ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
April 2, 2004
2:55 p.m.

MEMBERS PRESENT

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

MEMBERS ABSENT

Representative Tom Anderson, Vice Chair

COMMITTEE CALENDAR

PRESENTATION BY ALASKA JUDICIAL COUNCIL ON THE FELONY PROCESS IN ALASKA

- HEARD [See the 1:12 p.m. minutes for this date]

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

- HEARD AND HELD

HOUSE BILL NO. 438
"An Act relating to motorists moving over or slowing down for emergency vehicles."

- BILL HEARING POSTPONED TO 4/5/04

PREVIOUS COMMITTEE ACTION

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 --
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
03/30/04	(H)	Heard & Held
03/30/04	(H)	MINUTE(JUD)
03/30/04	(H)	JUD AT 3:00 PM CAPITOL 120
03/30/04	(H)	-- Meeting Canceled --
03/31/04	(H)	JUD AT 1:00 PM CAPITOL 120

03/31/04	(H)	Heard & Held
03/31/04	(H)	MINUTE(JUD)
04/02/04	(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

DEAN J. GUANELI, Chief Assistant Attorney General
Legal Services Section-Juneau
Criminal Division
Department of Law (DOL)
Juneau, Alaska
POSITION STATEMENT: During discussion of HB 244, presented some proposed amendments on behalf of the administration, and provided comments on other proposed amendments.

LINDA WILSON, Deputy Director
Central Office
Public Defender Agency (PDA)
Department of Administration (DOA)
Anchorage, Alaska
POSITION STATEMENT: During discussion of the proposed amendments to HB 244, responded to questions and provided comments.

VANESSA TONDINI, Staff
to Representative Lesil McGuire
House Judiciary Standing Committee
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: During discussion of the proposed amendments to HB 244, offered clarifying comments.

SUSAN A. PARKES, Deputy Attorney General
Central Office
Criminal Division
Department of Law (DOL)
Anchorage, Alaska
POSITION STATEMENT: Provided comments during discussion of the proposed amendments to HB 244.

ACTION NARRATIVE

TAPE 04-57, SIDE A
Number 0001

CHAIR LESIL McGUIRE called the House Judiciary Standing Committee meeting back to order at 2:55 p.m. Representatives

McGuire, Samuels, and Gruenberg were present at the call back to order. Representatives Holm, Ogg, and Gara arrived as the meeting was in progress. [For the presentation by the Alaska Judicial Council see the 1:12 p.m. minutes for this date.]

HB 244 - CRIMINAL LAW/SENTENCING/PROBATION/PAROLE

Number 0087

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.]

CHAIR McGUIRE relayed that the committee would begin discussion of proposed amendments.

Number 0102

DEAN J. GUANELI, Chief Assistant Attorney General, Legal Services Section-Juneau, Criminal Division, Department of Law (DOL), directed attention to Amendment 1, which contained a handwritten change and read [with original punctuation provided]:

> **Pages 15-16, Section 27.**
> **Delete the entire contents of the section and insert instead:**
>
> AS 47.12.310 is amended by adding a new subsection to read:
> (k) A state or municipal agency or authorized employee, other than a state or municipal law enforcement agency under (c) of this section, may disclose to the public information regarding a case as may be necessary to protect the safety of the public,

provided the disclosure is authorized by regulations adopted by the department.

Number 0229

REPRESENTATIVE SAMUELS made a motion to adopt Amendment 1. There being no objection, Amendment 1 was adopted.

MR. GUANELI directed attention to Amendment 2, which read [original punctuation provided]:

Page 8, after line 18:
Insert the following:
"*Sec. 15. AS 12.25.150(b) is repealed and reenacted to read:
(b) Immediately after an arrest, a prisoner has the right to (1) telephone or otherwise communicate with the prisoner's attorney; (2) telephone or otherwise communicate with any relative or friend; (3) an immediate visit from an attorney at law entitled to practice in the courts of Alaska requested by the prisoner; and (4) a visit from a relative or friend requested by the prisoner. This subsection does not provide a prisoner with the right to initiate communication or attempt to initiate communication under circumstances prescribed under AS 11.56.755."

Renumber the following bill sections accordingly.

Number 0252

REPRESENTATIVE SAMUELS made a motion to adopt Amendment 2.

Number 0260

REPRESENTATIVE GRUENBERG objected. He offered his recollection that the committee addressed this proposed change to statute last year and rejected it.

Number 0299

REPRESENTATIVE SAMUELS withdrew Amendment 2, but mentioned that he would offer it again at a later time.

MR. GUANELI directed attention to Amendment 3, which read [original punctuation provided]:

Page 9, lines 2 and 3: Delete all material.

Page 9, line 4: Delete "(4)" and replace it with "(2)"

Page 9, line 30 to Page 10, line 1: Delete "and inform the prosecution of the category of offense to which the privilege applies: a higher level felony, a lower level felony, or a misdemeanor"

Number 0417

CHAIR McGUIRE made a motion to adopt Amendment 3. There being no objection, Amendment 3 was adopted.

MR. GUANELI directed attention to Amendment 4, which read [original punctuation provided]:

Page 8, line 9 - 13:
Delete all material and insert the following"
"**(4) the force applied was the result of using a dangerous instrument that the person claiming the defense of justification possessed while**

(A) acting alone or with others to further a felonycriminal [sic] **objective of the person or one or more other persons; or**

(B) participating in a felony transaction or purported transaction, or in immediate flight from a felony transaction or purported transaction in violation of AS 11.71.

MR. GUANELI explained that Amendment 4 would narrow the self-defense provision and conform it to the Senate version.

Number 0476

CHAIR McGUIRE made a motion to adopt Amendment 4.

Number 0480

REPRESENTATIVE GRUENBERG objected. He made a motion to amend Amendment 4 such that "**deadly weapon**" replace "**dangerous instrument**".

Number 0487

LINDA WILSON, Deputy Director, Central Office, Public Defender Agency (PDA), Department of Administration (DOA), relayed that that language change has been made to the Senate version.

MR. GUANELI concurred, and said that the DOL has no objection to the amendment to Amendment 4.

Number 0569

CHAIR McGUIRE asked whether there were any objections to the amendment to Amendment 4. There being none, Amendment 4 was amended.

REPRESENTATIVE GARA observed that Amendment 4, as amended, appears to affect more than lines 9-13 of page 8.

Number 0600

REPRESENTATIVE GRUENBERG made a motion to adopt a second amendment to Amendment 4, as amended, such that "9" be changed to "7"; thus making Amendment 4, as amended, apply to page 8, lines 7-13. There being no objection, the second amendment to Amendment 4, as amended, was adopted.

[Following was a brief discussion regarding which version of the bill was before the committee, and whether Amendment 4, as amended, pertained to that version.]

Number 0721

VANESSA TONDINI, Staff to Representative Lesil McGuire, House Judiciary Standing Committee, Alaska State Legislature, clarified that the version before the committee was the proposed CS, labeled 04-0033, 1/16/2004, and that Amendment 4, as amended, did pertain to that version.

Number 0743

CHAIR McGUIRE asked whether there were any further objections to Amendment 4, as amended. There being none, Amendment 4, as amended, was adopted.

MR. GUANELI directed attention to Amendment 5, which 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.

