goods or services after a trial period, and to acts that are unlawful as unfair trade practices."

- SCHEDULED BUT NOT HEARD

**PREVIOUS COMMITTEE ACTION**

BILL: SB 30

SHORT TITLE: ABORTION: INFORMED CONSENT; INFORMATION

SPONSOR(S): SENATOR(S) DYSON

01/21/03 (S) READ THE FIRST TIME - REFERRALS  
01/21/03 (S) HES, JUD, FIN  
03/17/03 (S) HES AT 1:30 PM BUTROVICH 205  
03/17/03 (S) Heard & Held  
03/17/03 (S) MINUTE(HES)  
03/26/03 (S) HES AT 1:30 PM BUTROVICH 205  
03/26/03 (S) Heard & Held  
03/26/03 (S) MINUTE(HES)  
04/03/03 (S) HES AT 5:00 PM BELTZ 211  
04/03/03 (S) Heard & Held  
04/03/03 (S) MINUTE(HES)  
04/09/03 (S) HES AT 1:30 PM BUTROVICH 205  
04/09/03 (S) Heard & Held  
04/09/03 (S) MINUTE(HES)  
04/14/03 (S) HES AT 1:30 PM BUTROVICH 205  
04/14/03 (S) Moved CSSB 30(HES) Out of Committee  
04/14/03 (S) MINUTE(HES)  
04/15/03 (S) HES RPT CS 2DP 1DNP 1NR SAME TITLE  
04/15/03 (S) DP: DYSON, GREEN;  
04/15/03 (S) DNP: DAVIS; NR: WILKEN  
05/02/03 (S) JUD AT 1:00 PM BELTZ 211  
05/02/03 (S) Heard & Held  
05/02/03 (S) MINUTE(JUD)  
05/03/03 (S) JUD AT 9:00 AM BELTZ 211  
05/03/03 (S) Moved CSSB 30(JUD) Out of Committee  
05/03/03 (S) MINUTE(JUD)  
05/06/03 (S) JUD RPT CS 3DP SAME TITLE  
05/06/03 (S) DP: SEEKINS, THERRIAULT, OGAN  
05/12/03 (S) FIN AT 9:00 AM SENATE FINANCE 532  
05/12/03 (S) Moved Out of Committee  
05/12/03 (S) MINUTE(FIN)  
05/12/03 (S) FIN RPT CS(JUD) 3DP 3NR 1AM  
05/12/03 (S) DP: GREEN, TAYLOR, STEVENS B;  
05/12/03 (S) NR: WILKEN, HOFFMAN, BUNDE; AM: OLSON  
05/16/03 (S) TRANSMITTED TO (H)  
05/16/03 (S) VERSION: CSSB 30(JUD) AM  
05/16/03 (H) READ THE FIRST TIME - REFERRALS  
05/16/03 (H) HES, JUD, FIN  
05/17/03 (H) HES AT 1:00 PM CAPITOL 106  
05/17/03 (H) Moved HCS CSSB 30(HES) Out of Committee  
05/17/03 (H) MINUTE(HES)  
05/17/03 (H) HES RPT HCS(HES) 4DP 1NR  
05/17/03 (H) DP: SEATON, COGHILL, WOLF, WILSON;  
05/17/03 (H) NR: CISSNA  
02/18/04 (H) JUD AT 1:00 PM CAPITOL 120  
02/18/04 (H) Heard & Held

02/18/04 (H) MINUTE(JUD)  
03/18/04 (H) JUD AT 1:00 PM CAPITOL 120  
03/18/04 (H) Heard & Held  
03/18/04 (H) MINUTE(JUD)  
03/26/04 (H) JUD AT 1:00 PM CAPITOL 120  
03/26/04 (H) Scheduled But Not Heard  
03/29/04 (H) JUD AT 1:00 PM CAPITOL 120  
03/29/04 (H) Bill Postponed To 3/30/04  
03/30/04 (H) JUD AT 1:00 PM CAPITOL 120

BILL: HB 353

SHORT TITLE: JURY DUTY EXEMPTION FOR CERTAIN TEACHERS

SPONSOR(S): REPRESENTATIVE(S) KAPSNER

01/12/04 (H) PREFILE RELEASED 1/2/04  
01/12/04 (H) READ THE FIRST TIME - REFERRALS  
01/12/04 (H) EDU, HES, JUD  
02/17/04 (H) EDU AT 11:00 AM CAPITOL 124  
02/17/04 (H) Moved Out of Committee  
02/17/04 (H) MINUTE(EDU)  
02/18/04 (H) EDU RPT 3DP 2NR 2AM  
02/18/04 (H) DP: GARA, KAPSNER, GATTO;  
02/18/04 (H) NR: OGG, WOLF; AM: SEATON, WILSON  
03/04/04 (H) HES AT 3:00 PM CAPITOL 106  
03/04/04 (H) Scheduled But Not Heard  
03/18/04 (H) HES AT 3:00 PM CAPITOL 106  
03/18/04 (H) Moved CSHB 353(HES) Out of Committee  
03/18/04 (H) MINUTE(HES)  
03/22/04 (H) HES RPT CS(HES) 4DP 2NR  
03/22/04 (H) DP: KAPSNER, GATTO, CISSNA, WILSON;  
03/22/04 (H) NR: COGHILL, WOLF  
03/29/04 (H) JUD AT 1:00 PM CAPITOL 120  
03/29/04 (H) Bill Postponed To 3/30/04  
03/30/04 (H) JUD AT 1:00 PM CAPITOL 120

BILL: HB 244

SHORT TITLE: CRIMINAL LAW/SENTENCING/PROBATION/PAROLE

SPONSOR(S): RULES BY REQUEST OF THE GOVERNOR

04/04/03 (H) READ THE FIRST TIME - REFERRALS  
04/04/03 (H) JUD, FIN  
04/14/03 (H) JUD AT 1:00 PM CAPITOL 120  
04/14/03 (H) Heard & Held  
04/14/03 (H) MINUTE(JUD)  
04/25/03 (H) JUD AT 1:00 PM CAPITOL 120  
04/25/03 (H) -- Meeting Postponed to April 29 --  
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  
 05/08/03 (H) Heard & Held  
 05/08/03 (H) MINUTE(JUD)  
 05/09/03 (H) JUD AT 1:00 PM CAPITOL 120  
 05/09/03 (H) Moved CSHB 244(JUD) Out of Committee  
 05/09/03 (H) MINUTE(JUD)  
 05/12/03 (H) JUD RPT CS(JUD) NT 1DP 1DNP 4NR  
 05/12/03 (H) DP: SAMUELS; DNP: GARA; NR: HOLM,  
 05/12/03 (H) OGG, GRUENBERG, MCGUIRE  
 05/13/03 (H) FIN AT 1:30 PM HOUSE FINANCE 519  
 05/13/03 (H) -- Meeting Canceled --  
 05/14/03 (H) FIN AT 8:30 AM HOUSE FINANCE 519  
 05/14/03 (H) Heard & Held  
 05/14/03 (H) MINUTE(FIN)  
 05/15/03 (H) FIN AT 8:30 AM HOUSE FINANCE 519  
 05/15/03 (H) Moved CSHB 244(JUD) Out of Committee  
 05/15/03 (H) MINUTE(FIN)  
 05/15/03 (H) FIN RPT CS(JUD) NT 2DNP 4NR 4AM  
 05/15/03 (H) DNP: KERTTULA, FOSTER; NR: MOSES,  
 05/15/03 (H) CHENAULT, HARRIS, WILLIAMS; AM: HAWKER,  
 05/15/03 (H) STOLTZE, BERKOWITZ, WHITAKER  
 05/15/03 (H) RETURNED TO JUD COMMITTEE  
 05/15/03 (H) IN JUDICIARY  
 03/19/04 (H) JUD AT 1:00 PM CAPITOL 120  
 03/19/04 (H) Heard & Held  
 03/19/04 (H) MINUTE(JUD)  
 03/24/04 (H) JUD AT 1:00 PM CAPITOL 120  
 03/24/04 (H) Heard & Held  
 03/24/04 (H) MINUTE(JUD)  
 03/30/04 (H) JUD AT 1:00 PM CAPITOL 120

**WITNESS REGISTER**

VANESSA TONDINI, Staff  
 to Representative Lesil McGuire  
 House Judiciary Standing Committee  
 Alaska State Legislature  
 Juneau, Alaska

POSITION STATEMENT: During discussion of SB 30, explained the changes in the proposed committee substitute (CS), Version 0, and responded to questions.

SENATOR FRED DYSON  
 Alaska State Legislature  
 Juneau, Alaska

POSITION STATEMENT: Sponsor of SB 30.

JASON HOOLEY, Staff  
to Senator Fred Dyson  
Alaska State Legislature  
Juneau, Alaska

POSITION STATEMENT: Provided a comment during discussion about a proposed amendment to SB 30.

REPRESENTATIVE MARY KAPSNER  
Alaska State Legislature  
Juneau, Alaska

POSITION STATEMENT: Sponsor of HB 353.

LINDA SAITO  
Kotzebue, Alaska

POSITION STATEMENT: Provided comments and responded to questions during discussion of HB 353.

DOUG WOOLIVER, Administrative Attorney  
Administrative Staff  
Office of the Administrative Director  
Alaska Court System (ACS)  
Anchorage, Alaska

POSITION STATEMENT: Responded to questions during discussion of proposed amendments to HB 353; responded to questions during discussion of the proposed CS for HB 244.

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

POSITION STATEMENT: During discussion of the proposed CS for HB 244, relayed the PDA's concerns and responded to questions.

SUSAN A. PARKES, Deputy Attorney General  
Central Office  
Criminal Division  
Department of Law (DOL)  
Anchorage, Alaska

POSITION STATEMENT: On behalf of the administration, responded to questions during discussion of the proposed CS for HB 244.

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 the proposed CS for HB 244.

PATTY WARE, Director

Division of Juvenile Justice (DJJ)

Department of Health & Social Services (DHSS)

Juneau, Alaska

POSITION STATEMENT: Provided comments and responded to questions regarding Section 27 of the proposed CS for HB 244.

#### **ACTION NARRATIVE**

#### **TAPE 04-51, SIDE A**

Number 0001

**CHAIR LESIL McGUIRE** called the House Judiciary Standing Committee meeting, which had been recessed on March 29, 2004, back to order at 1:05 p.m. Representatives McGuire, Holm, Ogg, and Samuels were present at the call back to order. Representatives Anderson, Gara, and Gruenberg arrived as the meeting was in progress.

#### SB 30 - ABORTION: INFORMED CONSENT; INFORMATION

[Contains discussion of an amendment that would conform a provision of SB 30 to a provision of HB 472; contains adoption of what would become known as HCR 36 for the purpose of changing the title of SB 30.]

Number 0022

CHAIR McGUIRE announced that the first order of business would be CS FOR SENATE BILL NO. 30(JUD) am, "An Act relating to information and services available to pregnant women and other persons; and ensuring informed consent before an abortion may be performed, except in cases of medical emergency." [Before the committee was HCS CSSB 30(HES).]

CHAIR McGUIRE indicated that members' packets now include a proposed House committee substitute (HCS) for SB 30, Version 23-LS0193\0, Mischel, 3/22/04, and a legal analysis by the attorney general dated March 30, 2004, regarding that proposed HCS.

Number 0100

VANESSA TONDINI, Staff to Representative Lesil McGuire, House Judiciary Standing Committee, Alaska State Legislature, offered to explain the changes made by the proposed HCS.

Number 0167

REPRESENTATIVE HOLM moved to adopt the proposed HCS for SB 30, Version 23-LS0193\O, Mischel, 3/22/04, as the work draft. There being no objection, Version O was before the committee.

MS. TONDINI relayed that Version O was created in response to the attorney general's March 18 legal analysis outlining numerous areas in a prior iteration of SB 30 that needed to be addressed. One issue that was of concern was that the bill should contain language requiring that the information in the pamphlet be "unbiased information that is reviewed and approved for medical accuracy and appropriateness by recognized obstetrics and gynecological specialists." Section 1, paragraphs (4)-(5), and Section 2, subsection (a), paragraphs (6)-(9), of Version O now contain that language. Additionally, Version O now stipulates that the aforementioned review will be performed by the State Medical Board.

MS. TONDINI relayed that another issue of concern was that should the aforementioned change be made to Section 2, although changes made regarding information on gestational development and other information will be more legally defensible, it will not eliminate the possibility of a challenge, on privacy and equal protection grounds, that the material is intended to shock rather than inform. Also of concern was that the definitions in Section 2 should be medically accurate, and the most recent legal analysis still offers this as a concern. The definition section of Version O is on page 4, lines 9-16, Section 2, subsection (c)(1)-(4), and provides definitions for: "abortion", "fertilization", "gestational age", and "unborn child". She mentioned that she is providing members with copies of what she said she believes to be medically accurate definitions of the aforementioned terms that she gathered from several medical web sites and medical dictionaries.

MS. TONDINI noted that another issue of concern was that the bill should contain language specifying that there will be a disclaimer on the web site regarding the graphic and/or sensitive nature of the information contained on the web site. She said that such language is now included in subsection (a)(10) of Section 2, on page 10, lines 5-6. Still another issue of concern was that the bill should stipulate that the

pamphlet will only include those providers who consent to being included; that language can be found on page 2, line 30, of Version 0. Additionally of concern was that the findings section of a prior iteration the bill referred to immunity, but the text in Section 4 of that prior iteration did not use the term immunity and instead simply provided for affirmative defenses. This inconsistency has been addressed in Version 0 by removing "immunity" from the findings section, Section 1, and keeping the provisions in Section 4 regarding affirmative defenses.

