

**ALASKA STATE LEGISLATURE  
SENATE JUDICIARY STANDING COMMITTEE**

April 15, 2003

5:10 p.m.

**MEMBERS PRESENT**

Senator Ralph Seekins, Chair  
Senator Scott Ogan, Vice Chair  
Senator Gene Therriault  
Senator Johnny Ellis  
Senator Hollis French

**MEMBERS ABSENT**

All members present

**COMMITTEE CALENDAR**

SENATE BILL NO. 170

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

HEARD AND HELD

**PREVIOUS ACTION**

SB 170 - No previous action to consider.

**WITNESS REGISTER**

Mr. John Novak, Chief Assistant District Attorney  
Department of Law  
PO Box 110300  
Juneau, AK 99811-0300

**POSITION STATEMENT:** Commented on SB 170.

Ms. Annie Carpeneti, Atty.  
Criminal Division  
Department of Law  
PO Box 110300

Juneau, AK 99811-0300

**POSITION STATEMENT:** Commented on SB 170.

**ACTION NARRATIVE**

**TAPE 03-23, SIDE A**

#SB170

**SB 170-CRIMINAL LAW/SENTENCING/ PROBATION/PAROLE**

**CHAIR RALPH SEEKINS** called the Senate Judiciary Standing Committee meeting to order at 5:10 p.m. Present were Senators Ogan, Therriault, Ellis, French and Chair Seekins. [This meeting is a continuation of the 4/14/03 meeting that was recessed at 3:05 p.m.]

MR. JOHN NOVAK, Chief Assistant District Attorney, said this bill, if it passes, would allow our communities to be safer.

Regarding section 6, he explained that a person could choose to waive their rights to talk to their parents or an attorney when they talk to the police.

What has happened in the past is that all of a sudden I'll be back there with the police and we'll get paged - and an attorney has shown up at the front desk of the Anchorage Police Department demanding to go in and talk with the person being interviewed - despite the fact that the person being interviewed hasn't requested an attorney nor does he or she want to talk with an attorney.

Current statute provides the attorney a right to interrupt that interview. So, it is a right apart from the person being interviewed.... It shouldn't be - simply because you are a member of the bar - give you the right to intercede or interrupt a police interview trying to find out what the truth in that situation is.

SENATOR ELLIS asked if this wasn't really about the rights of the relatives who find out this person is being questioned and called a family attorney to provide legal representation to their family member. It's not really attorneys wandering in off the street interrupting interviews.

MR. NOVAK replied that could be the context. He hasn't been involved in the communications about why the lawyer gets there. However, if Mom or Dad showed up at the counter, they would not be entitled to interrupt the interview. "Simply because someone is a lawyer, they have a right to interrupt that interview."

SENATOR OGAN asked what other states were doing what Alaska is proposing.

MR. NOVAK replied that he never heard of a state that has a statute similar to Alaska's - giving an attorney the right to interrupt the interview when it's not at the request of the person being interviewed.

SENATOR OGAN asked if he knew that for a fact.

MR. NOVAK replied that he hadn't researched it, but it was his experience talking to other prosecutors.

SENATOR OGAN asked if the reason for having the Miranda was so that a person could have representation by an attorney so they are not coerced into making incriminating statements. A classic technique is the good cop/bad cop routine.

MR. NOVAK responded that in order for a prosecutor to use any statement, they would have to prove regardless, that it was voluntary, knowingly and intelligent. "If it was coerced, we couldn't use that at all."

He said the interviews are recorded on videotape and that people have a right not to talk to the police and a right to have an attorney present; people also have the right to talk and to confess.

I am not troubled by the fact that they exercised their right to confess and admit things, as long as it's truthful...The purpose of the Miranda is to tell them what their rights are and then they make a decision.

SENATOR OGAN noted that Miranda kicks in only when the arrest happens. Before the arrest, while they are being interviewed or investigated, they don't have a right to have an attorney present and what they say can be used against them in a court of law.