MR. GUANELI explained that the first part of Amendment 5 is in response to concerns raised by Representative Gara about the current language in [Section 22 of the proposed CS], and that the second part of Amendment 5 "is based on additional research involving the case that created the problem." He mentioned, however, that Amendment 5 ought to be amended to address concerns raised by the drafters in Legislative Legal and Research Services after review of [changes proposed to the Senate version].

Number 0821

CHAIR McGUIRE made a motion to adopt Amendment 5.

Number 0854

REPRESENTATIVE GRUENBERG objected [for the purpose of discussion].

MR. GUANELI suggested amending Amendment 5 such that proposed subsection (a)(2) include "**and**" before the first "**if**", and that the second "**if**" be deleted.

Number 0877

CHAIR McGUIRE made a motion to amend Amendment 5 as suggested by Mr. Guaneli.

Number 0904

REPRESENTATIVE GARA objected for the purpose of discussion. He asked whether this amendment to Amendment 5 has any substantive effect.

MR. GUANELI said that although Amendment 5 itself creates a substantive change, the amendment to Amendment 5 is merely a technical change.

Number 0948

CHAIR McGUIRE, after noting that there were no further [objections], announced that the amendment to Amendment 5 was adopted.

REPRESENTATIVE GARA asked for an explanation of the substantive change created by Amendment 5, as amended.

MR. GUANELI replied:

> The intent of these entire provisions [is] to prevent the "big gulp" defense, so to speak, and that arose as a result of [an] Alaska Court of Appeals opinion. And the opinion specifically focused on the ... two "when"s in this provision, and it said ..., "We understand what the legislature may have been getting

to, but the 'when' language creates some ambiguity and therefore we're going to allow this defense."

And so ... we thought it would be best to directly address the specific statutory language that the [Alaska] Court of Appeals focused on in allowing that defense, and that's why deleting the "when"s was appropriate. The additional provision, further on up in this amendment, was to address a concern that you had raised, that the ... language in the current version was a little broad in preventing people from using evidence of consumption of alcohol in their defense. And I hope that addresses your concern.

REPRESENTATIVE GARA, after noting that he has every intention of getting rid of the big gulp defense, asked Ms. Wilson whether, in her opinion, Amendment 5, as amended, does anything other than that.

Number 1053

MS. WILSON opined that it does. She elaborated:

"The problem is, is I think the language in that first section of [proposed subsection] (s) is sort of self-contradictory. It says that a person may introduce evidence of having consumed alcohol before operating the vehicle but ... it is not a defense that the chemical test did not measure the blood at the time of operating or driving. So, you recall your example you gave of somebody who had a couple of drinks but then went home and "pounded 'em back" and got called in?

Well now this person can't put on any evidence about the ... [fact] that he only had two drinks before he drove, because this section says it's not a defense. So he won't be able to present to the jury that he ... only had two when he was driving and that the ones he consumed after, which are going to be reflected in the test, ... [are what] defeats him. So it does more than get rid of the big gulp [defense]; it limits your ability to ... present evidence of your drinking before you drive, which is way more than just a big gulp [defense] ....

REPRESENTATIVE GARA offered his belief, however, that they all have the same intention, and according to the way he reads

Amendment 5, as amended, it says that a person can explain to the jury the amount of alcohol he/she had before getting in a vehicle in order to rebut the results of the chemical test; Amendment 5, as amended, seems to just get rid of the big gulp defense.

MS. WILSON argued, however, that the language which reads, ", but it is not a defense that the chemical test did not measure the blood alcohol at the time of the operating or driving." prevents someone from attacking the chemical test as being representative of the blood alcohol level at the time of operating or driving a vehicle. She went on to say:

> So you've introduced evidence, but the courts can instruct the jury that they don't get to consider it because that blood alcohol measures your blood alcohol at the time you were driving - whether on not it really does.

REPRESENTATIVE SAMUELS said he agrees that they were all trying to get to the same point. However, he opined, if the language says, "at the time" one could then still argue that the test was wrong, but could not argue that it was taken three hours later. Representative Samuels said he reads the language in Amendment 5, as amended, the same way that Representative Gara does.

REPRESENTATIVE GRUENBERG asked what was wrong with the current language in the proposed CS.

Number 1249

MS. WILSON said that the current language in the proposed CS limits someone to only being able to explain alcohol being drunk after the driving or operating. Amendment 5, as amended, she reiterated, prevents someone from talking about what he/she drank before or after the driving or operating of a vehicle because the jury will be instructed to disregard such evidence.

REPRESENTATIVE GRUENBERG surmised, then, that perhaps the current law should not be altered, adding that the big gulp defense might just have to be something that gets argued before a jury.

MS. WILSON concurred.

REPRESENTATIVE GRUENBERG said this makes sense to him because it would be tough to legislate this area [of law] due to the fact

that there are so many different kinds of defenses that can be raised and so many factual situations. The big gulp defense sounds pretty ludicrous, he opined, and suggested that one would have a tough time selling most juries on it. He asked whether the big gulp defense is a huge problem, and whether there were a lot of people getting off because of it.

REPRESENTATIVE GARA, upon further reflection of Amendment 5, as amended, remarked, "This language is wrong, I think."

MR. GUANELI explained that the current language in the proposed CS would prevent someone from saying to a jury that he/she only had one drink and that the test showing a blood alcohol level of .10 is wrong. Amendment 5, as amended, is intended to say that a person may offer evidence that he/she drank before, but could not argue to the jury that, "I was driving at 12 midnight, but the test wasn't given until 12:30 in the morning and, therefore, it didn't measure my blood alcohol level." The problem with the big gulp defense, he opined, is that it allows people to say, "I had this one big drink ... before I drove," and bring in an expert witness - at great cost - to dispute the results of the chemical test in relation to the time the person was actually driving. So instead of the jury focusing on what the legislature wants - was a test given and did it measure a significant amount of alcohol - the jury will look at all the factors that go into affecting someone's blood alcohol level. Mr. Guaneli acknowledged that the DOL has struggled with this issue a lot, and opined that Representative Gara's suggestion - the first portion of Amendment 5, as amended - is a good one and does what the legislature has always intended.

Number 1433

REPRESENTATIVE GARA countered that it is probably not what the legislature intended at the time. Instead, the court was probably right: the legislature probably wanted to only convict people who were drunk at the time they were driving. But then, later on, people started coming up with the big gulp defense, and this probably wasn't something that the legislature even considered at the time the current law as enacted. Referring to "the way it's written," he noted that one can be convicted of driving under the influence (DUI) if he/she has a blood alcohol concentration (BAC) of more than .08. So, if the defendant is guilty if he/she has a BAC of more than .08, what good does it do a defendant to be able to explain the results of the chemical test?

MR. GUANELI relayed that there are a number of ways to challenge the results of the DataMaster cdm (compact datamaster) - and before that the [Intoximeter 3000] and before that the breathalyzer. He added, "All of these machines have certain requirements, that the officer is supposed to observe the person ..."