Number 0481

MS. TONDINI relayed that another issue of concern was that requiring a 24-hour waiting period could raise constitutional issues; therefore, that requirement has been eliminated from Version 0, specifically from Section 5, subsection (c). A final issue of concern expressed in the attorney general's March 18 legal analysis is that under this legislation, abortion will be the only medical procedure that has its own informed consent requirements set out in statute; Version 0 does not change this, so equal protection issues may still exist.

MS. TONDINI noted that the attorney general's March 18 legal analysis also raised some technical points. One, that there should be a medically accurate definition of abortion; Version 0 - page 4, line 10 - says that the term "abortion" has the meaning given in AS 18.16.090. Two, that the inclusion of [child care] in Section 2, subsection (a)(3), is misleading; Version 0 deletes that reference. Three, that although inclusion of exceptions for rape and incest are necessary, neither rape nor incest is legally defined in statute; Version 0 now contains reference - in Section 5, subsection (d) - to the statutes pertaining to those crimes.

MS. TONDINI continued. Four, that the language requiring that information on alcohol use and drug use during pregnancy be provided did not specify whether the information should pertain to legal drugs or illegal drugs; Version 0 now specifies - in Section 2, subsection (a)(9) - that the information required should pertain to use of illegal drugs. She mentioned that the issue of whether to also require that information on tobacco use during pregnancy be included might be discussed later. Five, that there is no need, if there is a signed and dated certificate showing informed consent, for the certificate to be stamped as well; Version 0 does not contain language pertaining to certificates. Six, that the department should be granted

regulatory authority to create the pamphlet required by SB 30; Version 0 provides that authority in Section 2, subsection (b), on page 4, lines 7-8.

MS. TONDINI offered her belief that the attorney general's March 30 legal analysis agrees that almost all of the aforementioned concerns have been addressed in Version 0. The only other issue that the committee may still wish to address, she offered, pertains to the language on page 4, lines 30-31, which stipulates that a woman must be domiciled or physically present in the state for 30 days before the abortion. This language is part of current law, she relayed, but offered her understanding that there is a distinction between being domiciled, which she surmised meant being physically present with the intent to remain, and residency, which she surmised meant being physically present in the state for 30 days. She suggested that if such a requirement is kept in statute, it should be clarified with regard to the legislature's intent.

Number 0784

SENATOR FRED DYSON, Alaska State Legislature, sponsor, shared his appreciation for the committee's patience and all the work that's been done on SB 30.

Number 0803

REPRESENTATIVE OGG made a motion to adopt Conceptual Amendment 1, to say, on page 4, line 3, that the information pertain to alcohol, tobacco, legal drugs, and illegal drugs. There being no objection, Conceptual Amendment 1 was adopted.

Number 0881

REPRESENTATIVE GARA made a motion to adopt Amendment 2, which read [original punctuation provided]:

Page 4, lines 30-31:

Delete all material

Number 0889

CHAIR MCGUIRE objected [for the purpose of discussion].

REPRESENTATIVE GARA said that the language which would be deleted by Amendment 2 precludes a woman from getting an

abortion if she hasn't lived in the state for 30 days. He opined that such a restriction is probably unconstitutional, pointed out that no other medical procedure has such a restriction, and surmised that it would require a woman who is right at the end of her first trimester of pregnancy, for example, and who's just moved to the state, to wait until her second trimester before getting an abortion.

REPRESENTATIVE SAMUELS asked what other states do with regard to this issue, and asked for confirmation that the language which would be deleted via Amendment 2 is part of current law.

REPRESENTATIVE GARA replied: "It is part of the current law. I think ... it might have been added as part of the informed consent law that was passed a couple of years ago that is up in the supreme court now, but I'm not so sure when it was [adopted] ...."

SENATOR DYSON mentioned that he did not know that either.

REPRESENTATIVE GARA said he cannot see a reason why they should tell a woman who picks one procedure that she has to live in Alaska for 30 days, particularly given that the ramifications of waiting 30 days are that it might become too late or too dangerous to have an abortion, and also because anybody else, for any other procedure, doesn't have to live in Alaska for 30 days.

REPRESENTATIVE OGG suggested that the reason such language is in statute is to stop "form shopping."

REPRESENTATIVE GARA said he didn't think that people come to Alaska just to get abortions, and suggested that it is probably easier and cheaper to get an abortion in another state.

SENATOR DYSON remarked that preventing someone from form shopping is a persuasive argument for keeping the current language as is, because if the parental consent provision is ultimately struck down, then minors may come to Alaska in order to get around the parental consent requirements of other states.

Number 1212

REPRESENTATIVE GRUENBERG remarked:

I believe that the note [to that statute] says that the Department of law does not currently enforce that

section, and I believe the implication is that it's of doubtful constitutionality. The case that comes to mind, a case out of Washington DC from the U.S. Supreme Court a number of years ago, Shapiro v. Thompson (ph), said that in dealing with case involving fundamental rights, it is unconstitutional to impinge on the person's right to travel; in that case, it involved welfare. And recent cases have expanded that to include the privileges and immunities clause as a basis for striking down provisions like this.

I do not think that this would survive a constitutional challenge under either the ... [U.S.] Constitution or, frankly, under the Alaska [State] Constitution's right to privacy, and I think that this would be struck down without question. And ... I think the attorney general's very correct in its determination not to enforce it, because it would be a needless waste of state resources. It's on the books ... [though] it's not being enforced by any administration and it's unconstitutional, so I support the amendment. I'd like to see us pass things that are constitutional.

REPRESENTATIVE GARA said that ultimately, there's a philosophical rift among many legislators on an issue where there are really good arguments on both sides, but as long as the legislature is going to recognize that a woman has the right to choose an abortion, the language that Amendment 2 proposes to delete is an impediment to a legal right, an impediment that doesn't exist for anybody else for any other medical procedure. He said he believes that [the current language] is an inappropriate impediment to a constitutional right.

Number 1372

CHAIR MCGUIRE asked whether the language that Amendment 2 proposes to delete would apply to victims of incest or rape.

SENATOR DYSON said he did not intend for it to apply in those situations.

CHAIR MCGUIRE asked Senator Dyson whether he would be willing to accept a friendly amendment to that effect.

SENATOR DYSON said yes.

REPRESENTATIVE GARA said he would not accept a friendly amendment to Amendment 2, adding, "I just think ... it's a constitutional right ...."

REPRESENTATIVE HOLM mentioned that he isn't sure whether an abortion would even be preformed within the first 30 days [of a woman's pregnancy].

CHAIR McGUIRE noted that the provisions pertaining to rape and incest are on page 6, under proposed AS 18.16.060(d).

REPRESENTATIVE OGG remarked that such is a tough issue to deal with.

Number 1519

A roll call vote was taken. Representatives Gara, Gruenberg, and Samuels voted in favor of Amendment 2. Representatives Ogg, Holm, and McGuire voted against it. Therefore, Amendment 2 failed by a vote of 3-3.

Number 1535

REPRESENTATIVE GARA made a motion to adopt Amendment 3, which read [original punctuation provided]:

Page Two, Lines 11-12:

Delete all material

Number 1543

CHAIR McGUIRE objected for the purpose of discussion.

REPRESENTATIVE GARA said that although he would not ordinarily propose an amendment to a legislative finding, because its language says that the legislature has received considerable testimony indicating that women have, on occasion, received abortions in the state without considering sufficient information, but he has not heard such testimony in any of the committees that he has sat on, he is reluctant to include such language because it isn't supported by the evidence with which he is familiar.

CHAIR McGUIRE asked Senator Dyson whether, when creating this language, he was referring to testimony that he'd heard in the committees that he'd sat on.

SENATOR DYSON said yes, adding, "I understood that ... if the attorney general is ever having to defend this, it helps to establish the case of why, why ... did the legislature take this action to try to ensure that people got the information they needed."

REPRESENTATIVE HOLM asked whether the testimony that the findings section refers to is on record.

SENATOR DYSON said yes.

REPRESENTATIVE GARA remarked:

I ... think I misread this sentence; I guess it says considerable testimony has been received, not that this has happened on considerable occasions. So I guess I took this [paragraph] (6) to mean that we were finding that many women have had abortions without thinking about them first but, really, it doesn't say that. It just says there was a lot of testimony, and it doesn't say that this is happening a lot.

Number 1660

REPRESENTATIVE GARA withdrew Amendment 3.

Number 1700

REPRESENTATIVE GRUENBERG made a motion to adopt Amendment 4, which read [original punctuation provided]:

Page 4, line 19: Delete "or surgeon."

Number 1709

CHAIR McGUIRE objected [for the purpose of discussion].

REPRESENTATIVE GRUENBERG said it is his understanding that all surgeons are physicians.

CHAIR McGUIRE remarked that she knows of no surgeons that are not physicians.

Number 1725

JASON HOOLEY, Staff to Senator Fred Dyson, Alaska State Legislature, sponsor, noted that the language Amendment 4 proposes to delete is part of current law.

CHAIR McGUIRE, after withdrawing her objection to Amendment 4, announced that Amendment 4 was adopted.

Number 1784

REPRESENTATIVE GRUENBERG made a motion to adopt Amendment 5, which read [original punctuation provided]:

Page 2, lines 17-20: Amend paragraph (1) as follows

(1) contains geographically indexed material designed to inform a person of public and private agencies, [AND] services, clinics and facilities that are available to assist a woman with the woman's reproductive choices; the department shall include information about at least the following types of agencies, [AND] services, clinics and facilities:

Page 2, line 29: Amend paragraph (2) as follows:

(2) includes a comprehensive regional directory of the agencies, services [AND] clinics, and facilities identified by the department under (1) of this subsection, a description of the services they offer, and the manner in which the agencies, services [AND] clinics, and facilities may be contacted, including telephone numbers;

Number 1801

CHAIR McGUIRE objected [for the purpose of discussion].

REPRESENTATIVE GRUENBERG indicated that Amendment 5 merely conforms the language in paragraphs (1) and (2) to the language in paragraph (1)'s subparagraphs.

SENATOR DYSON said he did not have a problem with Amendment 5.

Number 1859

CHAIR McGUIRE withdrew her objection and asked whether there were any further objections to Amendment 5. There being none, Amendment 5 was adopted.

Number 1867

REPRESENTATIVE GRUENBERG made a motion to adopt Amendment 6, which read [original punctuation provided]:

Page 4, line 5: Insert new paragraph (10) and renumber existing paragraph (10) as paragraph (11):

(10) contains objective, unbiased, and comprehensive information that is reviewed and approved for medical accuracy and appropriateness by recognized obstetrics and gynecological specialists designated by the State Medical Board on different types of available contraceptive choices and the medical risk and possible complications commonly associated with each method as well as the possible psychological effects that have been associated with using contraceptives;

REPRESENTATIVE GRUENBERG mentioned that the language in Amendment 6 is from HCS CSSB 30(HES).

SENATOR DYSON relayed that he has in his possession a slightly different amendment on the same topic - contraceptive information - that uses the phrase "including abstinence and natural family planning". He indicated that adding such a phrase to Amendment 6 would alleviate most of his objections to including a provision regarding contraceptive information. He offered his belief, though, that neither Amendment 6 nor the amendment he has contains a disclaimer about the graphic nature of such information.

REPRESENTATIVE GRUENBERG pointed out that that disclaimer is already in the bill.

MS. TONDINI concurred, adding that it is in a separate subsection.

REPRESENTATIVE GRUENBERG said he would have no problem with conceptually amending Amendment 6 to add the phrase "including abstinence and natural family planning".

CHAIR McGUIRE suggested that Amendment 6 also be amended to include, wherever appropriate, the department's recommendation regarding graphic and sensitive material.

Number 2031

REPRESENTATIVE GRUENBERG [made a motion to] conceptually amend Amendment 6 to "put the [attorney general's recommendation] ... [with] Senator [Dyson's] ... language and my thing together in one provision." There being no objection, Amendment 6 was amended.

Number 2044

CHAIR McGUIRE asked whether there were any objections to Amendment 6, as amended. There being no objection, Amendment 6, as amended, was adopted.

Number 2073

REPRESENTATIVE GRUENBERG made a motion to adopt Amendment 7, which read [original punctuation provided]:

Page 5, lines 10-18: Amend subsection (i) as follows:

(i) It is a defense to any action for medical malpractice based upon an alleged failure to obtain informed consent of a person under (h) of this section that

(1) the risk not disclosed is too commonly known or is too remote to require disclosure; or

(2) the person who is the subject of the alleged failure to obtain the informed consent stated to the physician or other health care provider that the patient would or would not undergo the abortion procedure regardless of the risk involved or that the person did not want to be informed of the matters to which the person would be entitled to be informed; or

(3) under the circumstances, consent by or on behalf of the patient was not possible; or

(4) the physician or health care provider, after considering all of the attendant facts and circumstances, used reasonable discretion as to the manner and extent that the alternatives or risks were disclosed to the patient because the health care provider reasonably believed that a full disclosure

would have a substantially adverse effect on the patient's condition.

Number 2089

CHAIR MCGUIRE objected [for the purpose of discussion].

REPRESENTATIVE GRUENBERG relayed that Amendment 7 contains, in part, language from [AS 09.55.556 as it is proposed to be amended by] HB 472.