MR. NOVAK agreed and replied that what triggers the Miranda is when someone is in custody that a reasonable person wouldn't feel free to leave. It could be short of a formal arrest, which is when you are restrained and told you are under arrest and what you are charged with. "General practice at APD is, once people go to the police station at the request of the police, to advise them of their Miranda rights."

SENATOR THERRIAULT said he, too, was interested whether any other states have similar language. He then asked about the drafting style.

MS. ANNIE CARPENETI, Criminal Division, explained that the styles are optional and it is an issue of clarity. However, the Department of Law prefers to show the amendments so it's easier to see what has changed when it's read. They did not repeal and reenact in this instance.

SENATOR THERRIAULT said it seems odd to him that if he calls to tell a friend that the police picked him up and the friend sends an attorney that he wouldn't want to see the attorney.

CHAIR SEEKINS noted the bill gives the prisoner enumerated rights that are outside of the Miranda rights and he wondered whether the prisoner is advised of those rights.

MR. NOVAK replied the first right is to telephone or otherwise communicate with the prisoner's attorney and there is actually case law saying the state does not have to advise them of that right unless they are a juvenile. The second one is the right to telephone or otherwise communicate with a friend or relative and it's the same. Miranda would cover the third one and the fourth one would be applicable only to juveniles.

CHAIR SEEKINS asked how someone would know they have the right.

MR. NOVAK said that is a good question, but they might know from prior dealings with law enforcement.

CHAIR SEEKINS said hypothetically a first time arrestee might be innocent and scared to death. He thought they should know of those rights as a matter of justice.

MR. NOVAK replied that he wasn't disagreeing, but that is how the Miranda warning came about. Prior to that, there was no requirement to advise of those rights.

CHAIR SEEKINS asked what is in statute that would protect someone with diminished mental capacity so they would know they have these rights.

MR. NOVAK responded that the prosecutor would have to establish that any statement was made knowingly, intelligently and voluntarily. A juvenile has extra rights; they have to be notified that they can call their parents before they make a decision.

Section 7 is a response to a recent appellate case and the context is that the Legislature decided a couple of years ago to create a crime of felony DWI. The elements are two prior convictions for DWI in the last five years and that the offense of drunk driving is presently being committed. The idea is to have the jury hear all the evidence concerning the elements that the state has to prove. The court has said that there should be two separate trials, one about the case on whether he's driving drunk now and a separate trial on whether or not he's got the two prior convictions in the previous five years.

New language allows the prosecution to present the case and allows the jury to know why it is that 12 of them are sitting in what appears to be a misdemeanor DWI case rather than being kept in the dark.

SENATOR FRENCH said he worked with Mr. Novak for six years and respected his service. Mr. Novak mentioned a felony in possession and his experience is that first there is a trial on whether or not this person possessed a gun and then there is a trial on whether or not the person is a felon.

MR. NOVAK explained that he was referring to the McLaughlin case. Usually there is a separate trial if there are other charges. A felon with an assault would be tried separately so that the jury would not know that the person is a felon first. In the McLaughlin case, the court of appeals said there shouldn't be separate trials.

Sections 8, 9, 10, 11, 12 and 17 all deal with a single issue, which is when a witness asserts a Fifth Amendment claim that they are going to incriminate themselves by testifying. The context is typically in a situation where the attorney is talking to a witness ahead of trial about procedures. He then comes to court the next day and announces he's going to assert the Fifth Amendment privilege and not testify. At that point, the jury is excused and the witness gets a lawyer. Then the

witness, with his lawyer, goes into the chamber with the judge and no one else. After that, the judge will say whether he has a valid Fifth Amendment privilege. He would then have to ask the judge what he would have to promise not to prosecute him for to compel him to testify. The answer will be, "I'm not going to tell you that."