REPRESENTATIVE GARA interjected to say, "I'm wrong, you don't need to explain that to me." However, he remarked, it still seems to him that the last sentence of the first part of Amendment 5, as amended, causes a problem in that "what we want to really say is that it's not a defense that the chemical test includes the effect of alcohol consumed before driving." "That's what you don't want to do, is let somebody say, 'Yeah, I consumed it before I drove, but it ... hasn't really registered in my body therefore you can't use that against me.'" He again suggested that the wording be changed to say that it's not a defense that the chemical test includes the effect of alcohol that was consumed before driving.

MR. GUANELI offered his belief that such language brings them back closer to what is currently in the proposed CS [and] would prevent people from raising that defense.

Number 1568

REPRESENTATIVE GRUENBERG said:

> It just seems to me that if this [is] a question of relevance, then the judge determines whether the evidence is relevant; the parties argue relevance and the judge makes that determination under the [Alaska] Rules of Evidence. And the rules already provide [for] that in this case and every other case. And for the legislature to determine what is or is not relevant is going to be very difficult to do because the facts will vary so greatly.

[Chair McGuire turned the gavel over to Representative Samuels]

REPRESENTATIVE GARA opined that "we're changing the substance of the crime." He added:

> It used to be that it's not a crime if you had so much to drink that you register as drunk after you get out of the car - it used to be that it was a defense that you weren't drunk yet, that all the alcohol hadn't

registered through your system, so that ... even though you blew a .20 later on, you were really only at a [.079] at the time you were driving. This isn't really a relevance issue; we're changing policy here.

REPRESENTATIVE GRUENBERG surmised, then, that with passage of Amendment 5, as amended, it will be a crime to have a BAC above the limit even though a person might potentially have not been behind the wheel at that moment in time.

REPRESENTATIVES GARA and SAMUELS concurred.

REPRESENTATIVE SAMUELS added, "If it's in your stomach, it's as good as being in your blood, is what we're saying.

REPRESENTATIVE GRUENBERG asked why it would be wrong to allow such a defense if the aforementioned facts are true.

Number 1672

REPRESENTATIVE GARA replied:

> Because you've had way too much to drink, that's obvious, you've had enough to drink that you're about to get drunk. We know that you're not a technician and that you didn't time the amount you had to drink to get you home before you got drunk - you essentially just got lucky that you hadn't exceeded .08 at the time you got in your car, but you had been drinking irresponsibly. And I think, even though you're not technically at a .08, we want to punish you for having that much to drink and getting in your car, because I think the truth is, even at .05 and .06, you're putting the public in danger. So I don't want to give you the benefit of being at only [.079] when you've had so much to drink that you're endangering the public.

REPRESENTATIVE SAMUELS reiterated, "[If it's in your] stomach, it's in your blood."

REPRESENTATIVE GARA said, "I want to do what we just said we want to do; I'm not comfortable ...

REPRESENTATIVE SAMUELS interjected to suggest changing Amendment 5, as amended, to a conceptual amendment, adopting it, and then

if better language comes forth later, they could adopt that instead.

MR. GUANELI said he would be happy to work with Representative Gara in order to arrive at language that everyone is comfortable with.

[Representative Samuels returned the gavel to Chair McGuire.]

CHAIR McGUIRE indicated that the issue could be addressed again at the bill's next hearing.

REPRESENTATIVE GARA said that upon further reflection, he thinks that Amendment 5, as amended, is fine, adding that he will be voting to adopt it. However, he extended an invitation to Ms. Wilson to provide substitute language.

MS. WILSON asked the committee to consider where Amendment 5, as amended, would leave the person who has one drink before driving, gets home, drinks a lot, and then gets arrested three hours later and the chemical test shows a high BAC - that person is going to be without a defense. This is how she reads Amendment 5, as amended, she remarked, adding that it appears to reach more people than those just using the big gulp defense.

CHAIR McGUIRE replied, "I think it's clear that generally speaking, evidence about your drinking after you have been driving can be offered, and there may be this fine, tiny line of a couple of people that fall into this, but I'm not convinced."

Number 1987

CHAIR McGUIRE announced that Amendment 5, as amended, would be set aside. She indicated that the committee would be addressing Amendment 6.

REPRESENTATIVE GARA directed attention to Amendment 6, which read [original punctuation provided]:

> Insert at p 2
> At line 24 after "participants" and at line 28 after "participants" the following language:
> "except that when the killing of the participant is the direct result of criminal conduct by a non-participant."

REPRESENTATIVE GARA explained, however, that Amendment 6 should be altered to reflect that the language is to be inserted on page 5, not page 2.

Number 2059

REPRESENTATIVE GARA made a motion to adopt Amendment 6, as amended with regard to the page number.

Number 2062

CHAIR McGUIRE objected for the purpose of discussion.

REPRESENTATIVE GARA relayed that Amendment 6, as amended, addresses the part of the proposed CS which currently says that if a person goes on someone else's property to engage in robbery in any degree, and a killing occurs, then the person could be [charged with the crime of] murder in the second degree. In support of Amendment 6, as amended, he offered the following example:

> Five of you go on somebody's property. One person is the ringleader, he becomes totally out of control, pulls a gun on a robbery victim. The other four really hadn't intended on doing anything violent like that. All the kids start running away, and the robbery victim shoots one of the non-gun-bearing kids in the back ...

CHAIR McGUIRE interjected. Noting that this issue had been discussed at length during a prior hearing on the bill, she asked Mr. Guaneli whether the DOL has any problems with Amendment 6, as amended.

MR. GUANELI said that the only concern he has is that [Amendment 6, as amended] will require that in prosecuting somebody else, the DOL will also have to prove that the victim did not commit a crime. Generally, he added, the DOL has no problems with Amendment 6, as amended.

Number 2142

SUSAN A. PARKES, Deputy Attorney General, Central Office, Criminal Division, Department of Law (DOL), remarked that she'd not yet received a copy of Amendment 6, as amended

MS. TONDINI relayed that she'd just recently faxed Ms. Parkes copies of the proposed amendments that she did not get earlier.

CHAIR McGUIRE, for the benefit of Ms. Parkes, read Amendment 6, as amended. She asked Ms. Parkes to comment.

MS. PARKES said that conceptually, she doesn't have a problem with Amendment 6, as amended, because she doesn't think the DOL would actually charge someone under the circumstances described at a prior hearing on the bill. She said she is concerned, however, with how Amendment 6, as amended, will work when the state has to try two murder cases in a trial.

REPRESENTATIVE GRUENBERG opined that even if the state has to get into a second criminal issue, because a person's life is at stake, it is certainly worth a little time if there is a valid defense.

MR. GUANELI said he thinks that Ms. Parks is right in that the DOL wouldn't ordinarily charge such cases. In a case where the defense is raised that the victim committed a crime, he said he would hope that most juries would "see through that" and would recognize that a victim of a robbery using self defense to protect himself/herself is committing no crime.

CHAIR McGUIRE surmised that perhaps the DOL's concern is that Amendment 6, as amended, might be used too broadly.

MR. GUANELI agreed.

Number 2225

REPRESENTATIVE SAMUELS suggested amending Amendment 6, as amended, [again] to add "felony" before "criminal".

CHAIR McGUIRE asked, "Is that accepted?"

REPRESENTATIVE GARA said, "That's fine. And my intention, Mr. Guaneli, is [that] ... you wouldn't have to prove this other one beyond a reasonable doubt ....

[Although no formal motion was made, this suggested second amendment to Amendment 6, as amended, was treated as adopted.]