CHAIR MCGUIRE added that Amendment 7 would conform SB 30 to HB 472, which pertains to medical malpractice.

REPRESENTATIVE GARA objected. He said:

It would be inconsistent for me to narrow the rights of a woman who's a victim of ... malpractice because she's pregnant, when I don't believe that the rights of other victims of malpractice should be limited. ... So, right now, we're getting rid of the reasonable-patient standard for pregnant women - that's the reasonable-patient standard for informed consent. Current law is that a doctor has a duty to give a patient all of the information that they need and all of the information that a reasonable patient would want. There is an effort afoot, in the medical malpractice bill, to say that [that] shouldn't be the standard for informed consent, [rather that] the standard for informed consent should be what a reasonable doctor in the community provides for information - it's a ... smaller amount of information probably. ...

Number 2201

REPRESENTATIVE GRUENBERG suggested bifurcating Amendment 7. He directed attention to proposed [paragraph] (3) of Amendment 7, and posited that there shouldn't be any objection to the addition of that language because it should be a defense if it is impossible to get someone's consent for some reason.

SENATOR DYSON asked how it would be impossible to get consent by or on behalf of the patient.

REPRESENTATIVE GRUENBERG suggested that such could happen if a woman is in a coma and an abortion needs to be performed to save her life.

SENATOR DYSON pointed out, however, that language on page 6 [of the bill], lines 27-28, says that informed consent is not required in cases of medical emergency; he suggested, therefore, that proposed paragraph (3) of Amendment 7 is not necessary.

CHAIR MCGUIRE agreed.

REPRESENTATIVE GRUENBERG argued that the aforementioned hypothetical situation might not constitute an emergency and, thus, would not be covered under the language on page 6, lines 27-28.

SENATOR DYSON opined, though, that if it is not an emergency, then there will be time to obtain consent from the person designated or appointed to act on the woman's behalf.

**TAPE 04-51, SIDE B**

Number 2364

REPRESENTATIVE GRUENBERG said:

The context this will arise [in] is in a medical malpractice case, and I don't want to see the [doctor] sued in this situation when they're reasonably trying to give the information that's necessary. This is trying to allow a reasonable physician to practice reasonably ... without fear of some lawsuit coming out of left field, ... and it's doing the same thing we did in the general malpractice bill ....

SENATOR DYSON said he did not feel a need to include proposed paragraph (3). With regard to proposed paragraph (4) of Amendment 7, he said that it comes across as insulting to women to say that full disclosure will have an adverse effect on their condition. He said he could envision a scenario wherein a doctor decides to perform an abortion on a woman having surgery without getting informed consent because of the possibility that informing her about the pregnancy/abortion will have an adverse effect on her condition. He opined that women are tough enough to handle the information that they are pregnant and what would be involved in an abortion, and that they would want that information.

REPRESENTATIVE SAMUELS remarked that he wouldn't want to have doctors exposed to potential lawsuits regarding this issue. He, too, suggested bifurcating Amendment 7.

REPRESENTATIVE GARA said he cannot understand why they would want to give a pregnant woman fewer rights than any other patient. People have a right to fair information and a fair level of competence from their physicians, and he did not feel like compromising those rights, he remarked, adding, "I've never heard of any sort of explosion of frivolous lawsuits in the area abortions, and don't know why we have to limit people's rights just to prevent frivolous lawsuits ... that don't exist." He mentioned that he agrees with Senator Dyson regarding Amendment 7.

SENATOR DYSON asked whether the provisions contained in HB 472 would cover abortions if it is adopted into law. He questioned whether, if such is the case, Amendment 7 is even necessary.

CHAIR McGUIRE remarked that in statutes, a general provision applies unless there is a specific provision.

Number 2011

REPRESENTATIVE GRUENBERG offered that since SB 30 already contains paragraphs (1) and (2) of Amendment 7 - which contains, in part, language from [AS 09.55.556 as it is proposed to be amended by] HB 472 - it would be congruent to also add paragraphs (3) and (4). Not including paragraphs (3) and (4) in SB 30 would provide less immunity for abortion procedures than for all other procedures, he added. Conversely, he queried, if that immunity should not apply to abortion procedures, why, then, should it apply to all other procedures.

SENATOR DYSON said he still has a strong objection to including proposed paragraphs (3) and (4) in SB 30, and reiterated his arguments for leaving them out.

REPRESENTATIVE GARA asked what kind of circumstances proposed paragraph (4) would apply in.

REPRESENTATIVE GRUENBERG said that he didn't know of any specific circumstances; rather, he was just thinking that if the language is in HB 472, then it ought to also be in SB 30. He surmised that all of Senator Dyson's arguments against including this language in SB 30 are also applicable to HB 472.

Number 1917

REPRESENTATIVE SAMUELS made a motion to amend Amendment 7, to eliminate paragraph (3).

REPRESENTATIVE GRUENBERG said he just wants HB 472 and SB 30 to be consistent.

CHAIR MCGUIRE opined that abortion is different than other procedures, and said she could envision someone using paragraph (3) to get around having to obtain informed consent.

REPRESENTATIVE GRUENBERG said he would not object to the amendment to Amendment 7, but noted that his concern is simply that the two bills be consistent.

Number 1853

CHAIR MCGUIRE, after ascertaining that there were no objections, announced that Amendment 7 was amended.

REPRESENTATIVE GARA said he objected to the adoption of Amendment 7, as amended, for the reasons he stated earlier.

REPRESENTATIVE OGG offered his understanding that the bill that passes last takes precedence: if HB 472 passes first, SB 30 will provide an exception to it and visa versa.

REPRESENTATIVE GRUENBERG said he disagrees. He elaborated:

This covers the defenses for medical malpractice based upon an alleged failure to obtain informed consent of a person under subsection (h), and the specific controls over the general where they're inconsistent, and so if there's any inconsistency, this would apply. And I think it is inconsistent now in at least the sense that a defense in [HB 472] ... that would be, quote, "under the circumstances, consent [by or on] behalf of the patient was not possible", unquote, would not be an allowable defense in this kind of malpractice (indisc.).

Number 1757

CHAIR MCGUIRE asked Representative Gruenberg whether he would accept a second amendment to Amendment 7, as amended, to put a period after "patient" in proposed paragraph (4).

REPRESENTATIVE GRUENBERG said he would accept that change.

Number 1719

REPRESENTATIVE GARA said he objects to such a change. He elaborated:

I can't imagine a circumstance where a woman who doesn't want to have an abortion should have her will overruled. If a woman doesn't want to have an abortion, that ... decision should be respected. And if we are implying here that a physician might know better than the woman and decide, 'under the facts and circumstances', to withhold information because the physician thinks it's better for the woman to have an abortion, I think that's ... not good policy. ... We have a right in this state ... under current law that says a physician has the duty to disclose all known risks and all known dangers and all known reasonable alternatives to a patient.

I think that's fair; that's ... a right that patients should have, and I'm going to object [to] the changes in that law in [HB 472] ... vociferously on the House floor. But the implication here that a doctor should, because they believe it's reasonable, be able to lull somebody into having an abortion when they don't want to have an abortion I think is dangerous."

CHAIR McGUIRE offered her belief that such is not Representative Gruenberg's intent or the intent of Amendment 7, as amended. She opined that the language in Amendment 7, as amended, is meant to allow for a reasonable-physician standard, so that there will not be a proliferation of lawsuits. It is not meant to provide a method by which a doctor can bypass a patient's will.

REPRESENTATIVE GRUENBERG pointed out that he offered Amendment 7 with the goal of making the two bills congruent. Now, however, Amendment 7 has been amended and a further amendment to it has been suggested, and so it substantially increases the discretion [of the physician] and the scope of the defense.

Number 1512

REPRESENTATIVE GRUENBERG withdrew Amendment 7, as amended.

The committee took an at-ease from 2:20 p.m. to 2:21 p.m.

Number 1493

REPRESENTATIVE GARA made a motion to adopt Amendment 8, which read [original punctuation provided]:

Page 1, lines 1-2: Delete "and other persons"

Page 3, section 6 and Page 4, sections 3 and 4: Delete "unborn child" wherever it appears and replace with "fetus"

Number 1474

CHAIR McGUIRE objected [for the purpose of discussion].

REPRESENTATIVE GARA, referring to the second portion of Amendment 8, noted that the bill currently uses the term "unborn child" in places where historically the term "fetus" has been used. He said he does not want to decrease the chances that a woman's right to choose to have an abortion will be upheld by future courts, and suggested that not using the term "fetus" increases the chances that a woman will lose her right to choose. He said he would prefer that the bill use the term "fetus" because it is the medical term and has been used historically.

REPRESENTATIVE GRUENBERG said he would like to cosponsor Amendment 8.

SENATOR DYSON, referring to the first portion of Amendment 8, explained that he'd included the phrase "and other persons" in the title because he's anticipating that parental consent language will survive constitutional challenge, and that "and other persons" refers to parents and guardians.

Number 1304

REPRESENTATIVE GARA made a motion to amend Amendment 8, to delete the first portion of Amendment 8.

Number 1290

REPRESENTATIVE HOLM objected and then removed his objection.

Number 1287

CHAIR MCGUIRE announced that Amendment 8 has been amended.

SENATOR DYSON opined that Amendment 8, as amended, gets right to the heart of the whole debate. He elaborated:

Fetus is just Latin for unborn child. You can put the whole bill in Latin if you want. ... What I really worry about here, and it gets back to the heart of the argument, is an attempt to justify the fact that in this country, some people do not have protections, and that is: if you're an unborn child, you're not worthy of ... protection under the law. And if ... that's your goal, then you really do want to, everywhere you can, substitute a synonym, in whatever language, for a human being. And that has been ... the classic pattern of oppressors down through 6,000 years of recorded history .... [If] there's a group that you don't want to have rights, then you come up for another term for them. And I'm very wary of ... continuing that pattern. ...

The U.S. Congress has just passed the unborn child protection Act recognizing at least, if the child happens to be wanted, [that in] doing damage to that child, something, in fact and in law, of value was lost. ... [Amendment 8, as amended] is not going to change the content of the bill; it changes the flavor. And for those of you that want to preserve, quote, "the right to choose" - and I think the more proper (indisc.) is, "the right to solve the unwanted pregnancy by terminating the life of a developing child" - ... and if you want to obscure the fact that we're dealing with a human life, then obscuring language, even if it happens to be that it [is] sometimes used in medical circles, but I can tell you when a doctor's ... dealing with a woman [regarding] prenatal care, they don't ever talk about the fetus, they're talking about a baby -- and so I object ....

Number 1068

REPRESENTATIVE GARA said he did not introduce Amendment 8, as amended, to denigrate the value of a woman or a woman who's carrying a child. He elaborated:

I've introduced [Amendment 8, as amended] because the first thing that those lawyers on the pro-life side of the issue are going to do if this bill passes as written is say, "Look, the state of Alaska recognizes that a pregnant woman is carrying a child even before the child is born, at day one, at day two, at month one, at month two, at month three, at month four." They're going to make that argument and they're going to say to the courts that the state of Alaska has now elevated the protection it wants to give to unborn children, it has now lowered the interest that a woman has, in having an abortion. And it will argue that the calculus the court has to enter into in deciding whether a woman still has a right to abortion has changed, because in order to take away a fundamental right, the court has to consider what the state's interests are. And I think by changing the language we are now creating an argument for the pro-life side of the battle, that we have elevated the interest in not having abortions in this state.

So I am not particularly offended, in the parlance. I've ... patted pregnant friends of mine and talked about the baby inside the pregnant friend of mine; I consider it a baby at that point, personally, in parlance. I just know that this language is going to be used in legal battles to try and undermine a woman's right to have an abortion, and I don't want to undermine that right. We are so philosophically opposed on this one, we'll never agree, and so, if I have a ... motive ..., it's that I want to protect a woman's right to choose and I don't want to give away an argument in court in the future. And frankly, that's why the lawyers on both sides and the lobbyists on both sides of these issues fight over these words all the time. And so in a conversation I'll have no problem using either term, but in court it's a different [story].

Number 0979

A roll call vote was taken. Representatives Gara and Gruenberg voted in favor of Amendment 8, as amended. Representatives Ogg, Samuels, Holm, Anderson, and McGuire voted against it. Therefore, Amendment 8, as amended, failed by a vote of 2-5.

Number 0945

REPRESENTATIVE HOLM moved to report the proposed House committee substitute (HCS) for SB 30, Version 23-LS0193\0, Mischel, 3/22/04, as amended, out of committee with individual recommendations, the accompanying fiscal notes, and the legal analysis by the attorney general dated March 30, 2004. There being no objection, HCS CSSB 30(JUD) was reported from the House Judiciary Standing Committee.

Number 0908

CHAIR McGUIRE made a motion to [adopt and] report a House Concurrent Resolution, for the purpose of making conforming changes to the title of SB 30, out of committee with individual recommendations. There being no objection, a House Concurrent Resolution [which later became HCR 36] was reported from the House Judiciary Standing Committee.

[HCS CSSB 30(JUD) was reported from committee.]

HB 353 - JURY DUTY EXEMPTION FOR CERTAIN TEACHERS

Number 0850

CHAIR McGUIRE announced that the next order of business would be HOUSE BILL NO. 353, "An Act relating to jury duty; and amending Rule 15(k), Alaska Rules of Administration." [Before the committee was CSHB 353(HES).]