As a lawyer, he has no way to judge what he can do to have the witness testify. His options are to say the state will give the witness immunity for anything he testifies about. This is not real attractive because if he's going to testify that he killed somebody last week and they don't know about that, the prosecutor would have just given him immunity from that unsolved homicide. This provision of the law says the prosecutor needs to know what crimes the witness has a valid Fifth Amendment claim against so he can make an intelligent decision to grant the person immunity for those crimes and compel them to testify rather than being on a walk in the dark. At this point, everyone would go into the judge's chambers; the witness's attorney would explain to the judge what the exposure is for potential crimes; the court would make a finding on whether they have a valid Fifth Amendment claim and for what crimes and they would turn to the prosecutor and ask if he is willing to give him immunity for possession of cocaine or whatever. The prosecutor can then make a good decision. Right now, he is totally kept in the dark and has no way to evaluate that.

SENATOR OGAN said the Alaska Constitution says the government must make its case without requiring the defendant to cooperate as a witness. The reason for the Fifth Amendment is so that the information can't be used at the trial, but it might be given to the police to investigate.

MR. NOVAK said the statute expressly provides that that information can't be used or passed along to the police to investigate.

SENATOR OGAN asked what would happen if this bill passes and he decides not to grant immunity because it isn't worth it.

MR. NOVAK replied that it really depends on what the issues are. He wouldn't give immunity for a greater crime so someone would testify on a lesser case.

SENATOR OGAN wondered what happens if a person incriminates himself without immunity.

MR. NOVAK responded that from his point of view it would be criminal for a defense attorney to allow that to happen.

SENATOR FRENCH said that prosecutors occupy a special role in the justice system. They aren't out to convict people; they are out to do justice. A defense attorney is trying to get his client off. It's a mismatch and the immunity area is frustrating. For example, if there is a witness in a sex assault case who was at party and can give good evidence, usually a defense attorney gets to them and scares them about testifying. He pointed out that Mr. Novak is trying to do something to make more witnesses available to tell the truth on the stand without fear of prosecution for what they may have seen or done in a particular situation.

SENATOR OGAN said immunity doesn't seem to be a certain thing under the new language.

SENATOR FRENCH asked Mr. Novak to describe how immunity works now.

MR. NOVAK explained that he could lose his job if he granted immunity to the wrong person; in other words, if he granted immunity to the triggerman.

**TAPE 03-23, SIDE B**

Typically, the witness says he has a Fifth Amendment privilege, but the prosecutor doesn't know what it's being applied to. If he finds out that the privilege is smoking marijuana, he can give the witness immunity for possession and consumption of marijuana. In doing so the court will say, "Okay, having been granted immunity for that, now you don't have any choice. You have to testify."

SENATOR THERRIAULT added that with the changes, the witness's lawyer could say the client is afraid to disclose that he had a controlled substance that night and the judge could offer to waive that charge right there.

SENATOR FRENCH asked how they try to deal with it now.

MR. NOVAK replied they try to have the witness agree in writing that they will testify in exchange for certain promises. This is a way to force someone to testify and still protect Fifth Amendment privileges.

SENATOR FRENCH asked if any other states do it this way.

MR. NOVAK acknowledged he didn't know, but very few other states have transactional immunity. In most other states, all he would have to do is agree with the witness that nothing they say at trial will be used against them and therefore, they are forced to testify.

MR. NOVAK continued saying that sections 13 - 14 and 18 - 20 deal with the concept of consecutive sentencing, which is adding one sentence on top of another. In 1982, the Legislature enacted a law that says if you have multiple victims in a case, the sentences should be consecutive. However, this legislation does not seek to go back to 1982. This legislation would result in people serving longer sentences and make the mandatory minimum sentences run consecutively.

SENATOR ELLIS said he agrees with this provision. He read through some drunk driving cases with multiple victims and feels that the sentences were not long enough. He asked if this is a recommendation the Sentencing Commission had several years ago.

MR. NOVAK said he didn't know, but would find out.

CHAIR SEEKINS asked if this also made some parole changes.

MR. NOVAK replied yes and that it would make some difference in parole eligibility, which is dependent upon the mandatory sentences. The bottom line is it will result in longer sentences when there are multiple victims.

CHAIR SEEKINS asked about section 15.

MR. NOVAK said section 15 deals with situations where someone has a prior felony conviction and is convicted of a new felony. This triggers presumptive sentencing.