MR. GUANELI reiterated his opinion that the DOL would have to prove that the victim did not commit a crime, adding that it would have to be proven beyond a reasonable doubt.

Notwithstanding this point, he posited that "it's going to be an unusual circumstance, and I think we can accept that burden."

Number 2262

CHAIR McGUIRE said she would remove her objection and asked whether there were any further objections to Amendment 6, as amended.

REPRESENTATIVE GRUENBERG asked whether the committee still needed to adopt the second amendment to Amendment 6, as amended.

CHAIR McGUIRE stated, "We already did."

Number 2269

CHAIR McGUIRE noted that there were no further objections to Amendment 6, as amended. Therefore, Amendment 6, as amended, was adopted.

Number 2280

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

> Delete page 6, lines 24 and 25.

Number 2283

CHAIR McGUIRE objected.

REPRESENTATIVE GARA opined that the language he is proposing to delete is troubling because the way it is currently written, it will make felons out of people who have car accidents that cause serious physical injury to another person.

CHAIR McGUIRE urged the committee to reject Amendment 7. She said that there are 6 proposals which have been drafted that would go toward narrowing the aforementioned language. She added, "I think that there is clearly a gap in the law [and] we need to address it somehow; I do think that the arguments [toward narrowing it] have had merit ..., and we have [several] ... options including defining what we mean by 'serious physical injury' and including linking it to chemical tests with respect to blood alcohol levels ...."

Number 2362

A roll call vote was taken. Representative Gara voted in favor of Amendment 7. Representatives Gruenberg, Samuels, Holm, and McGuire voted against it. Therefore, Amendment 7 failed by a vote of 1-4.

Number 2383

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

> Insert at p 6 line 24 after "negligence" the following language:
> "in violation of AS 28.35.030"

Number 2385

CHAIR McGUIRE objected.

REPRESENTATIVE GARA said that Amendment 8 is a more narrow way to "get at this problem." He said he did not have a problem saying it's a felony to, while intoxicated, injure someone, and posited that Amendment 8 would get at the problem described by the DOL. Amendment 8 would say that if someone is [criminally] negligent [in violation of AS 28.35.030] and causes serious [physical] injury to another, then he/she would be guilty of a felony.

TAPE 04-57, SIDE B
Number 2389

REPRESENTATIVE GARA mentioned that someone who is simply negligent and causes serious physical injury to another would still be guilty of only a misdemeanor. Under Amendment 8, "the thing that makes it a felony is that you violated society's interest by also being drunk when you did it," he added, noting that this was the example used by the DOL when explaining the need for the language on page 6, lines 24-25.

CHAIR McGUIRE, after ascertaining that Mr. Guaneli was in receipt of and had reviewed all of the proposed amendments dealing with this issue - including those drafted by the Public Defender Agency (PDA) - asked him where the DOL would be amenable to narrowing down this provision.

MR. GUANELI said that the DOL does not believe that any narrowing ought to be done. With regard to Amendment 8, he said:

> That would be, in essence, only allowing this crime to be committed if somebody is driving drunk - as I understand [Amendment 8]. Currently, if you are driving drunk ..., that is considered reckless conduct. If you kill somebody and you were driving drunk ..., that's manslaughter, and the mental state for manslaughter is recklessness. So what that means is that under current law, this crime of recklessly causing serious physical injury by means of a dangerous instrument, which is what this would be, is covered under current law under first degree assault, which is a class A felony.
>
> So, the - and I'm sure unintended - consequence of [Amendment 8] is to reduce what is now a class A felony to a class C felony, and so for that reason we certainly object to Amendment 8. With respect to the other amendments proposed by the [PDA], one suggestion is to limit the serious physical injury to ... only one part of the definition of serious physical injury, and that is the protracted impairment of bodily function and that sort thing - essentially putting someone in a wheelchair. But there's another important part of the definition of serious physical injury and that is physical injury under circumstances which raise a ...

Number 2259

REPRESENTATIVE GRUENBERG interjected to say that if Amendment 8 is not adopted, he would be offering one of the PDA's proposed amendments, that which contains a "D" in the lower right-hand corner and which uses AS 11.81.900(b)(55)(B) to define serious physical injury.

CHAIR McGUIRE asked Mr. Guaneli whether the DOL would have any objection, if and when Representative Gruenberg offers that amendment, to also using AS 11.81.900(b)(55)(A) as part of the definition of serious physical injury.

REPRESENTATIVE GRUENBERG noted he'd meant to add AS 11.81.900(b)(55)(A) as well to that amendment.

MR. GUANELI pointed out that serious physical injury is defined by both 11.81.900(b)(55)(A) and (B). Therefore, to include reference to both (A) and (B) in an amendment wouldn't really change anything in the bill.

REPRESENTATIVE GRUENBERG concurred.

CHAIR McGUIRE mentioned, however, that including reference to the definition would clarify the bill.

REPRESENTATIVE GRUENBERG relayed that he would not be offering the aforementioned amendment.

REPRESENTATIVE GARA said that the problem with leaving the language in the bill as written is that serious physical injury as defined in the criminal code is not "the kind of serious injury that you and I would think of." He elaborated:

> It's not just putting somebody in a wheelchair, which would be terrible, it's not just these very heightened levels of injury. It is also protracted impairment of the function of a body member. That would be a broken arm if you were in a cast for six weeks, that would be other injuries that aren't as debilitating as ones that we might think of when we hear the term "serious physical injury". So ... if we're going to say that people who are negligent, who cause a broken arm, are felons, I've got a problem with that. So I don't want to change the criminal law's definition of serious physical injury. ... It makes sense, I'm sure, in many other sections of the law, where you're punishing people for intentional conduct and reckless conduct. But now that we're doing negligent conduct, there has to be something that narrows either the kinds of injuries we're talking about or the kind of conduct we're talking about, but written as is I can't support this.

Number 2115

CHAIR McGUIRE said that according to her recollection of past discussions, "any time you have a vehicle ... barreling at you at speeds between ... 35 and 75 miles an hour, by definition, if you injury that person, it's going to be 'under circumstances that create a substantial risk of death'."

MR. GUANELI replied that although that might be true theoretically, that's not the way it works as a practical matter, nor is it the way that prosecutors charge cases involving a serious physical injury. He went on to say:

> I think that the problem with eliminating [subparagraph] (A) in that definition is that someone [could], acting with criminal negligence, ... [cause] a horrendous accident where ... both cars are mangled and everyone is sure that the occupants have died, and the victim ..., just out of fortuity, walks away unharmed or only with bruises and cuts and scratches.
>
> In terms of that person's culpability, in terms of what could have happened - ... the physical injury that ... was caused under terrible circumstances and could have resulted in death - ... that person really ought to be treated the same as ... a driver who puts someone in a wheelchair. And in terms of their danger to the public, they are exactly the same, and it was just [luck] ... that someone walked away. And that's what this [subparagraph] (A) definition is designed to address: those situations that ... by the grace of God someone lived, but in terms of the culpability of the driver, ... that driving was as dangerous.