Number 0829

REPRESENTATIVE MARY KAPSNER, Alaska State Legislature, sponsor, said that HB 353 will exempt from jury duty teachers who teach in schools that are not meeting adequate yearly progress (AYP) under state and federal law. In the last six to eight years, the state has implemented benchmark testing and the high school qualifying exit exam, and, at the federal level, there has been implementation of the No Child Left Behind Act of 2001 (NCLB Act), which requires that every school have highly qualified teachers in each subject area. For many small schools these changes have posed a challenge when teachers are asked to leave the classroom for the purpose of serving jury duty, because, in a lot of locations around the state, it is very difficult to find substitute teachers that are certified in the area of expertise that the regular teacher is certified in.

REPRESENTATIVE KAPSNER noted that in Bethel, for example, the court system seeks jurors from a pool of 11 surrounding villages and Bethel. If a teacher in Kasigluk, for example, is called out of the classroom for jury duty, or if there is even the possibility that this will occur, it creates a lot of stress on the whole school, on both students and other teachers, because in most villages it's hard to find a substitute teacher that has a high school diploma. The Lower Kuskokwim School District, between September and December, lost 107 teaching days to jury duty. Now that districts are facing AYP, benchmark tests, and high school exit exams, loss of teaching days is really ratcheting up the pressure on schools, students, and parents.

REPRESENTATIVE KAPSNER said that HB 353 provides an exemption for teachers from jury duty so that while a school is not meeting AYP, they can stay in the classroom as much as possible. She relayed her hope that this exemption won't last forever, that when all schools meet AYP, the exemption will no longer be needed and all teachers can be part of a jury pool; hopefully, HB 353 will just be a temporary fix to a temporary problem.

Number 0604

REPRESENTATIVE KAPSNER pointed out two areas of concern regarding CSHB 353(HES): page 1, line 5, contains "may" instead of "shall"; and page 1, line 6, contains "school year" instead of "school term". She indicated that the bill should be changed to say "school term" because that refers to whatever period of time in a given year the school district decides students will be required to attend. In response to a question, she indicated that the "may" that she is suggesting should be changed to a "shall" is the second "may" on line 5. She said that although there was discussion in a prior committee that judges could simply decide whether a person should be exempted from jury duty, it is not customary for judges to make such a decision, and so to require it of them would create an additional burden on the court system.

CHAIR McGUIRE noted that some students from Representative Joule's district were present to observe the hearing on HB 353.

[The students introduced themselves and stated the school they were from.]

Number 0432

LINDA SAITO relayed that she is the music teacher at Kotzebue Middle/High School and was called for jury duty starting January 4 [2004] through the end of April [2004]. Noting that her school has not yet met AYP, she said that [getting picked for jury duty] was a concern because she had to be prepared every day, for four months, to call in a substitute so she could go serve. She added that it is very difficult, particularly in villages, to get substitute teachers that can come in and give quality lessons.

REPRESENTATIVE KAPSNER, in response to questions from Representative Anderson, said that there are between 400 and 500 residents in the village of Kwigillingok, that the Alaska Court System picks jurors from the list of people that have applied for a permanent fund dividend, and that a jury made up of teachers [from rural schools] is not necessarily going to be a jury of one's peers because many of those teachers are newly arrived from the Lower 48 and won't know the culture or the language.

REPRESENTATIVE ANDERSON mentioned that he supports HB 353.

**TAPE 04-52, SIDE A**

Number 0001

REPRESENTATIVE GARA remarked that a jury is supposed to be made up of people who live in one's community, and this notion militates in favor of the bill. He also remarked that the turnover rate in small schools is phenomenal, that this is terrible for the students, and asked whether there is a similar problem in larger communities such as Kotzebue.

MS. SAITO said that this year her school is losing 10 out of 28 teachers, and that two years ago about half of the staff left. In response to a question she relayed that this turnover is not related to teachers retiring.

REPRESENTATIVE GARA said he agrees with the bill, adding that it makes sense. He mentioned that he would like to also exempt teachers from schools that are not on the road system, since those teachers can't easily be replaced by a substitute and their presence is very important to the students; he predicted, however, that such a change might hurt the bill's chances of passing.

REPRESENTATIVE SAMUELS indicated that he would support such a change if an amendment were offered to that effect on the House floor.

CHAIR MCGUIRE suggested making the bill apply to those schools that have only one to five teachers.

REPRESENTATIVE OGG offered his belief that teachers are part of the community, and opined that the legislature should not be saying that teachers who've been encouraged to come to the state to teach in small communities are not part of those communities. He said he thinks that HB 353 is a good bill that recognizes some paucity in the ability to draw jurors in small areas.

Number 0363

REPRESENTATIVE GRUENBERG said he would like to offer an amendment to "tighten the title", and that he would like to know from the Alaska Court System what the impact will be of changing the second "may" on page 1, line 5, to "shall". He noted that as currently written, the bill applies to a school in Anchorage, and predicted that it could apply to more Anchorage schools next year. He said it sounds to him as though the problem doesn't have anything to do with the NCLB Act, rather that the problem stems from a lack of substitute teachers in rural areas, but HB 353 doesn't appear to get at that specific issue. Under the bill, a school in Anchorage is covered even though getting a substitute teacher is not a problem, whereas a rural school that is meeting AYP would not be covered even though it could be quite difficult to get a substitute teacher.

[Chair McGuire turned the gavel over to Representative Samuels.]

REPRESENTATIVE KAPSNER responded:

I had the pleasure and distinction of serving as a substitute teacher for one year, in Bethel. And one of the things that I was very surprised to find out is how many students' lives are extremely disrupted when the teacher is out of the classroom. Typically these are the students [for whom] their teacher is the only thing that stays constant in their life on a daily basis ... in one year - maybe that teacher changes every year. But what I noticed is, in almost every class that I taught, there was one student that was extremely, emotionally disturbed, and that was really brought out when their teacher was gone. And I think

that this is especially true in schools that are not meeting adequate yearly progress; there's something else going on that's not just the fault of the school, but I think that something else is missing in their home life and in their community. So I think that any school that is not meeting adequate yearly progress probably has some element of the teacher really needing to be there everyday.

REPRESENTATIVE GARA mentioned that it might be difficult to define which schools should have their teachers be exempted from jury duty. He said he agrees that teachers are part of the community and did not mean to suggest that they aren't.

Number 0763

REPRESENTATIVE SAMUELS said he would like to offer an amendment "to change the second 'may' on line 5 to 'shall', and the word 'year' to 'term' on line 6, page 1," as suggested by Representative Kapsner.

Number 0769

REPRESENTATIVE OGG made a motion to adopt the foregoing as Amendment 1.

REPRESENTATIVE GRUENBERG asked that the representative from the Alaska Court System be allowed to comment on Amendment 1.

Number 0770

DOUG WOOLIVER, Administrative Attorney, Administrative Staff, Office of the Administrative Director, Alaska Court System (ACS), said he did not see a particular problem for the ACS regarding changing the second "may" to "shall",. In fact, he added, it is easier administratively if there is a blanket exemption rather than a judicial determination. In larger communities, he relayed, jury clerks handle this type of issue, but in smaller communities, judges do it.

REPRESENTATIVE GRUENBERG said he removes his objection.

Number 0836

REPRESENTATIVE SAMUELS asked whether there were any further objections to Amendment 1. There being none, Amendment 1 was adopted.

Number 0853

REPRESENTATIVE GRUENBERG made a motion to adopt CSHB 353(HES) as the work draft. There being no objection, it was so ordered.

Number 0862

REPRESENTATIVE GRUENBERG made a motion to adopt Conceptual [Amendment 2], to tighten the title so that it is confined to the specific subject of the bill.

REPRESENTATIVE SAMUELS asked whether there were any objections to Conceptual Amendment 2.

REPRESENTATIVE KAPSNER indicated that adoption of Conceptual Amendment 2 would be fine with her.

REPRESENTATIVE SAMUELS, after ascertaining that there were no objections, announced that Conceptual Amendment 2 was adopted.

[Representative Samuels returned the gavel to Chair McGuire.]

REPRESENTATIVE HOLM asked whether HB 353 would be limiting one's right to serve on a jury, and whether a blanket exemption for any group of people would be constitutional.

[Chair McGuire turned the gavel over to Representative Samuels.]

REPRESENTATIVE HOLM, characterizing HB 353 as a law of exclusion, said he questions whether they, as American citizens, should be promoting such. "Are we saying that we have polarized groups within ... the United States that cannot be peers?" he asked, and, "Is it good state policy for us to have different rules for people that live in Aniak or people that live in Fairbanks or in Juneau when it comes to justice?"

REPRESENTATIVE KAPSNER explained that she did not intend for this to become a regional issue, and reminded members that HB 353 was created in response to the NCLB Act and AYP.

[Representative Samuels returned the gavel to Chair McGuire.]

Number 1101

REPRESENTATIVE KAPSNER went on to say:

What we're saying is that under the conditions that teachers are teaching in now, under the conditions that students are learning in, in schools with exorbitant overhead, with few classroom tools, with a lot of testing going on, [with] a lot of people ill-prepared for tests, [and with] a myriad of other challenges that schools ... [face], I think this would be a good ... policy ... that we can give the schools, saying, "This didn't cost us anything, this is going to provide more classroom hours for you, less of a burden for you to be paying teachers for doing a lot of work in preparation time and serving on ... juries and away from the classroom, the travel expenses, [and] the expense of getting other people lined up in their communities to serve as substitute teachers if that need should arise."

Number 1261

And this could happen in Fairbanks. I'm not sure if you know how many schools in your community are not meeting adequate yearly progress, but I'm sure that when and if this bill is passed, Representative Holm, many teachers in your community will say, "Thank you for helping me do my job under these very trying times." And as I said at the outset, this is a temporary solution to a temporary problem, hopefully. Hopefully we get to the point where 100 percent of our schools are meeting adequate yearly progress. The conversation of jury of peers was merely as an aside and that is not the heart of the bill, and I am nervous about going down that path.

REPRESENTATIVE KAPSNER concluded:

And we could spend many hours talking about [a] jury of peers, and I could tell you [about] specific cases where trials have been won because all the jurors understood that every person in a village has a different smell depending on what family they come from - depending on the kind of meat they eat or greens that they pick - that perhaps somebody not from that area ... wouldn't understand. ... But I don't want to go down that path. I want to talk about adequate yearly progress, highly qualified teachers, and helping schools meet those needs.

Number 1206

REPRESENTATIVE HOLM reiterated his concern about taking away someone's right to serve on a jury.

REPRESENTATIVE KAPSNER pointed out that a teacher covered under this bill is not required to claim exemption.

CHAIR McGUIRE concurred, adding that a teacher is not compelled to claim exemption because the bill says, "A person may claim exemption".

MR. WOOLIVER agreed that the first "may" on line 5 gives the teacher the discretion of whether to claim exemption; if the teacher does choose to claim exemption, then he/she shall be excused. In response to a question, he noted that currently there are no other exemptions from jury duty.

REPRESENTATIVE KAPSNER mentioned that there was [one] more housekeeping measure she'd like the committee to address.

CHAIR McGUIRE suggested that members focus on the policy question of whether it is appropriate to create an exemption from jury duty for a teacher from a school that has failed to meet AYP.

REPRESENTATIVE GARA offered his belief that it is constitutional to provide exemption from jury duty to certain people, and noted that such is done in the federal courts. He said it makes sense to him to provide the exemption proposed by HB 353, and that he is supportive of the bill.

REPRESENTATIVE GRUENBERG offered his belief that there is case law that says the legislature does have the authority to create exemptions from jury duty and establish qualifying criteria for serving on a jury.

REPRESENTATIVE KAPSNER turned attention to page 1, line 7, and indicated that the language, "has failed" should be changed to read, "is designated as failing".

Number 1631

CHAIR McGUIRE made a motion to adopt Amendment 3, to replace, on page 1, line 7, "has failed" with "is designated as failing". There being no objection, Amendment 3 was adopted.

CHAIR McGUIRE, in response to comments regarding Amendment 1, clarified that Amendment 1 changed the second "may" on line 5 to "shall", and changed "school year" on line 6 to "school term".

Number 1687

REPRESENTATIVE GRUENBERG moved to report CSHB 353(HES), as amended, out of committee with individual recommendations and the accompanying [zero] fiscal notes. There being no objection, CSHB 353(JUD) was reported from the House Judiciary Standing Committee.

The committee took an at-ease from 3:20 p.m. to 3:40 p.m.

HB 244 - CRIMINAL LAW/SENTENCING/PROBATION/PAROLE

Number 1733

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."

[Before the committee, adopted as a work draft on 3/19/04, was a proposed committee substitute (CS) labeled 04-0033, 1/16/2004.]

Number 1769

BARBARA BRINK, Director, Central Office, Public Defender Agency (PDA), Department of Administration (DOA), noting that she has been a public defender for more than 21 years, specified that the information she'd present wouldn't be in the order of her priorities. She referred to Section 5, paragraph (3), which read:

(3) the violation occurs within the boundaries of a municipality or the perimeter of an established village that has adopted a local option under AS 04.11.490.

MS. BRINK pointed out that this makes it a [class C] felony for a person to provide alcohol to a minor within the boundaries of a local option area. Although it's a policy call within the legislature's purview, she cautioned about the racially disparate impact on Alaska Natives, who are the people that live in areas that have established these local options. A 21-year-old may share a beer with a nephew who is 20 years old, for example; that suddenly would become a felony, and that person would be punished with a felony conviction and all the possible ways such a conviction can hurt somebody.

