ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE
March 10, 2004
8:05 a.m.

TAPE(S) 04-17,18

MEMBERS PRESENT

Senator Ralph Seekins, Chair
Senator Gene Therriault
Senator Hollis French

MEMBERS ABSENT

Senator Scott Ogan, Vice Chair
Senator Johnny Ellis

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 COMMITTEE ACTION

BILL: SB 170
SHORT TITLE: CRIMINAL LAW/SENTENCING/ PROBATION/PAROLE
SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

04/04/03	(S)	READ THE FIRST TIME - REFERRALS
04/04/03	(S)	JUD, FIN
04/11/03	(S)	JUD AT 1:30 PM BELTZ 211
04/11/03	(S)	<Bill Hearing Postponed to 4/14/03>
04/14/03	(H)	JUD AT 1:00 PM CAPITOL 120
04/14/03	(S)	Scheduled But Not Heard
04/15/03	(S)	JUD AT 5:00 PM BELTZ 211
04/15/03	(S)	Heard & Held

04/15/03	(S)	MINUTE(JUD)
04/24/03	(S)	JUD AT 4:00 PM BUTROVICH 205
04/24/03	(S)	Heard & Held
04/24/03	(S)	MINUTE(JUD)
05/14/03	(S)	JUD AT 0:00 AM BELTZ 211
05/14/03	(S)	-- Meeting Postponed to 5/15/03 --
05/15/03	(S)	JUD AT 8:45 AM BELTZ 211
05/15/03	(S)	-- Meeting Rescheduled from 5/14/03 --
05/16/03	(S)	JUD AT 1:00 PM BELTZ 211
05/16/03	(S)	<Above Item Removed from Agenda>
05/16/03	(S)	MINUTE(JUD)
03/05/04	(S)	JUD AT 8:00 AM BUTROVICH 205
03/05/04	(S)	<Bill Hearing Postponed>
03/10/04	(S)	JUD AT 8:00 AM BUTROVICH 205

WITNESS REGISTER

Ms. Susan Parkes
Deputy Attorney General
Criminal Division
Department of Law
POSITION STATEMENT: Presented the changes made in version H of SB 170

Mr. Paul Harris
Fairbanks Chief of Police
800 Cushman St.
Fairbanks, AK 99701
POSITION STATEMENT: Supports the changes made to SB 170 in version H

Mr. Ray Brown
Dillon and Findley PC
350 N Franklin St.
Juneau, AK
POSITION STATEMENT: Expressed caution about the unconstitutionality of the immunity provision in version H of SB 170 and expressed concern about Section

Ms. Cindy Cashen
MADD Juneau Chapter
211 4th St.
Juneau, AK
POSITION STATEMENT: Stated support for version H of SB 170

Lt. Al Storey
Alaska State Troopers

Department of Public Safety
PO Box 111200
Juneau, AK 99811-1200
POSITION STATEMENT: Stated support for version H of SB 170

Ms. Linda Wilson
Alaska Public Defender Agency
Department of Administration
900 W 5th
Anchorage, AK 99501-2090
POSITION STATEMENT: Expressed concerns about several sections of version H of SB 170, particularly the unconstitutionality of the immunity provision.

ACTION NARRATIVE

TAPE 04-17, SIDE A

CHAIR RALPH SEEKINS called the Senate Judiciary Standing Committee meeting to order at 8:05 a.m. Senators Therriault, French and Chair Seekins were present. Senators Ogan and Ellis were excused. The committee took up SB 170.

^#SB 170

SB 170-CRIMINAL LAW/SENTENCING/ PROBATION/PAROLE

MS. SUSAN PARKES, Deputy Attorney General, Criminal Division, Department of Law (DOL), told members she has been with DOL since 1987. She has spent all of her career, except 2½ years, doing criminal prosecutions. She believes the bill addresses some very real problems facing the law enforcement community and prosecutors by addressing gaps in the current law. She pointed out the committee substitute (CS) before the committee (version H) is very different from the version that was before the committee last year. The administration assessed concerns expressed about SB 170 last year and tried to balance protecting citizens' rights in the criminal justice process with protecting communities.

SENATOR THERRIAULT moved to adopt version H as the working document before the committee.

CHAIR SEEKINS announced that with no objection, the motion carried.

MS. PARKES reviewed version H as follows.