Number 2039

CHAIR McGUIRE responded:

> I'm going to argue against it. I just think it's too broad. I think that in almost any circumstance a good prosecutor could argue that ... when you're talking about a vehicle and you're talking about an accident, ... the likelihood of being able to say, "under a substantial risk of death" is going to be there regardless of the extreme circumstance that you're presenting. In point of fact, ... on the other end, we're trying to do things in this committee to discourage people from drinking and driving at all, because, in point of fact, that could happen in any single case that a person gets into a car drunk. ... But to raise it to that level, I have concerns about it.

MR. GUANELI said that the cases that are the most heartrending for the DOL are the cases wherein family members and victims

come to prosecutors and say: "Isn't there anything more you can do? Can't this person be charged with a more serious crime?" He acknowledged, however, that subparagraph (B) does get to the most egregious cases.

CHAIR McGUIRE said:

> I think that [subparagraph] (B) should be in there and I think that this is a loophole; I think that [Ms. Parkes] argued that very well, that just because a person doesn't die we [still] ought to be punishing the conduct. So I would be supportive of the amendment that Representative Gruenberg would offer on [subparagraph] (B) ....

Number 1940

REPRESENTATIVE GARA withdrew Amendment 8.

Number 1927

REPRESENTATIVE GRUENBERG made a motion to adopt Amendment 9, that which was just being discussed and which read [original punctuation provided]:

> Page 6, line24
> (4) with criminal negligence causes serious physical injury **under AS 11.81.900(55)(B)** [sic] to another person by means of a dangerous instrument.

Number 0901

CHAIR McGUIRE objected for the purpose of discussion.

REPRESENTATIVE GRUENBERG asked for clarification on why they should not also include [AS 11.81.900(b)(55)(A)] in Amendment 9.

REPRESENTATIVE GARA reminded members that if Amendment 9 is altered to include [subparagraph] (A), then it is no different than what is currently being proposed by the bill.

[Following was a brief discussion referencing some of the other amendments provided by the PDA.]

MS. WILSON, referring to Amendment 9, concurred that the reason it only references AS 11.81.900(b)(55)(B) is because if it were to include both subparagraphs (A) and (B), then it would be no

different than what is currently [proposed in the bill]. She went on to say:

> [Subparagraph] (A) has to do with just physical injury with a risk of death, which could be caused by any automobile accident, as you so succinctly said. So [Amendment 9] takes out [subparagraph] (A) because anytime you're involved in a vehicular accident there is the potential or the risk of death. So we're taking out the bumps, the bruises, the scratches - all those kinds of thinks that we really don't want to address .... [Subparagraph] (B) of the definition of serious physical injury really gets to the targeted injuries that we're talking about in this case. So that's why [Amendment 9] has it limited to the second half of the definition of serious physical injury.

MS. PARKES asked that if the committee is going to limit this provision of the bill in any way, that it only exclude [subparagraph] (A).

REPRESENTATIVE GRUENBERG said that he is inclined towards keeping subparagraph (A), adding that an accident that creates a substantial risk of death is a serious accident and not just a fender bender.

Number 1624

REPRESENTATIVE GARA remarked that the problem with including both subparagraphs (A) and (B) is that it would be looked at as (A) "or" (B); hence, a person could be thrown in jail as a felon for being negligent, having a car accident, and breaking somebody's arm - even that of a passenger. He noted that there has been just such a case. He opined: "If we're going to make you a felon for being negligent, I think it's got to be either a very serious injury - and we don't to have to go through an hour [of] debate trying to redefine serious injury to make it a very serious injury - or at least let's say 'permanent'." In other words, not whiplash, not a broken arm, not a sprained shoulder that could last someone three months and is therefore protracted, but a "permanent" serious physical injury. In response to a question, he offered his belief that "reckless" [behavior] is already a crime.

MR. GUANELI added that it is already considered assault in the first degree, which is a class A felony.

CHAIR McGUIRE, to clarify, said:

> For the cases of criminal negligence we already say that if you are criminally negligent and you kill somebody, you can be charged with manslaughter, and so what we're trying to say is, for the lesser injury that comes about, there ought to be a crime that comes with the "non-mental" intent of criminal negligence. ... So we're in an area that's unaddressed yet, and we're trying to define how far we go.

REPRESENTATIVE SAMUELS opined that if the actions are the same, then the penalties should be the same, rather than making allowances depending on the end result of an accident.

MR. GUANELI, in response to a question, reiterated that "reckless" behavior can be considered assault in the first degree if someone is seriously injured "under circumstances that create a substantial risk of death".

REPRESENTATIVE GRUENBERG remarked, then, that he is dissuaded from offering [Amendment 9].

Number 1439

CHAIR McGUIRE announced that Amendment 9 was withdrawn, and made a motion to adopt this same amendment as Amendment 10, which read [original punctuation provided]:

> Page 6, line24
> (4) with criminal negligence causes serious physical injury **under AS 11.81.900(55)(B)** [sic] to another person by means of a dangerous instrument.

REPRESENTATIVE GARA said:

> The reason we throw people in jail for accidentally killing somebody is that [he/she] ... killed somebody. It's the worst thing you could ever do in this world - is kill somebody. And we're saying we understand it was an accident, but you killed somebody [so] it's a felony. That was a pretty big departure from the sort of historical context of criminal law. We used to ... want to punish people who did things intentionally, maybe recklessly, but negligently, we weren't so thrilled about it. We made the exception for ... death. Now we're going to the point of making the

> same exception for a broken arm. I don't want to do that, and so one way around that would be to ... say [that] ... if we're going to make accidental conduct a felony, then it's got to be at least a permanent serious physical injury that you've caused. So I would be willing to go along with that, but no further.

Number 1370

REPRESENTATIVE GARA made a motion to amend Amendment 10 such that "permanent" is added between "causes" and "serious". Such a change would include disfigurement and other injuries that are permanent, but would exclude injuries that heal.

REPRESENTATIVE OGG pointed out that in the fishing, construction, mining, agriculture, and medical and dental industries, people use dangerous instruments all the time, and that in these industries there is negligence and tort. "And if they have accidents, then what's the result going to be there?" he asked.

MR. GUANELI remarked:

> We are not talking about negligence, here - not the kind of negligence that gets you sued in civil court. We're talking about criminal negligence, which is defined in our criminal code and it applies to a number of offenses including criminally negligent homicide, and ... it's something much more than civil negligence. There are dozens of car crashes all across the state of Alaska - and all across the country - that are the result of negligence, and people die in those car crashes. And we simply do not prosecute them; we are not prosecuting every car crash [wherein] somebody dies. We are prosecuting those car crashes where the driver was drunk or there was such ... outrageous driving that it rises to the level of criminal culpability. ...
>
> And it's not that we don't have the resources to prosecute these cases; it simply isn't part of the element of the offense. It is not simply careless conduct that a reasonable person would exercise. That's the civil context; that's what gets you sued ... for a wrongful death. It's called wrongful death, and it's an insurance claim, and that's dealt with in

> the civil courts. We're talking about something that rises to the level [of] criminal negligence such that a jury is willing to find criminal culpability. ...

CHAIR McGUIRE sought confirmation that criminal negligence would mean acting in careless disregard of a known risk.