MS. BRINK, in response to questions from Representative Gruenberg, specified that AS 04.16.051 has to do with furnishing or delivering alcohol to a person under the age of 21. Section 5 makes that a felony if it happens within a municipality or the perimeter of an established village that has adopted a local option.

CHAIR McGUIRE clarified, "Meaning they're dry - or damp." She opined that if a village has made that public policy decision, it's more egregious for somebody to provide alcohol to someone under the age of 21.

MS. BRINK said she understands, but asked whether it is so egregious that the desire is to make it a felony for someone in that village. She reiterated that those felony convictions will disparately impact Alaska Natives in the local option areas.

Number 1943

MS. BRINK turned attention to Section 6, the forfeiture provisions. Referring to discussion at the last hearing about how forfeiture works, she affirmed that the police seize property or money first and ask questions later. She explained:

Frankly, they seize everything on a person. So if my client is arrested and charged with sharing a beer, they will take all the money in his possession at the time he is cited or arrested and put that into the state's evidence locker. And it will be difficult for that person to get that money back.

Not only can the state then forfeit it, but, frankly, a lot of times the prosecutor's office makes it a requirement -- if you want to work out a plea agreement or a settlement of the case without going to trial, the state will often require forfeiture of that

property without a forfeiture proceeding, in order to give you any concessions on a charge (indisc.).

MS. BRINK, in response to Representative Gruenberg on another topic, agreed to talk with him later and added that public defenders or advocates aren't the best experts on forfeiture because most of their clients don't have assets that are seized in forfeiture proceedings.

Number 2014

MS. BRINK addressed Section 8, which amends the statutes on murder in the second degree [by removing "other than one of the participants" in two locations]. It makes a person guilty of murder in the second degree even if a participant in the felony crime was killed during that act. She offered her view that the policy, by not including the participant previously, has been that someone who engages in felonious conduct somehow assumes the risk that things could go wrong and therefore that person's life has been "valued less seriously." Ms. Brink said, "This section, which I don't have a whole lot of disagreement with, just makes it so a participant's getting killed during a felony [crime] ... can also result in felony murder charges." She noted that she'd bring up Section 8 later when discussing Section 13 because they seem a little inconsistent.

MS. BRINK paraphrased new language in Section 9 [relating to committing the crime of assault in the third degree], which read:

**(4) with criminal negligence causes serious physical injury to another person by means of a dangerous instrument.**

MS. BRINK clarified that this is being moved from assault in the fourth degree, a class A misdemeanor, to assault in the third degree, a class C felony. She said she appreciates the desire to bring harsher consequences to those who are "drinking but are not under the influence of alcohol, but somehow are related in automobile accidents"; however, she suggested if that is the purpose, this bill is drafted far too broadly because nothing in this statute requires any alcohol to have been consumed.

MS. BRINK predicted there'd be "unintended people falling under the rubric of this crime." She explained that the following examples could be felony-level conduct if there were an accident: failure to see a stop sign, not seeing black ice on a

road and thus traveling too fast for conditions, or getting distracted by the behavior of kids in the back seat and swerving over the line. She added that she doesn't think [paragraph (4)] is necessary, that she believes the current state of the law is that recklessly-caused serious physical injury by means [of a dangerous instrument] will result in a felony, and that she cannot imagine that a jury in Alaska wouldn't find reckless behavior if someone had been drinking and caused a car accident.

MS. BRINK, in response to a question from Chair McGuire, clarified that her suggestion is to omit paragraph (4) in its entirety. Saying it's already a felony to cause serious physical injury to another person by means of a dangerous instrument, she added that she believes it's actually assault in the second degree. She said recklessly causing serious physical injury by means of a dangerous [instrument] is a felony and carries a mandatory presumptive [sentence]. [Teleconference cutting out.] She went on to say, "We should think twice about making felons out of people who make careless but still innocent mistakes." She added that if the goal is to get at people who have consumed alcohol, then "we should at the very least include that requirement in that section."

Number 2170

CHAIR MCGUIRE asked how many times a person has been charged with assault or criminal negligence from turning around to deal with kids in the back seat or other examples such as Ms. Brink had mentioned. She also asked about times when it has been alleged.

MS. BRINK replied that the case management system doesn't allow breaking down the categories with that kind of detail. She did report that when she handled misdemeanors in the early 1980s, people were charged with assault in the fourth degree without having consumed any alcohol. She suggested that the representative from the Office of Public Advocacy (OPA) might have examples of cases he has seen.

MS. BRINK turned attention to Section 12, which makes it a crime if a third-party custodian fails to provide immediate notification of a violation. She explained that the idea of third-party custodians originated to help poor people get out of jail when they had absolutely no money for bail. A third-party custodian is like a substitute jailer and must come to court, most often promise the judge to watch the person 24 hours a day, insist that every condition ordered by the judge be followed,

and promise to immediately turn in the person if there is a violation of those conditions.

MS. BRINK said the problem is that the system has evolved into a requirement in practically every case, "not only as a substitute for money bail, but ... in addition to money bail." Saying that now people are being held in jail for even low-level misdemeanors because they have no friends or relatives who can take off work and watch them 24 hours a day, she explained:

My biggest fear with this section is that now even fewer people will be able to be third-party custodians because these people are not well versed in the law. To be a third-party custodian, you pretty much have to have no criminal record and not much experience. And so when they come to court and hear that they are now subject to being charged with a crime, I can tell you that that information isn't going to be clear enough to them that ... this is really only a serious problem if you're not going to do your duties. I think it's just going to dissuade more and more people from acting as third-party custodians. ...

Number 2249

And, frankly, that's already happening. The Alaska Judicial Council just prepared a report on Alaska felony processes, looking at 1999, and I'm pretty certain that they sent copies of this report to everyone in the legislature. But it already confirmed that public-defender clients - poor clients - (indisc.) incarcerated pretrial than other clients. And it also confirmed that third-party custodians were a huge reason why people spent more time incarcerated.

It's going to have a huge chilling effect on people's willingness to come forward and be [third-party custodians]. And ... it's going to result in more and more people spending more and more time in custody before they're ever convicted.

MS. BRINK emphasized that these are "pretrial people" sitting in jail because they cannot come up with a third-party custodian.

Number 2300

CHAIR McGUIRE asked why that trend of increasingly requiring a third-party custodian is occurring.

MS. BRINK replied that she'd asked judges to explain it but still didn't know why. She said people already are somewhat reluctant to be third-party [custodians] because they're advised they could be subject to contempt of court if they don't follow all the conditions to the letter. Saying she disagrees with testimony that the contempt process is a cumbersome process, she added:

You file a one-page order to show cause why this person should not be held in contempt, and I've seen it done in bail cases. I think that the prosecutors' office, rightly so, limits their prosecutions of these people to ... cases where they think there really was a deliberate failure. ... Since they already can be prosecuted, and since it's already so difficult to find [third-party custodians], I just don't think we need to criminalize yet another act in the state of Alaska.

CHAIR McGUIRE remarked that she'd be more inclined to say "that you should have this" and that third-party custodians should take it very seriously, since they are jailers by extension. She expressed curiosity about discovering why third-party custodians are increasingly being required in addition to bail, even in misdemeanor cases, and suggested that should be the problem that is focused on.

**TAPE 04-52, SIDE B**  
Number 2389

CHAIR McGUIRE suggested third-party custodians should believe "to the bottom of their soul" that what they're doing is very serious. She said she is concerned about "the logic process" here and doesn't think the answer is to not implement stronger measures for third-party custodians simply because judges perhaps inappropriately require such custodians in some situations. If the original intent was to help poor people who cannot come up with bail money, she asked, why would it be required in misdemeanor cases in addition to bail. She said she didn't know the answer.

MS. BRINK replied that she didn't know either. She shared her experience that it's difficult to find a third-party custodian, and pointed out that the person is informed of the rules and

then has to sign a document which states that he/she could be charged with contempt. Ms. Brink said there is a strong effort to convince third-party custodians of the importance of this obligation, that it's critical to the process, and that they will be prosecuted with contempt if they violate the terms. She expressed concern that because it is so hard to find a third-party custodian, this will just make it harder.

REPRESENTATIVE GARA agreed that third-party custodians are overused. He asked, if it's already a crime for third-party custodians to violate their duties, why it makes things worse to "just come up with a different misdemeanor" to charge instead of criminal contempt. He also asked how that deters third-party custodians if they're already being told a violation may constitute a crime.

MS. BRINK replied that contempt can be punished by up to six months in jail and a fine of up to \$300. This provision raises it to a class A misdemeanor, which carries a potential punishment of up to a year in jail and up to a \$10,000 fine.

Number 2247

REPRESENTATIVE GARA suggested someone who is willing to commit a crime probably doesn't think about the full extent of the penalties. He questioned whether the change in penalty would affect people's behavior.

MS. BRINK pointed out that [third-party custodians] are making a huge sacrifice in their lives and thus already are somewhat reluctant to undertake this, even for someone they love and support; that they aren't people who commit crimes, but will think about consequences and will listen carefully when the judge advises them of what the mandatory or maximum penalties might be; and that they aren't well versed in criminal law. She expressed concern that this will increase their level of reluctance to get involved.

REPRESENTATIVE GARA remarked that he'd prefer that fewer third-party custodians were used, but still wasn't so convinced about the difference between criminal contempt and a misdemeanor. He shared his belief that third-party custodians are imposed only when the prosecution asks for them, but said he has found that some - especially younger prosecutors - ask for them almost routinely. He suggested attorneys may overuse their authority in this regard. For example, an attorney may say to a judge that someone "might possibly, conceivably be dangerous while out

on bail," which might apply to any defendant; thus the judge will agree to a third-party custodian just to be safe.

REPRESENTATIVE GARA asked other attorneys present, "Is there a tweak to the statute that governs third-party custodians and when they may be offered that we might consider that would be a reasonable tweak - not a ... radical tweak but a minor tweak - that might result in limiting the use of third-party custodians to really the more necessary cases?" Saying it's a rhetorical question, he added that if such a tweak exists, however, it might be considered as an addition to the bill. He suggested if the result is less frequent use of third-party custodians, then everybody would be better off in the long run, even if this is changed to a misdemeanor from criminal contempt.

Number 2130

MS. BRINK observed that many times the requirement for a third-party custodian is set by an arraigning magistrate before a prosecutor is involved in a case; this happens when the person is taken to the magistrate right from the scene of arrest for arraignment. Even though the state constitution and the rules require reasonable bail to be set within 24 hours, in actuality reasonable bail hasn't been set because the person cannot get out; to get out, the person must request a bail hearing and either propose removal of the third-party custodian - which the next judge down the line is loath to do - or bring in a third-party custodian who'll be approved. Thus there always must be a bail hearing, which greatly increases the workload of prosecutors, defense lawyers, and judges. This initial setting of bail is sort of meaningless, she remarked.

MS. BRINK added that bail setting seems almost in inverse proportion to the seriousness of cases the judges usually see. Magistrates, whose day-to-day business other than these arraignments is handling the lowest level of serious offenses such as traffic offenses, seem to set third-party requirements all the time. District court judges, who handle misdemeanor clients and cases, often set much harsher bail conditions. And superior court judges seem to be the best at setting reasonable bail, she said, because they see the whole gamut.

REPRESENTATIVE GARA clarified that he'd meant to suggest perhaps there should be some standard that a magistrate must meet before imposing the third-party custodian requirement, a higher standard than currently exists.

MS. BRINK replied, "The statute actually has a presumption of 'OR' [own recognizance] release, but it seems to mean nothing."

CHAIR McGUIRE noted that the violation being discussed is the third-party custodian's failure to immediately report a released person's violations of his/her conditions of release. Given that, she remarked, it seems a minimal burden to pick up the phone and report immediately.

REPRESENTATIVE GRUENBERG asked that the representative from the Alaska Court System be allowed to comment on this issue.

Number 1989

DOUG WOOLIVER, Administrative Attorney, Administrative Staff, Office of the Administrative Director, Alaska Court System (ACS), relayed that this coming Friday, the Alaska Judicial Council (AJC) will be reporting to the committee regarding its felony sentencing study, a good portion of which addresses third-party custodians and their impact [on the ACS].

MS. BRINK turned attention to Section 13, which, she opined, removes the right of a whole class of people to claim self-defense. She said:

I have great hesitation supporting this because I don't think these are questions that we can determine legislatively. Whether or not a person has the reasonable right of self defense has traditionally, in the American system of justice, been left to the jury, who can hear all the evidence. And removing this from ... whole classes of people engaged in fairly petty conduct actually seems inconsistent with Section 8 ... that I mentioned. ... In Section 8, we're setting to value the life of a participant in a felony who gets killed, and making that a possibility to charge felony murder.

Well here [in Section 13] it seems like we're removing the right of self defense for whole classes of people, and I have a couple of examples and I can also address the amendment that I know is before you because it tries to address this but I don't think it addresses it adequately. I think in the current state of the bill, as it looks now, let's say a prostitute picked up a customer and it turned out, which is not unheard of in Alaska, that he's a serial killer - this bill is

telling her that she has no right to preserve her own life. Let's say there's a couple of underage kids at a park sharing a beer and they're attacked by some ... robber or mugger - you're telling those kids that their life is not worth protecting. ...