So, if I've got a prior felony and I commit a class C felony offense, what that says is then, the court presumptively should impose a two-year term of incarceration, absent degrees, and it can deviate up or down - mitigators and aggravating factors. What this does is limit the ability to have to re-litigate that prior conviction.

This means if a person had a right to jury trial and right to counsel in connection with that prior conviction, that won't be retried in the new felony offense.

Section 16 is a proposed mitigating factor. If someone pleads to a sexual assault against a child or adult, this would allow the court the authority to take that into consideration and "reward" that person for not dragging the victims through that prosecution.

You could look at this as punishing people for exercising their rights or as rewarding people for accepting responsibility and preventing the state from having to drag little kids through trial.

SENATOR FRENCH noted that AS 11.41.470 is the definition in the sexual assault statute and Mr. Novak might want the definition in AS 11.41.460. He also asked whether Mr. Novak objects to increasing the 30 days for discovery issues to 45 days.

MR. NOVAK replied he thought 30 days is fairly generous to the defense, because this is post superior court, after a grand jury. However, there isn't a great difference between 30 and 45 days.

CHAIR SEEKINS told Senator French that he could offer that amendment if he wanted to.

MR. NOVAK discussed section 21 - 23 dealing with disclosure. The state and defense must notify each other ahead of trial about their expert witnesses and their defense. The idea is that the criminal justice system shouldn't be a game; it should be a search for the truth. This section imposes sanctions if you don't comply with disclosure seven days before trial. He gave an example of a murder case on St. Paul Island that was a logistical nightmare to prosecute and was made more so when the defense attorney changed the defense to alcohol blackout the day before the trial began.

Section 24 is a provision that would bring Alaska in compliance with most other states in terms of allowing someone to change their story when they are testifying if they haven't been advised of their Miranda rights. Without this provision, the prosecution would have to prove that the statement is knowing and voluntary and not tricked or coerced.

SENATOR FRENCH agreed and said it is very frustrating to know that someone can take the stand and lie. "You have a statement directly to the contrary in your trial notebook that you can't use to impeach him with."

He noted that the section is written such that after three readings he feels that it is about a perjury prosecution.

MR. NOVAK assured members that an appellate court would interpret the language in a light most favorable to the defendant.

CHAIR SEEKINS told Senator French that he would appreciate any work he could do to clarify the language.

MR. NOVAK agreed the section should be redrafted and went on to explain section 25. Currently, if someone testifies and has prior convictions of crimes involving dishonesty, it can't be used unless the date of the conviction for that offense is five years or less prior to the date that person actually testifies. This seeks to address situations where a person would still be in jail serving a sentence. It changes language to the date after they are released from probation.

Section 26 relates to domestic violence (DV) cases and the fact that the perpetrator frequently continues the violent cycle if the victim doesn't press charges.

Over time, a number of things have changed. Mandatory arrest laws have been created and now prosecutors may use prior instances to prove that he or she once again battered the same person. This section is another effort to expand the evidence that would be available to the state at trial.

Currently the law says that if a victim were to call 911 that call is admissible at the prosecution. This expands that to acknowledge that the victims are sometimes pressured to recant.

SENATOR FRENCH asked if this is an exception to the hearsay rule that is traditionally unreliable.

MR. NOVAK replied yes.

SENATOR FRENCH said the reason he is concerned about the 24-hour rule is that by the time the police get to the typical DV setting, the recanting has begun. A woman who is obviously bloody will come to the door and say that she fell down or that

no one is there yet the husband is hiding in the closet. All those statements would be let in, and the defense would go crazy.

MR. NOVAK agreed and said typically, the state presents evidence including the statement given to the police and then the defense brings the victim in to testify and she recants because the defendant and his family don't want the case to go forward. He said he believes this would further the search for the truth.

He said the remaining parts are sections 1 - 5 that deal with self-defense.

6:32 p.m. - 6:35 p.m. - at ease

CHAIR SEEKINS announced that sections 1 - 6 would probably take as much time as the other sections and they would take them up after the Easter break.

SB 170 was held in committee.

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CHAIR SEEKINS adjourned the meeting at 6:36 p.m.