Number 1199

MR. GUANELI said that the definition of criminal negligence - AS 11.81.900(a)(4) - is very similar to recklessness, and reads in part: "the person fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exits; the risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation." He noted that in a criminal case, a jury would have to decide whether the behavior constituted a gross deviation from reasonable care, and whether it wanted to criminally punish that behavior. In response to a comment by Representative Gara, Mr. Guaneli reiterated that the definitions of "criminal negligence" and "recklessly" are very similar.

MS. WILSON said she disagreed with Mr. Guaneli's assertion that prosecutors don't prosecute cases wherein the result might not be a serious physical injury or that they only prosecute the most serious of cases. She elaborated:

> There certainly could be a defendant out there who would not be popular with the district attorney's office and might have a passenger in the car who suffers physical injury which does not rise to the level of a serious physical injury but yet that person could be prosecuted. And then there certainly was a case - the Wally Tetlow case [State v. Tetlow, 3AN 01-03356] - [wherein] Mr. Tetlow was charged with assault in the first degree for vehicular assault against his passenger. My guess is, maybe the unintended purpose of this section is to get Mr. Tetlow: he was convicted of a misdemeanor. So to say that they're only after ones where serious physical injury results is disingenuous. These cases are overcharged, and for us to just go along [with] the assumption that we should trust the prosecutors to only take these cases [with] the most serious consequences gives them far too much prosecutorial discretion, and it should be a serious concern for the committee.

CHAIR McGUIRE said she remembered that case and assured Ms. Wilson that it is of concern to her.

REPRESENTATIVE GARA relayed his recollection that in the aforementioned incident, the passenger simply had to get stitches and it was not a lasting injury.

Number 0951

CHAIR McGUIRE urged the committee to reject the amendment being offered to Amendment 10, and highlighted that currently, Amendment 10 proposes to restrict the bill such that the serious physical injury it refers to would include: "serious and protracted disfigurement, protracted impairment of health, protracted loss or impairment of the function of a body member or organ, or that unlawfully terminates a pregnancy".

REPRESENTATIVE GRUENBERG mentioned that he was troubled by the Tetlow case because it is an example of things going wrong, and asked Mr. Guaneli to comment.

MR. GUANELI said that Mr. Tetlow was ultimately convicted of two misdemeanors, adding that if those two misdemeanors were joined together they made up the elements of a felony offense.

REPRESENTATIVE GRUENBERG asked how they could guard against this proposed statute being misused.

MR. GUANELI, in response, continued describing the Tetlow case:

> At the beginning of that case, both the driver in that case and the passenger left the scene; they did not wait around. It was a case where the car left the road and, as I recall, got wrapped around a light pole or a telephone pole or something like that. ... There were people who stopped to help, and they were met with some level of hostility, perhaps, and the driver and the passenger left the scene, and the police were not able to find them for some period of time afterwards.
>
> The victim in the case, the person who was injured -- there was indications at the scene of the crime that he was injured, and he was unable to be found; he would not cooperate in terms of providing information about the extent of his injuries. My recollection is,

he was a friend or a [coworker] of the driver, and under those circumstances, the prosecution was left with deciding, at a very early point in time, what [was] the immediate charge to be leveled. And so based on the elements of the statutes, certain charges were leveled at the very beginning of the case, and when the case ultimately went to the grand jury, the grand jury returned other, lesser charges.

Number 0759

MR. GUANELI went on to say:

> But the fact remained that the state was unable to gather information about the extent of the victim's injuries because the victim simply refused to cooperate and, therefore, we were left to use the elements of the offense that we had. As it turned out, we found out some time later that [the] victim of the offense actually had to go to ... some sort of neurologist or neurosurgeon because ... he had passed out or something like that, which, again, raises some concern that there may have been some lasting injury in [that] case.
>
> So ... I think that we can all talk about that case forever, but the fact remains that we are trying to plug what we perceive to be ... a gap in the law, right now, and we're trying to do it in the best way that we can. And I think that the particular amendment limiting it to those kinds of protracted injuries, the serious injuries, does that without the risks that Ms. Wilson and Representative Gruenberg are suggesting exist.

CHAIR McGUIRE asked for a roll call vote on an unamended Amendment 10.

Number 0673

REPRESENTATIVE GARA said he was withdrawing any objection he might have had to Amendment 10. [The motion to amend Amendment 10 was not addressed again.]

Number 0660

CHAIR McGUIRE asked whether there were any further objections to Amendment 10. There being none, Amendment 10 was adopted.

Number 0643

REPRESENTATIVE GARA made a motion to adopt Amendment 11, although he noted it listed the wrong page and line numbers. Amendment 11 read [original punctuation provided]:

> Insert at p 7 line 13, and renumber remaining sections accordingly:
>
> Amend AS 12.30.020 by adding a subsection (i) that reads:
>
> "In the case of a misdemeanor, the court shall issue written findings to demonstrate why conditions provided under subsection (b)(1) needed to be imposed."

REPRESENTATIVE GARA suggested that perhaps the text of Amendment 11 ought to be inserted on line 28.

Number 0601

CHAIR McGUIRE objected for the purpose of discussion.

REPRESENTATIVE GARA suggested amending Amendment 11 to delete, "In the case of a misdemeanor". Thus the text being inserted by Amendment 11 would then read: "the court shall issue written findings to demonstrate why conditions provided under subsection (b)(1) needed to be imposed." He offered:

> This does not do a whole lot in the third-party custodian realm, but I think it will minimize the number of sort of lazy third-party custodian orders that courts issue. This would just say, if you're going to require third-party custody as a court, you have to issue written findings to say why you're doing it. I think this is not a perfect fix to the problem, [but] my understanding from the [Alaska] Judicial Council [AJC] is that they and the court system are going to sit down and talk about the problems of third-party custody and the over-ordering of it, and I hope that discussion leads to maybe a long-term resolution. But in the meantime, ... we just want to

make sure the courts spend some time before they issue a third-party custody order ....

CHAIR McGUIRE said she is removing her objection, and asked whether there were any further objections to Amendment 11.

REPRESENTATIVE SAMUELS indicated he had an objection for the purpose of asking a question. He asked for clarification regarding the subsection referred to in Amendment 11.

REPRESENTATIVE GRUENBERG offered his belief that Amendment 11 should not be inserted on page 7, line 28; instead, he suggested, it ought to be inserted elsewhere - perhaps on page 8, line 19.

Number 0471

REPRESENTATIVE GARA withdrew Amendment 11 for the purpose of restating it. He then restated the motion to adopt Conceptual Amendment 11, to amend AS 12.30.020 by adding a new subsection (i) that says, "The court shall issue written findings to demonstrate why conditions provided under subsection (b)(1) needed to be imposed."

Number 0439

REPRESENTATIVE SAMUELS withdrew his objection.

Number 0421

CHAIR McGUIRE asked whether there were any further objections to Conceptual Amendment 1, as restated. There being none, Conceptual Amendment 1 was adopted.

Number 0316

REPRESENTATIVE GARA, after a brief discussion regarding which of his proposed changes he wished to offer next, made a motion to adopt Amendment 12, that which read [original punctuation provided]:

Delete page 8 lines 7 - 13 all language after "aggressor".

Number 0241

CHAIR McGUIRE objected.