You might think these hypotheticals are overdramatic, but these are instances that easily could be charged under this. What we're doing is we're sentencing people to death if they engage in petty criminal conduct. What if somebody is driving with a license that's suspended and they get carjacked [and] there's a baby in the backseat of the car? The mother has no right to protect her child or herself because she's driving with a suspended license. ... What we're saying is, you don't have a right to defend yourself. But what are we going to do if these people are attacked with deadly force and they do defend themselves? Well, we're going to convict them. We're not even going to let them bring to the jury the fact that they had a dangerous situation and it was their life or the person's life at stake because we're saying, "You have no right of self defense"; their lawyer won't even get to ask the jury to consider that.

Number 1855

MS. BRINK continued:

And the examples can go on and on. What if there's a woman who has a restraining order out against a violent husband and she's carrying a concealed weapon in someplace where it's prohibited or banned, like a university or a bank? Her husband, who has already posed a documented danger to her in the past, comes up and attacks her, and what we're telling her is that she has no right to defend herself. [If she's] charged, she may not be permitted to talk the jury about his violent history, what he's done to her in the past, because [we've] said to her, "You cannot defend [yourself]."

And even under the amendment that is being proposed, where we change it to felonious conduct, [it] doesn't take much to be [charged with a] felony these days. If you're shoplifting something worth over \$50 and, in

the last five years, you've shoplifted a pack of cigarettes and a carton of milk, you are facing a felony. And if some lunatic attacks you [in] the parking lot as you're fleeing the shoplifting, you may not defend yourself. ... This reminds me of the case in California where the "three-strikes law" was drafted to cover all kinds of conduct. I'm certain that the drafters in California did not think that stealing three videos would subject you to a life sentence.

But under this bill, if you steal three videos - and you have a prior conviction for a theft - that's over \$50; now, all of a sudden, you're not going to be permitted to defend yourself. And I just think that we're removing the power from the people, [because] we're taking away a jury's right to look into all the evidence about why someone engaged in self defense.

CHAIR McGUIRE asked whether changing the burden such that the defendant would have to argue an affirmative defense would alleviate the PDA's concerns.

MS. BRINK said that might be an improvement, but pointed out that that is a difficult burden.

Number 1759

REPRESENTATIVE SAMUELS offered a hypothetical situation:

If I go to a house and I'm there to buy a large quantity of drugs, and I bring a gun and I know it's a dangerous situation, ... and somebody gets shot, do you think self defense should be allowed in? Because that's [a] far more realistic situation than two kids sitting there drinking beer getting beat up by a serial killer ....

MS. BRINK replied:

Self defense is a lot more complicated than that. What would have to be determined is whether the person who went there to buy drugs with a gun was the initial aggressor, because, if he was the initial aggressor, the person in their own home, even if they're selling drugs, has a right to defend themselves - there's no duty to retreat in your own home. So I appreciate

what you're saying, but self defense is really complicated, and all I'm saying is that we should let the jury sort it out .... No, I don't think the guy is justified if the person in the house doesn't do something to attack him or try to hurt him or kill him. But let's say the person in the house does do that. Why would we want to force this guy, just because he's going there to get drugs, to not be able to defend himself?

REPRESENTATIVE SAMUELS offered a different hypothetical situation:

You've got two cars full of kids driving down Northern Lights [Blvd.] shooting back and forth at each other, and nobody gets charged, even though somebody got killed, because they both claimed self defense. And that's a far more realistic [hypothetical] than the two kids in the park. ... If ... you bring a gun to a situation and you escalate it, and if it's a drug dealer, it's already escalated enough. And if it's not in somebody's house, let's say it's in a parking lot somewhere, and somebody gets shot, and those, once again, are far more realistic real-life scenarios, but I think that ... when the ... Department of Law drafted this that they were trying to cut those off at the pass.

Number 1682

MS. BRINK said she doesn't know that she can agree that Representative Samuels's hypothetical situations are more realistic, because she has seen more of the type of situations that she listed. She referred to Representative Samuels's hypothetical about the two cars full of kids, and said:

Let's say that's true. Let's say there's two cars driving down Northern Lights [Blvd.] and all of a sudden one car starts firing on the other. We're telling the people in the second car that because they fired back they don't have a right to self defense. I mean, Representative Samuels, the right of self defense is inherent in every citizen's right to life, liberty, and the pursuit of happiness. How can we decide, before an event even takes place, that someone has forfeited their right by engaging in petty crime?

And why would we want to do that? Wouldn't that encourage vigilantism to go on? ... I disagree that those people can't be charged. They can be charged; yes, it might be a more difficult case to prove. So why couldn't the juries figure that out? Why couldn't the jury, based on all the evidence and proof brought before them, decide who fired on [whom] first and whether or not someone was justified. Why can't they make that decision?

REPRESENTATIVE SAMUELS asked Ms. Brink whether she is proposing that all the information should just be given to the jury so that it can determine what occurred.

MS. BRINK said yes.

Number 1604

REPRESENTATIVE GARA said:

There are circumstances where it's hard to prove somebody is guilty. There are two things we can do: make it presumptive that ... both guilty people and innocent people are guilty - that makes it really easy, you don't have to worry about hard-proof problems; or you can follow the sort of constitutional mandate that we've followed in this country that says, "You know, sometimes proof is really hard to come by, but we're going to require it anyway." And we know when we do that, ... that that benefits guilty people as well as innocent people. That's the fight that we have here all the time.

But by taking away the right to self defense from people who didn't do anything to deserve death, by taking away the right to self defense from people who should, by all rights, be able to defend themselves, just because we want to make it easier to prosecute people, I think is wrong. I understand your point, Representative Samuels: if we don't do this, there will be guilty people who go free. But if we do, do this, we are ... taking away the right to self defense from somebody who, by all rights, should have that right to self defense.

CHAIR McGUIRE opined that the current language in the proposed CS goes too far, and mentioned that she would be offering an

amendment to "add back in the presumption," perhaps by shifting the burden.

REPRESENTATIVE GRUENBERG asked whether courts have upheld the constitutionality of shifting the burden.

MS. BRINK said she did not know.

Number 1422

SUSAN A. PARKES, Deputy Attorney General, Central Office, Criminal Division, Department of Law (DOL), said that other states currently have such in law and it has been upheld in those other states.

REPRESENTATIVE GRUENBERG asked whether there are any states where it has not been upheld.

MS. PARKES said she did not know of any.

Number 1392

ANNE CARPENETI, Assistant Attorney General, Legal Services Section-Juneau, Criminal Division, Department of Law (DOL), indicated that she only knew of cases in which it has been upheld, one of those being a U.S. Supreme Court case.

MS. BRINK, referring to language in Section 13, subsection (a)(4)(B), said she did not understand what is meant by "transaction or purported transaction", especially what is meant by "purported", and that she would be even more confused if this were changed to an affirmative defense because she doesn't understand who will have the burden of proving what. Is the defendant going to have to prove that he/she was not in a "purported transaction", or was not acting to "further the criminal objectives of one or more persons"? She opined that the "purported" language is very vague; if there is even an accusation that a defendant was trying to buy or sell drugs, then he/she would lose the right to claim self defense.

CHAIR McGUIRE said she agrees that that language is a bit vague and relayed that there would be amendments addressing that section.

MS. BRINK directing attention to Section 14, said that this section also addresses the issue of self defense but contains language specifying that the court may only instruct the jury

about the justification of self defense if the court, sitting without a jury, finds that there is "some plausible evidence". Currently, jury and judge have two different roles in a trial: the judge decides what evidence is admissible - and this involves determining whether the evidence was legally obtained, whether it's relevant to prove some issue in that particular case, and whether the evidence would be too prejudicial to one side or the other - and often hears evidence in advance of the jury for the purpose of ruling on the evidence's admissibility; the jury decides what weight to give evidence and whether evidence is plausible, or credible, or believable. Section 14 takes away the jury's power and give it to the judge.

MS. BRINK said she doesn't understand why such a change should be made, adding, "we don't make the judge the finder of fact in a jury trial." "You have a right to have a jury trial, you have a right to have 12 of your peers determine whether or not your [claim of] self defense [is] plausible, and what self-respecting jury would find self defense when the evidence was implausible?" she asked. She offered her belief that if evidence is admissible, then the jury should be allowed to determine whether it is plausible.

Number 1209

MS. PARKES, in response to a question, said that according to her understanding, the word "plausible" is used in the proposed CS because the Alaska Court of Appeals currently says any evidence, even if implausible, raises self defense and [the jury] "gets the instruction." She said that the DOL is "trying to make the level of evidence a little higher."

MS. CARPENETI indicated that there are Alaska cases regarding this issue.

REPRESENTATIVE GARA remarked:

There seems to be an undercurrent here that we don't want the self-defense defense to be used in cases where it's really a frivolous claim, and so I think that was the attempt, frankly, in Section 13. But Section 13 is written in a way that bothers many of us. And I wonder whether, if we adopt Section 14, we don't need to deal with Section 13, if we could just dump it. And here you have this gatekeeper standard that says ... if it's plausible, let the jury hear about it, and [then] we don't have to go through the

whole process of adopting this sort of really loose or more troublesome standard that's in Section 13. I wonder if that might be the way to deal with it.

REPRESENTATIVE GRUENBERG offered his belief, however, that there are two different issues: one, whether the evidence is plausible; and two, whether "it's susceptible of determination."

Number 1033

MS. BRINK referred to Sections 15-17, which pertain to immunity for witnesses. She mentioned that the PDA has submitted a proposed amendment that would simply end [subsection] (i), of Section 17, after the word "finding" on page 9, line 30.

REPRESENTATIVE GRUENBERG remarked that that proposed amendment might also require some conforming changes elsewhere in Sections 15-17.

MS. BRINK relayed that [the PDA] doesn't have any problems with the provisions in Sections 15-17 that clarify statute and conform it to State v. Gonzalez, wherein the Alaska Supreme Court held that Alaska's privilege against self incrimination requires any finding of immunity to be transactional immunity, not just use and derivative use immunity. She also relayed that [the PDA] does have a problem, however, with the provisions of those sections that requires the judge, after a proffer by a witness who's exercising the privilege against self incrimination, to share information about what was said during the hearing in camera in which the judge finds that the witness does have a valid claim of "Fifth Amendment" privilege. She remarked that when a judge makes such a finding, the witness has an absolute right not to testify or give any information regarding his/her involvement.

MS. BRINK pointed out that language in Section 17 is telling the judge that he must tell the prosecutor what level of offense the witness is involved in. She said:

I think, Madame Chair, that that is a link in the chain tying them to the crime and, under transactional immunity, that's unconstitutional. I don't you think you can fix that part. I think the only way you can make this statute constitutional is to remove that proffer from the judge to the [district attorney's] office. I realize the [district attorneys] are frustrated, they would like to know what that person

is involved in, like to know that before making a decision to grant them immunity, [but] the privilege is absolute and it cannot be breached. And I think if you include that information going from the court to the [district attorney], this renders that section unconstitutional.

Number 0869

REPRESENTATIVE GRUENBERG asked Ms. Brink whether she has any authority to support that proposition or whether any state has adopted "such a provision."

MS. BRINK, in response, relayed that the Gonzalez case [in referring to E.L.L. v. State, 572 P.2d, 786 (Alaska)] says that in Alaska, the privilege against self-incrimination applies where the answers elicited could support a conviction or might furnish a link in the chain of evidence leading to a conviction. She indicated that her position is that the information mandated by Section 17 to be shared with the prosecution constitutes such a link.

MS. PARKES said the DOL has not found any state with a provision such as is being proposed in Section 17, though very few states require transactional immunity. She said [the DOL does] not believe that the proposed language is unconstitutional under Gonzales, which declared that Alaska must have transactional immunity, and is prepared to litigate the issue. Characterizing the proposed language as one of the most important provisions of the bill and as a very minimal request by prosecutors regarding the extremely powerful tool of immunity, she opined that because of the possible ramifications, it is very dangerous to give someone immunity with absolutely no information, which is what the DOL is required to do now.

REPRESENTATIVE GRUENBERG noted that the Gonzalez case [in referring to E.L.L. v. State, 572 P.2d, 786 (Alaska)] also says that a witness may not refuse to testify where there is no real or substantial hazard of incrimination. He asked Ms. Parkes whether her view is based on a belief that the information the judge would be required to reveal to the prosecution is not a link.

MS. PARKES indicated that that is her view.

REPRESENTATIVE GRUENBERG asked Ms. Brink why she believes it is a link.

Number 0535

MS. BRINK said:

Because the idea is that a person who has a valid Fifth Amendment right must be kept in the same position as if he remained silent. ... So the standard is, the same position if he remains silent. This is not the same position. This is giving the state information about the crime - about the type of crime, about the level of crime - from his own words; if he had remained silent, he would have faced no hazards of incrimination from his own words. And through the second basis, through the Gonzales opinion, it says that the court and the state cannot safeguard against the nonevidentiary use of compelled testimony.

And nonevidentiary use means, what's to prevent law enforcement or the [district attorney's] office from focusing the investigation, deciding to initiate a prosecution, refusing to plea [bargain], ... interpreting evidence, ... planning a [cross-examination], or somehow otherwise planning trial strategy. ... I'd like to point out one more thing. The state ... prosecutor's office argued extremely strongly in this case that our statute, which only provided use and derivative use immunity, was constitutional, and they were wrong about that. The [Alaska] Supreme Court held that the statute, this very statute that you're fixing now and that [the state] supported, was unconstitutional if it only provided use and derivative use [immunity]. So that question of constitutionality was resolved against the state

REPRESENTATIVE GRUENBERG asked Ms. Parkes what safeguards the state would use to ensure against nonevidentiary use of compelled testimony. "It seems to me that if that information's provided to you, then you could use it," he remarked.

MS. PARKES replied:

It's information, it's not testimony. ... This is just a judge letting us know the level of offenses, and not even the specific level, that we're looking at. ... So I don't think we're getting much information. I don't

consider it evidence to be given that level of information. What seems to be being implied here is that we're in an investigative stage of a case, [but] ... we're not. What we're talking about is, when someone's been charged, we're trying to go to trial, we've made a charging decision, we've done our investigation, we're trying to get a witness on the stand to give evidence, and so I think the concerns that we're somehow going to be using this information to now focus on the person we're trying to get to testify ... are far afield of what would really happen.

Number 0372

REPRESENTATIVE GRUENBERG, in response, said:

The first, that this is not testimony, frankly, I can't buy ... because the way the judge learned it was from the defendant's mouth, or from the attorney's mouth on behalf of the defendant, in chambers; it clearly was testimony at that point. Secondly, if you're saying that you're focusing on whether to get this person to testify, that's great, but the court here is talking about whether you, the state, can provide an assurance [that] it won't be used against that person. And that's the crux. I don't need an answer now, but if you want something like this, I think to meet the standard of Gonzales you have to have a meaningful safeguard that the words, the information you obtain, are not going to be used against that person.

MS. PARKES said she wouldn't be opposed to the addition of language that said that the information given by the judge - fruits of that poisonous tree - would be suppressed, couldn't be used, or couldn't be pursued. She mentioned that she couldn't see that the information given by the judge would be particularly useful in an investigation anyway.

REPRESENTATIVE GRUENBERG suggested to Ms. Parkes that she pursue the issue of additional language.

Number 0133

CHAIR McGUIRE remarked:

The way it is right now, if there's a witness that you want to put up, and they claim immunity and go and meet with the judge, you really are in a position where it could be for something very, very serious. And I'm sure that there's probably even a case of somebody ... [wanting] to be a witness because they could get immunity for something like that, where, at a minimum, you're granting immunity for something very, very serious when you could have found another witness or you could have let that part go.

MS. PARKES responded:

That's exactly the concern: ... you give immunity to the wrong person because you do it blindly and, yes, someone's going to get up there and confess to a homicide. And [if] you've given them transactional immunity, you're done, you can't prosecute them. And that's what we're trying to avoid. And I just would like to point out that many, many times, we work with witnesses and work these things out, where they tell us what their concerns are [and] we know what the crime is that they're concerned about - drug use or something like that - and we do give immunity in these cases. These are cases where the witness is uncooperative with us; sometimes they are afraid to testify - they've been intimidated by the defendant - [or] they're friends with the defendant [and] want to protect them. Those are the kind of cases, often, where this is coming up, and then we lose very valuable evidence in a serious case.

**TAPE 04-53, SIDE A**

Number 0001

REPRESENTATIVE GARA remarked:

We're asking the court to advise the prosecution whether the privilege was for [a class A felony, a class B felony, a class C felony, or a misdemeanor], and I don't think that's knowable in many cases because the gradations in the severity of your conduct are so subtle, sometimes, between a high level misdemeanor and low level felony, and a mid level felony and a high level felony. That's why prosecutors submit jury instructions that say, "If you find all of this evidence, convict the defendant of

this; if you find some of it, convict the defendant this lesser offense." And so how is a ... defendant supposed to tell a judge, and a judge supposed to tell the prosecution, whether the conduct is clearly [a class A felony, a class B felony, a class C felony, or a misdemeanor] when it might be very fuzzy as to [which] side of the line the conduct falls on.

MS. PARKES clarified that the bill only refers to a higher-level felony, a lower-level felony, and a misdemeanor. For a judge to make a finding that a person has a valid Fifth Amendment privilege, he/she has to have some concept of what crime the person potentially could be prosecuted for. She said she has faith that judges are able to make that call and perhaps err on the side of "a higher potential liability."

REPRESENTATIVE GARA pointed out, though, that the bill does not specify that if it's unclear the judge should assume it's a higher-level crime. The bill presumes that the level of crime will be really clear.

MS. PARKES said she did not think it will be that difficult for a judge to determine what the potential charge could be. With regard to the aforementioned jury instructions given by prosecutors, she said, "What you're actually going to be able to prove beyond a reasonable doubt in front of a jury may be a different thing and so we want to give juries options, but the prosecutor, I can guarantee you, always believes that the highest level charge charged is the accurate charge."

Number 0300

MS. BRINK, with regard to the suggestion of adding language to limit the state's use of the information given by the judge, said she didn't think that that would be effective because, in Gonzales, the Alaska Supreme Court has said, "Even the state's utmost good faith is not an adequate assurance against nonevidentiary uses because there may be 'nonevidentiary uses of which even the prosecutor might not be consciously aware.'" She pointed out that in that case, the court also said:

We sympathize with the Eighth Circuit's lament in McDaniel that "we cannot escape the conclusion that the [compelled] could not be wholly obliterated from the prosecutor's mind in his preparation and trial of the case." ... This incurable inability to adequately prevent or detect nonevidentiary use, standing alone,

presents a fatal constitutional flaw in use and derivative use immunity.

MS. BRINK turned attention to Sections 18 and 19, which pertain to consecutive sentences. She said:

What these provisions do is specify, in great detail, what cases have to have consecutive sentences and, in many cases, in fact, what amount of jail time has to be consecutive. And I guess I'm unhappy with [these sections] because I've always felt like individualized case consideration is the hallmark of our system of justice. I don't really understand why we want this judicial discretion taken away from judges. They have a lot more time and energy to listen to all the facts of a particular individual case and try to determine the appropriate sentence. And there might be individual circumstances that warrant a deviation from a strict application of presumptive ... [consecutive] sentences.

Number 0497

Why would we, as a state, want to spend \$56,000 a year to house an inmate when it isn't justified in ... [a] particular case? I think this will have a huge fiscal impact on [the Department of Corrections] that isn't reflected in their fiscal note. And I realize that all we're trying to do is to punish people appropriately and somehow reduce recidivism and save money that way, but I have to say, after being a [public defender] for 21 years, I have not seen an instance where we, as a state, have decided to increase penalties [and] that has then resulted in the reduction of a particular type of crime.

One of our goals, in criminal justice, is to have uniformity of sentences, sentences that are not influenced by race, whether [the defendant] had a public attorney [or] a private attorney, [or] what [the defendant's] socioeconomic status is. I think that by doing this you'll actually damage uniformity of sentencing because, in essence, you're leaving the sentencing decision up to an individual prosecutor. That individual person, who draws up the charging document and deals with the case and either negotiates it or sends it to trial, has the ultimate say in the

number [and] types of counts that are charged against any one [defendant]; ... that individual prosecutor can decide whether all these counts and charges should be resolved in one judgment or more than one judgment, and if it's more than one judgment, there's no possibility of concurrent sentencing.

MS. BRINK continued:

Now, I have to say, some prosecutors I've dealt with for years I could trust to make that decision. But I frankly trust the judges to make objective and fair decisions more than I do the prosecutors because the prosecutors are advocates in this process - they're subject to the human emotions of engaging in a competitive and ... [adversarial] system - and I would prefer that we (indisc. - coughing) decisions by the judge and the probation officer in the Department of Corrections who writes the presentence report and is supposed to give an objective viewpoint. As advocates, our viewpoint is not objective.

Number 0609

Frankly, the trend nationally is to get away from rigid and mandatory minimums. We often read in the paper about federal judges who are complaining about the federal sentencing guidelines; many states are starting to revoke mandatory minimums because they found that the people who don't need to be in jail are staying there a long time and draining the state of the resources that they really need to use for other matters. [This] seems to be regressive and unnecessary. People are getting long sentences; people are getting long presumptive sentencing. I don't know that ... you, as a legislative body, or we, as people outside of a case, can determine that somebody should have gotten 20 years instead of 13 - we have limited information. I think the judges, who have all the information, should get [to make] that decision of what sentence a person should get.

And the report that Mr. Wooliver was testifying about had another interesting conclusion. In case you think that we're not punishing people enough, in that report they concluded that more Alaska defendants are sentenced to jail time than in other places in the

Nation, and that they're likely to serve more of the time that's imposed on them than defendants in the rest of the country. So, believe me, if we think we're not already being punitive enough, compared to the national standards, we certainly are.

Number 0739

MS. BRINK, in response to a question, said that for the most serious crimes, the PDA agrees that the presumptive term has to be imposed consecutively.

CHAIR MCGUIRE asked Ms. Brink, if three people are murdered, for example, why isn't each one of those lives deserving of an individual sentence?

MS. BRINK replied:

I do think each individual life has value, but I think that those of [us] who've practiced in the courts don't think that the value of the person who was lost is characterized by the sentence that is imposed. I think that what judges do and what lawyers understand is that the total gravity of the situation is reflected in the total length of the sentence. And that's why, for a double homicide, for example, a person might get 99 years for the first one and an additional 20 or 10 for the second one to run consecutive.

It's not that that second life is only worth 10 or 20 years, Madam Chair, it's that the fact that there was more than one person involved increases the gravity of this crime and the seriousness and the punishment to go beyond the maximum, beyond what anybody could get for a single homicide, and that the total sentence of say 119 years is reflective of that situation. I don't think any judge ever intended that that should somehow be a measure of each individual life, and I think that's why we err when we try to calculate time in that manner. I don't think that that's what the sentence is reflective of because certainly no one's life could be measured in a term of years.

CHAIR MCGUIRE posited that many share a frustration over the tendency to view a situation as one criminal act even if multiple people are seriously harmed or killed. "I really do

feel like, for each person who is hurt, for each life that is taken, there ought to be that opportunity for a separate sentencing," she relayed.

Number 0938

REPRESENTATIVE GARA, referring to page 10, line 26, asked what AS 11.41. pertains to.

MS. PARKES explained that AS 11.41 pertains to offenses against a person.

REPRESENTATIVE GARA referred to page 11, lines 6-7, which read: "two years or the active term of imprisonment, whichever is less, for each additional crime that is criminally negligent homicide". He asked whether a two-year minimum term of imprisonment will be required for criminally negligent homicide, and whether that is more jail time than is currently required.

MS. PARKES replied: "I don't believe there's a mandatory minimum on criminally negligent homicide, so I think ... the belief was [that] two years was an appropriate amount of additional time for each count."

REPRESENTATIVE GARA asked what "active term of imprisonment" means.

MS. PARKES explained that if someone is sentenced, for example, to five years of imprisonment with four years suspended, the active term of imprisonment would be one year. She noted that these provisions of the proposed CS are identical to provisions in the original version of HB 244

REPRESENTATIVE GARA asked whether Section 19 is saying that if there are two or more crimes against a person, then the total sentence has to be at least the minimum for one of those two crimes.

Number 1266

MS. BRINK responded:

No, I think what [Section 19 is] saying is it has to be doubled. What's happening in this section is that it's a regimented approach. Already the statute creates a presumption of consecutive sentences, so judges know that judges do have the opportunity to

impose consecutive terms. What this does is it regiments how much time must be consecutive. If it's an escape, all the imprisonment must be consecutive. If it's [murder in the first] degree, the mandatory minimum term for each one must be consecutive. Same with an unclassified felony. In a manslaughter or a kidnapping that's a class A felony, the presumptive term must be consecutive. So, depending on the number of people involved, it's really arithmetic: you take the mandatory minimum term and you chop it up among the different counts.

Now currently, the judges can get to the same overall sentence, if they want to, in the appropriate case just by doing a larger term of years or doing consecutive sentencing. But they don't have to parse it out; they don't have [to] apportion it among victims. And so that's what's different, here; this is a regimented approach, dealing with cases that haven't even happened yet, deciding what might be appropriate in the individual circumstances by arithmetic.

REPRESENTATIVE GARA asked, "Currently, if the presumption is consecutive sentences, that just applies to felonies?"

MS. BRINK said it applies to all crimes, both felonies and misdemeanors.

MS. PARKES remarked, however,

I don't think there's a presumption that every sentence, every time, should be consecutive. There are times that the statute indicated that it should be consecutive, but there are times it can be concurrent. And frankly, part of this proposal was because it appeared that judges were not necessarily following what was already in the statutes; they were not giving consecutive times when it appeared that that was the legislative intent of the statutes that are currently on the books.

Number 1359

REPRESENTATIVE GARA asked, "So are you saying that the statutes provide that in some cases the presumption is not consecutive sentences?"

MS. PARKES offered as an example AS 12.55.025(g), which says in part: "If the defendant has been convicted of two or more crimes before the judgment on either has been entered, any sentences of imprisonment may run concurrently if ...". So it's a clear opportunity, she remarked, rather than a presumption.

REPRESENTATIVE GARA asked: "So the statutes provide that ... if the defendant meets certain standards, then they can get out of the concurrent sentence presumption - is that what you're saying?"

MS. BRINK offered:

I have to strenuously disagree that the presumption is for concurrent sentences. The presumption is for consecutive sentences. [In AS] 12.55.025(e) it states very clearly, "Except as provided in (g) and (h) of this section" - and that was the section that [Ms. Parkes just referred to] - "if the defendant has been convicted of two or more crimes, sentences of imprisonment shall run consecutively."

REPRESENTATIVE GARA said, "So [AS 12.55.025(e)] says they shall be presumptive, and then [AS 12.55.025(g) and (h)] say here are the circumstances where you can get out of a presumptive ... consecutive sentence. ... What are the circumstances that ... now would get you out of the consecutive sentence?"