REPRESENTATIVE GARA said that Amendment 12 would leave intact the law of self defense, which, he remarked, has a long history and has been amended in the past to say that a person cannot claim self defense if the problem is caused as a product of mutual combat or if he/she provokes the conduct. The language that Amendment 12 proposes to delete, he remarked, adds what he considers to be an unprecedented departure from current law by also saying that a person can't claim self defense if he/she was participating in criminal conduct, either felony or misdemeanor criminal conduct. He went on to say that although he understands and sympathizes with the DOL's argument that gang crimes are hard to prosecute, he doesn't think that taking away the right to claim self defense, from a whole class of people, is the right way to go, adding that he'd like to preserve, as much as possible, the right to claim self defense.

REPRESENTATIVES SAMUELS and GRUENBERG noted that the language that Amendment 12 is proposing to delete has already been amended via Amendment 4.

REPRESENTATIVE GARA concurred, and said, "I think now it just applies to felonies. He asked whether it would be possible to charge someone with a felony for buying marijuana for personal use.

MR. GUANELI said that if someone uses a lot of a particular drug for personal use, then perhaps it would be possible to charge him/her with a felony. He opined, however, that the language that Amendment 12 proposes to delete does not pertain to possessory offenses; instead, that language pertains to drug transactions. He also opined that Amendment 4 has already limited the language in the bill such that it only addresses core conduct that he thinks they would all like to discourage.

TAPE 04-58, SIDE A
Number 0001

MR. GUANELI added that that behavior consists of bringing a gun to a dangerous, illegal situation, and opined that such is analogous to participating in mutual combat or starting a fight and, therefore, a person doing such should not be allowed to claim self-defense.

Number 0054

REPRESENTATIVE GRUENBERG suggested amending Amendment 12 to simply strike Section 13 of the proposed CS. He relayed that making such a change to Amendment 12 would have the same effect on the bill.

REPRESENTATIVE GARA indicated that he would accept that amendment to Amendment 12.

CHAIR McGUIRE said she was maintaining her objection.

Number 0153

A roll call vote was taken. Representatives Gara and Gruenberg voted in favor of Amendment 12, as amended. Representatives Ogg, Samuels, Holm, and McGuire voted against it. Therefore, Amendment 12, as amended, failed by a vote of 2-4.

REPRESENTATIVE GARA asked about the provision in the proposed CS pertaining to immunity.

REPRESENTATIVE GUANELI relayed that the Senate did amend that provision in its version, and offered his belief that that change has the effect of keeping the current law regarding immunity as is.

Number 0224

REPRESENTATIVE GARA made a motion to adopt Amendment 13, which read [original punctuation provided]:

> At page 9 line 30, delete remainder of sentence after "finding".

REPRESENTATIVE SAMUELS objected.

REPRESENTATIVE GRUENBERG noted that the change proposed via Amendment 13 has already been made via [a portion of] Amendment 3.

Number 0260

REPRESENTATIVE GARA withdrew Amendment 13.

Number 0268

REPRESENTATIVE GARA made a motion to adopt Amendment 14, which read [original punctuation provided]:

At pages 10- 11, delete Section 19.

Number 0275

CHAIR McGUIRE objected.

REPRESENTATIVE GARA explained that Amendment 14 would have the effect of leaving the current law pertaining to consecutive and concurrent sentences as is. He said:

> Currently, if you commit a class A felony or an unclassified felony, the presumption is that your sentence will be consecutive. If you're a second-time class B felony or class C felony offender, the presumption is [that] your sentence shall be consecutive. And we have a number of exceptions in the rule that let you get out of a consecutive sentence, right now, but they are in essence that sentences can run concurrent if the various counts of your crime are all related. So, you're in a fight with somebody and you hit them in the head nine times; that conceivably could be nine counts, but you don't have to run that sentence consecutively. You get into a fight with three people, and that could conceivably be three or more counts, but the court has the discretion to ... treat that as one event and run those sentences concurrently.
>
> ... We heard from [Larry Cohn, Executive Director, Alaska Judicial Council]; you can take the statistics two ways, I think. I think the fair way to take Mr. Cohn's statistics are that on average, in jail time served, we do sentence people to longer felony sentences in this state than on the national average. I don't think that we've heard enough examples ... to say that sentences in the areas that this section [addresses] are too short. This will have a fiscal impact if we decide to sentence people for longer periods of time, and frankly that comes out of money that should be otherwise available to prevent crime, which would mean, I think, more police on the street and more prosecutors, at least to put people who we're already not able to prosecute in jail.
>
> And as folks on this committee know from this summer: A, we're not investigating serious sexual abuse and

sexual assault cases because we don't have the police staff, and then B, we're not prosecuting a lot of these cases because we don't have the prosecution staff. So, I don't see a compelling reason to divert resources to additional sentences, that we haven't heard the crying need for, when those resources will likely come out of the side that I think would be more beneficial to our criminal justice system.

REPRESENTATIVE GRUENBERG directed attention to a proposed amendment provided by the PDA, that which contains an "O" in the lower right-hand corner and which read [original punctuation provided]:

Page 10 line 15 through page 11 line 25: omit proposed new section 19 in its entirety; renumber sections.

Page 14, line 22-30, omit Sec. 25 amendment [AS 12.55.127], renumber sections.

Page 14 line 31 - page 15 line 11, omit sec. 26 amendment [AS 12.55.127, renumber sections.

Page 16, line 26, omit Sec. 28(b).

REPRESENTATIVE GRUENBERG opined that because this language contains conforming changes, it provides the proper way of going about what Amendment 14 proposes to do

Number 0448

REPRESENTATIVE GRUENBERG made a motion to amend to Amendment 14 such that its language be substituted by the language in the amendment labeled "O".

REPRESENTATIVE GARA indicated that he would accept such a change.

CHAIR McGUIRE relayed that Amendment 14 has been amended as suggested by Representative Gruenberg.

Number 0537

A roll call vote was taken. Representatives Gara and Gruenberg voted in favor of Amendment 14, as amended. Representatives Ogg, Samuels, Holm, and McGuire voted against it. Therefore, Amendment 14, as amended, failed by a vote of 2-4.

Number 0581

REPRESENTATIVE GRUENBERG made a motion to adopt Amendment 15, that which contains an "A" in the lower right-hand corner and which read [original punctuation provided]:

Page 2, line 30 - p. 3 line 26

Sec. 4 AS 04.11.491 is amended by adding a new subsection to read:

(g) If a municipality or established village has adopted a local option under (a)(1), (2), (3), or (4), or (b)(1), (2), or (3) of this section, the municipality or established village, as part of the local option question or questions placed before the voters, may

(1) adopt an amount of alcoholic beverages that may be imported that is less than the amounts set out in AS 04.11.150(g);

(2) adopt an amount of alcoholic beverages that would give rise to a presumption that the person possessed the alcoholic beverages for sale; the amounts adopted under this paragraph may be lower than those set out in AS 04.11.010© [sic];

(3) adopt an increased penalty of a class C felony for furnishing or delivery of alcoholic beverages to persons under 21 pursuant to AS 04.16.051(d)(3).

Sec. 5 AS 04.16.051(d) is amended to read:

(d) A person acting with criminal negligence who violates this section is guilty of a class C felony if

(1) within the five years preceding the violation, the person has been previously convicted under

(A) this section; or

(B) a law or ordinance of this or another jurisdiction with elements substantially similar to this section; [OR]

(2) the person who receives the alcoholic beverage negligently causes serious physical injury to or the death of another person while under the influence of the alcoholic beverage received in violation of this section; in this paragraph,

(A) "negligently" means acting with civil negligence; and

(B) "serious physical injury" has the meaning given in AS 11.81.900**; or**

(3) the violation occurs within the boundaries of a municipality or the perimeter of an established village that has adopted a local option and the increased penalty of a class C felony under AS 04.11.491.

Number 0586

CHAIR McGUIRE said that there is an objection, and offered her understanding that Amendment 15 affects the provision pertaining to bootlegging and minor consumption in local option areas.

REPRESENTATIVE GRUENBERG said that Amendment 15 raises the crime of bootlegging alcohol and selling to minors to a class C felony if a community chooses to adopt this increased penalty.

MR. GUANELI clarified that Amendment 15 would require that the municipality or the established village hold a local option election in order to adopt this higher penalty. He said that currently, the proposed CS says that furnishing liquor to minors in an area that has a local option is a felony offense. The purpose of local options are twofold: one, to deal with the problems that alcohol consumption by adults causes; two, to send a message to the children in an effort to protect them against alcohol abuse. Therefore, he opined, it is a particularly aggravated offense when someone in a local option area provides alcohol to the children of that area, adding that he questions whether they should actually force an area to hold [another] local option election for the purpose of determining whether the offense should be considered a felony. The policy of having this offense be a felony ought to be applied across the board.

REPRESENTATIVE OGG raised the issues of enforcement and prosecution.

MR. GUANELI offered:

> All of these offenses that arise out of local option elections are prosecuted by the state; it is something that the municipality or the established village adopts ... as ... the statement of policy in their village [or municipality], and that triggers certain state law violations. So these would be a violation

under Alaska State law, and the [Alaska State] Troopers would enforce it, and the state prosecutors would prosecute it.

REPRESENTATIVE GRUENBERG asked if the DOL would be more comfortable if the language in Amendment 15 were changed to say that it would normally be the felony, but a municipality or established village could opt out of the felony penalty. He indicated that if such a change would make the DOL more comfortable, then he would consider it as a friendly amendment to Amendment 15.

MR. GUANELI relayed that such an alternative would be preferable, but added that he questions whether any villages will actually vote to say that the higher penalty should not apply to people who supply alcohol. He cautioned that if any areas do vote to keep the penalty a misdemeanor, this will result "in somewhat of a patchwork of enforcement areas around the state," but went on to acknowledge that this is just what the local-option system does anyway.

Number 0932

REPRESENTATIVE GRUENBERG [moved to conceptually amend Amendment 15] to make it "an opt out" provision.

Number 0947

CHAIR McGUIRE asked whether there were any objections to the amendment to Amendment 15. There being none, Amendment 15 was amended.

REPRESENTATIVE OGG asked whether this provision would automatically apply to areas that have already voted to become dry or damp.

REPRESENTATIVE GRUENBERG said that areas that have already voted to become dry or damp would automatically have a felony penalty apply to violations unless that village or municipality holds another election to opt out. For those areas deciding the local option question for the first time, there would also be a second question on the ballot regarding whether to opt out of the felony penalty.

[Following was a brief discussion informing Representative Gara about Amendment 15, as amended.]

REPRESENTATIVE GARA expressed a preference for the original version of Amendment 15.

Number 1150

CHAIR McGUIRE, after noting that she was removing her objection, asked whether there were any further objections to Amendment 15, as amended. There being none, Amendment 15, as amended, was adopted.

Number 1237

REPRESENTATIVE GRUENBERG made a motion to adopt Amendment 16, that which contains a "P" in the lower right-hand corner and which read [original punctuation provided]:

> Page 12 line 6 and page 13 line 16.
> Add the words, "**within the last twenty years**."

REPRESENTATIVE GRUENBERG asked Ms. Wilson to explain Amendment 16.

MS. WILSON said that Amendment 16 addresses felony DUI and refusal to take a chemical test, and puts a twenty-year cap on the look-back provision.

Number 1371

REPRESENTATIVE GRUENBERG again made the motion to adopt Amendment 16.

Number 1384

REPRESENTATIVE HOLM objected for the purpose of discussion. He said that he is not convinced that 20 years is the right number.

REPRESENTATIVE GRUENBERG said he would be amenable to a different number.

REPRESENTATIVE HOLM suggested 10 years.

REPRESENTATIVE GRUENBERG said he would accept that as a friendly amendment. He then asked Ms. Wilson whether the PDA would object to such a change to Amendment 16.

MS. WILSON said the PDA would not have any objection to such a change

CHAIR McGUIRE said she would.

REPRESENTATIVE GARA noted that language on page 12, line 4, and page 13, line 14, refers to 10 years. He asked what that pertains to.

MS. WILSON said that those references to 10 years pertain to qualifying for that first felony level. She elaborated:

> If you get your third [DUI] within 10 years, that qualifies for a felony. What we're talking about now is what would be your fourth [DUI], and the bill says, "Once a felony, always a felony, no matter how much time falls between the third and the fourth [DUI].

Number 1468

MR. GUANELI added:

> In order to get a felony under current law, you have to have three drunk driving convictions since January 1, 1996, ... but essentially it means within 10 years, ... so that means you've got to get three in, ... in my mind, relatively quick succession. However, ... let's say you got ... one the first year, [a] second one the second year, and then you waited until the eighth year to get your third one - that third one is kind of hanging out there - your fourth one may not be three within 10 years, ... so it ends up being a misdemeanor offense.
>
> Still, it ends up being your fourth drunk driving conviction ... and you've already been on felony probation supervision, so the purpose of this provision is to say [that] regardless of when you get your fourth [DUI conviction] if you've already been convicted once of a felony, ... the public needs that additional protection of your felony probation again. And whether it's 10 years or 20 years or 30 years later, to my mind, you still have a drinking problem and it's something that the public needs protection for. But ... this is not a legal issue, this is a policy call, and I accept that.

REPRESENTATIVE HOLM removed his objection. In response to a question, he said he would not be offering an amendment to Amendment 16.

Number 1580

CHAIR McGUIRE asked whether there were any further objections to Amendment 16. There being none, Amendment 16 was adopted.

REPRESENTATIVE GARA asked whether members had any problems with Section 17 of the proposed CS.

REPRESENTATIVE GRUENBERG reminded members that Amendment 3 addresses Sections 16 and 17 of the proposed CS.

REPRESENTATIVE GARA clarified that he was referring specifically to subsections (f)-(h) of Section 17, and asked whether the language in those subsections is a big departure from current law and whether members are satisfied with those subsections.

REPRESENTATIVE GRUENBERG replied, "As far as I know."

CHAIR McGUIRE suggested that further discussion regarding those subsections be held over until the bill's next hearing.

Number 1640

CHAIR McGUIRE announced that although some copies of the proposed CS were received from the DOL with some handwritten text on page 8, that text is not intended to be part of the bill, and she asked members to disregard it.

[HB 244 - the proposed CS, as amended - was held over.]

ADJOURNMENT

Number 1660

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 5:00 p.m. [For the presentation by the Alaska Judicial Council see the 1:12 p.m. minutes for this date.]