MS. BRINK replied:

For you to get out of the consecutive sentence, ... what you have to show is that the crimes violate similar societal interests; they are part of a single, continuous criminal episode; there was not a substantial change in the objective of the criminal episode, including a change in the parties to the crime, the property or the type of property right offended, or the persons offended; the crimes were not committed while [you] ... attempted to escape or avoid detection or apprehension after commission of another crime; it's not for a violation of [AS] 11.41.100-11.41.470, which, again, [are] crimes against persons; and it's not for a violation of [AS] 11.41.500-11.41.530 that results in physical injury or serious physical injury, [and those] I believe [are] misdemeanor crimes against [a person].

Number 1529

So it is very, very difficult to get a concurrent sentence. And in fact, when that section was changed, it was a sea change; the presumption, when I began practicing ... was for concurrent sentences. [The] legislature changed that and made the presumption very clear: they are to be consecutive sentences. [if] there's a change in the parties, if you have more than one person who is injured, in two different assault counts, they cannot get concurrent [sentences].

MS. BRINK turned attention to Section 20, and said she likes this section because it codifies the current practice regarding instances in which an indigent witness is called upon to testify in a court proceeding and the judge thinks that that person needs legal representation to address the issue of whether or not he/she has a valid Fifth Amendment privilege. That person can be appointed a public defender so that the judge and the witness are not left to sort out that point on their own without assistance.

MS. BRINK turned attention to Sections 21 and 23, and surmised that [Section 21] says that once someone gets convicted of felony driving under the influence (DUI), any DUI after that will always be a felony, and that Section 23 says the same regarding "felony [DUI] refusal." She urged the committee to consider a time limit for those provisions. She elaborated:

If you have a young kid struggling with a drinking problem who, say, gets [DUIs] when he's 16, 17, or 18, [but] he successfully attends a [rehabilitation] program and ... remains clean and sober [and] becomes a hard working and productive citizen for 30, 40, 50 years, ... do we really want to make that person a felon at the age of 48, 58, 68? Do we really want to make that a felony? ... I know there is pending before the legislature another bill to adjust the current look-back for mandatory minimum sentences on [DUI] sentences. ... We're looking at that because what we've discovered is, we have among the harshest look-back ... and [DUI] sentencing provisions in the country; we have the longest look-back provision, and so, once again, I think that making it a felony anytime in the next lifetime of a person would be extremely harsh.

CHAIR McGUIRE remarked that those are good points.

Number 1633

MS. BRINK turned attention to Section 22, which, she remarked, has to do with eliminating what [prosecutors] characterize as the "big gulp" defense. She said this provision would prohibit any introduction of evidence regarding the consumption of alcohol [that occurred before] the driving or operating. So that means that the person who's charged with a blood alcohol concentration (BAC) level of .08 does not get to come in and testify that, "No, I only had a beer," even if there are witnesses to that effect. She posited that this provision is broader than what people have said is the intent. She added:

I don't think we ought to eliminate the big gulp defense because, frankly, don't we want to punish those people whose judgment and skills [are] impaired? Don't we want to punish those people who are driving under the influence? If a person isn't under the influence at the time they're driving, do we really want to treat them the same as somebody who is? That's what we do if we adopt this measure saying that that evidence is not relevant or admissible. And I, frankly, think we should concentrate on punishing those people who are under the influence or impaired at the time of driving.

MS. PARKES relayed that for those very reasons, the DOL has drafted a proposed amendment for the purpose of tightening down that provision such that it will only apply in the situations intended. That proposed amendment read [original punctuation provided]:

**Delete Page 13, lines 7-10**

**Insert in its place:**

(s) In a prosecution under (a) of this section, a person may introduce evidence of having consumed alcohol before operating or driving the motor vehicle, aircraft or watercraft, to rebut or explain the results of a chemical test, but it is not a defense that the chemical test did not measure the blood alcohol at the time of the operating or driving.

**Add a new section and renumber other sections accordingly:**

**\*Sec. \_\_.** AS 28.35.030(a) is amended to read:

(a) A person commits the crime of driving while under the influence of an alcoholic beverage, inhalant, or controlled substance if the person operates or drives a motor vehicle or operates an aircraft or a watercraft

(1) while under the influence of an alcoholic beverage, intoxicating liquor, inhalant, or any controlled substance;

(2) if [WHEN], as determined by a chemical test taken within four hours after the alleged offense was committed, there is 0.08 percent or more by weight of alcohol in the person's blood or 80 milligrams or more of alcohol per 100 milliliters of blood, or if [WHEN] there is 0.08 grams or more of alcohol per 210 liters of the person's breath; or

(3) while the person under the combined influence of an alcoholic beverage, an intoxicating liquor, an inhalant, or [AND] a controlled substance.

Number 1606

MS. PARKES added:

If someone wants to attack the validity of the [Intoximeter 3000] and needs to talk about how much alcohol they've had to say the Intoximeter wasn't accurate at the time of the test, that certainly should be admissible. And this is a policy call for the legislature. It appeared to us that the intent in the original drafting of the DUI statute - [which] ... said, within four hours of driving, you get tested and you're .08, you're considered under the influence under the statute - was [that that would] ... be a presumption. And we feel that the big gulp defense of, "Well, ... my blood alcohol was rising," sort of thwarts the legislative intent. If the legislature doesn't believe that that thwarts it, then you would want to reject this provision ....

MS. PARKES, in response to a comment, remarked that the defense [currently used] is, "My blood alcohol was rising, and if I'd only made it home before I got stopped, I wouldn't have been drunk driving."

Number 1789

REPRESENTATIVE GARA posed a scenario in which someone has two drinks, drives home, starts "partying like a maniac," and the police, who've received a call, come, test that person, and find that he/she has a BAC level of .15. He asked whether the aforementioned proposed amendment would allow that person to offer the defense that he/she had only had two drinks before driving.

MS. PARKES pointed out that the person really ought to speak to how much alcohol he/she consumed after driving. That's the real defense, and that's preserved, she remarked.

REPRESENTATIVE GARA said: "And you could talk about what you had before you started driving, too, right? ... Frankly, that's the more important part."

MS. PARKES remarked, "To rebut or explain the results of the chemical test."

REPRESENTATIVE GARA offered, "I don't really want to have to prove how much I had to drink after I got home; I want to be able to prove that I only had two drinks before I got in the car."

MS. PARKES responded, "Under those circumstances, that is not what we're intending to exclude now."

REPRESENTATIVE GARA asked, "But it's clear in the amending language that you can show that I only had two drinks before I got in the car?"

MS. PARKES said she'd have to look at the DOL's proposed amendment to see if it addresses the aforementioned scenario.

CHAIR McGUIRE surmised that a person's conduct after he/she gets out of the car can be used as a defense, and that a person will still have the ability to question the validity of the Intoximeter. What they didn't want to allow, she posited, is the argument that it was that last drink before leaving the bar that "put you over the edge and that you weren't drunk when you

were driving - it was that you were tested later and that huge drink that you took, before you left, kicked in."

MS. PARKES concurred.

Number 1887

MS. BRINK opined that under the scenario offered by Representative Gara, the jury would be instructed to disallow those facts as a defense because a portion of the proposed amendment stipulates that it is not a defense that the chemical test did not measure the blood alcohol at the time of the operating or driving. So, although a person may be allowed to offer evidence, the jury will be told that it is not a defense that the chemical test did not measure the blood alcohol at the time of the operating or driving.

MS. PARKES disagreed, saying that "this does not preclude the alcohol that was then [drunk] at the house after the driving, and could be introduced to explain why the chemical test was high."

REPRESENTATIVE GARA suggested that they write an amendment that says a person shall be allowed to show what he/she had to drink before driving.

MS. PARKES argued, however, that the real defense pertains to the alcohol that was consumed after driving; evidence regarding that is what will show that a person was not DUI, and that evidence would still be admissible. She noted that part of the proposed amendment will alter "when" to "if" in the current statute because the court, in the Conrad (ph) case, focused on that current statutory language and decided that it didn't clearly disallow a big gulp defense.

REPRESENTATIVE SAMUELS offered his belief that everyone is in agreement with regard to the intent, and now they just need the right language.

Number 2080

MS. BRINK turned attention to Section 27 and said she doesn't like Section 27 because it doesn't offer protection to juveniles. She elaborated:

The reason we treat juveniles differently and we have their information be confidential is because, although

juveniles don't have the (indisc.) capabilities of processing information like adults - their brain is not sufficiently developed - many, many juveniles who come (indisc.) are rehabilitatable and never reappear in the adult [system]. And so we keep their record and their cases confidential.

I understand wanting to be able to protect members of the public, but if we were going to do that, I would suggest we limit [it] strictly to sexual offenses [and] we limit [it] strictly to adjudications. What about a case that's investigated and dismissed? Or [a] case where the juvenile is acquitted at trial? We don't want to give that information to members of the public. So I would like to pick and chose between these two version to find the one that provides, first of all, the most-needed information for reasons of public safety - and I think that's adjudication having to do with [sexual] offenses - upon request, giving that to members of the public.

MS. BRINK noted that although a proposed amendment was drafted with the assistance of the Division of Juvenile Justice (DJJ) and stipulates that the department shall formulate regulations regarding disclosure, nothing in the bill precludes someone from giving out information before those regulations are actually in place. Additionally, nothing in the bill precludes members of the public, once they receive information, from putting up flyers all over the neighborhood saying that "Johnny" is being investigated for a sexual offense by the DJJ, and include that child's picture and home address on those flyers. She characterized the aforementioned as a good reason for not freely giving out this sort of confidential information.

Number 2215

PATTY WARE, Director, Division of Juvenile Justice (DJJ), Department of Health & Social Services (DHSS), said that although she understands the PDA's concerns, the language in the proposed amendment contains "may" rather than "shall" with regard to disclosing information. She offered that the intent of Section 27 is to allow the Office of Children's Services (OCS) employees and DJJ employees to share information when it's appropriate. Noting that Section 27 proposes to alter AS 47.12.310, she relayed that under existing AS 47.12.315, there is a fair amount of information that the DJJ can share with the public, information related to specific offenses though not

solely limited to cases that have been adjudicated. For example, when a juvenile is 13 years of age or older and the DJJ is going to file a petition on a felony crime against a person, or a crime that involves a deadly weapon, arson in the first or second degree, burglary in the first degree, distribution of child pornography, promoting prostitution in the first degree, or misconduct involving a controlled substance, the DJJ can disclose that information to the public.

MS. WARE said that the DJJ is committed to working closely with the DOL and the OCS to ensure that regulations are crafted to address concerns about treating juvenile information differently than adult information. In response to questions, she said that the DJJ is already able to share information with the OCS, but the OCS cannot then share that information with a member of the public; that AS 47.12 addresses the issue of inappropriately releasing information; and that the penalty is a Class B misdemeanor.

**TAPE 04-53, SIDE B**

Number 2381

CHAIR McGUIRE surmised, then, that that penalty would also apply to the provision proposed via Section 27.

MS. WARE, in response to a further question, offered her belief that Section 27 would not expand the amount of information that may be shared with the public; rather, it would just ensure that all relevant agencies would be allowed to share information that is currently available to the public.

MS. BRINK offered her belief that the disclosure prohibition in AS 47.12.320 only applies to state officials or employees, and, thus, there is no punishment for a member of the public who inappropriately disseminates information. She acknowledged that it is hard to find a balance between protecting juvenile offenders and protecting the public, but asked the committee to err on the side of ensuring control of confidential information once it's released and limiting disclosure to circumstances in which there is a genuine danger to the public.

CHAIR McGUIRE said she did not see that the type of information that could be released is being changed by Section 27.

MS. BRINK said:

The way I read [AS] 47.12.310, which has to do with agency records, we have to go to [subsection] (a), [and the] amendment starts with [subsection] (c). But in [subsection] (a), if you're complying [with AS] 47.12.310, [it] allows [disclosure of] all information and social records pertaining to a minor prepared by or in the possession of [a] federal, state, or municipal agency or employee.

CHAIR McGUIRE remarked that that point is critical. She asked whether a minor's criminal record is destroyed when he/she turns 18, and what happens to "the trail of that record" if that record had to be disclosed.

MS. PARKES explained that there will be three sets of records: the court system's records - she remarked that did not know what occurs with those records; the DHSS's records - she surmised that the DHSS must have a policy regarding those records; and the DOL's records - she said that the DOL keeps files on delinquency cases until the person is 21 because sometimes that information can be used if the person gets into trouble as an adult, and that those records are archived and ultimately destroyed.

Number 2031

MS. WARE said that something similar occurs with the DJJ's records. She noted that although the DJJ can disclose a fair amount of information to the public, it does not disclose that information unless requested. Once that information is disclosed, though, nothing in existing statute limits what can be done with it - it becomes public information - and the proposed changes will not alter that.

CHAIR McGUIRE said that one hopes that when a member of the public asks for such information, he/she does so for legitimate reasons, because that information could be used against the minor from then on. This is of concern to her, she remarked.

CHAIR McGUIRE, after ascertaining that the representative from the Office of Public Advocacy (OPA) was willing wait until HB 244's next hearing to testify, suggested that any forthcoming amendments from interested parties should be in written format.

[The committee had a brief discussion regarding when the bill would be heard next; HB 244 was held over.]

**ADJOURNMENT**

Number 1673

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 5:55 p.m.