The first important provision of the bill pertains to the consecutive sentencing provisions (Sections 23, 24, 30 and 31). Those provisions remain identical to the original bill. The intent of the original sentencing provisions in statute was to give judges discretion to impose consecutive terms for multiple crimes. However, because of poor drafting, those statutes have been interpreted to allow judges to impose concurrent terms so, essentially, a person who is convicted of assaulting five people could end up with the same sentence as a person who assaulted one person. Version H mandates that in certain situations, judges must impose consecutive terms; it mandates a particular amount of time for very serious felonies and gives the judge discretion to determine the appropriate amount of time for lesser felonies.

The immunity provision, in Sections 21, 22, and 25, addresses the problem of prosecutors having to blindly decide whether to grant immunity when witnesses request immunity. The original bill contained a standardized process for determining whether a witness had a valid Fifth Amendment claim. It allowed the prosecutor to attend the hearing where that decision was made. That issue raised a lot of concerns and is no longer part of the proposal. The issue for prosecutors is that granting transactional immunity for any crime a person might testify on is a powerful responsibility. Prosecutors want to make that decision with as much knowledge as possible of whether they are granting immunity for a misdemeanor or a felony. In version H, an ex parte hearing will be held in front of the judge without the prosecutor present. If the judge determines the witness has a valid Fifth Amendment claim, the judge informs the prosecutor of such and of the level of crime to which it applies. That way, the prosecutor will know what level crime he or she is granting immunity for. She recounted in a recent case, a babysitter had murdered the child she was caring for. The victim’s mother had left her other children alone for a period of time so refused to testify against the babysitter for fear of being charged with child neglect. The prosecutors were unable to learn until much later why the mother would not testify in a homicide case involving her own child. She said the current law disrupts prosecutors’ ability to prosecute some very serious cases.

The self-defense provision in the original version raised serious concerns. That provision is now located in Sections 18 and 19. Under current law, a judge is required to allow a self-defense claim if there is some evidence, even implausible evidence, of a self-defense claim. The new provision aligns with

federal law, which requires the defendant to produce enough evidence to support a self-defense claim that a rational jury could find that the defendant acted in self-defense. Sections 18 and 19 require that some plausible evidence be presented that a jury could rely on to find that the defendant acted in self-defense. Once that evidence is found, the burden remains on the state to prove beyond a reasonable doubt. She asserted that this approach will weed out unmerited claims of self-defense that only serve to distract a jury and waste resources.

The second part of the self-defense provision is intended to address gang shoot-outs, in which everyone points the finger at the other guy. Because the prosecutor cannot prove who fired the first shot, no one is prosecuted even if an innocent bystander is hurt. The current statute lists specific situations in which a self-defense claim does not apply, for example to a first aggressor. Version H provides that a defendant who is involved in a drug deal or is a member of a criminal gang acting in furtherance of criminal intent does not get to claim self-defense. She said the intent is to prevent people who are involved in shoot-outs on public streets from skirting prosecution by claiming self-defense.

8:16 a.m.

SENATOR THERRIAULT asked if the different constituency groups reviewed the new language.

MS. PARKES said she was told that it was reviewed by some of the different constituency groups and, as of yesterday, they felt it addressed their concerns. Those groups intend to further evaluate it. She pointed out the self-defense claim exclusion would not apply to a citizen homeowner who is confronted with a situation at home or on the street with his/her family.

CHAIR SEEKINS asked, “This does eliminate John Wayne and the bad guy at high noon on Main Street?”

MS. PARKES said that would be considered as mutual combat and under the current statute that would not meet muster for self-defense. She continued her explanation of version H.

Section 13 is a new provision that pertains to the felony murder provision. Alaska currently has a felony murder provision under murder in the second degree. That statute indicates that if people attempt to commit a serious felony and the felony is articulated and, in the course of the furtherance of that crime

someone is killed, all those involved can be charged with murder in the second degree. The underlying theory is that if a person is willing to engage in such dangerous activity as robbery or sexual assault, it is a foreseeable consequence of that conduct that someone will die. Version H would expand that provision to include the death of a participant based on the logic that a death is a foreseeable consequence so it should be extended to a participant. She advised that if A and B rob a liquor store and A shoots the clerk, A and B will both be charged with the murder. It will give prosecutors the ability to take very dangerous people off of the street for a longer period of time.

CHAIR SEEKINS asked if other state laws were used to draft that provision.

MS. PARKES replied:

> There are. I did some research. It is the minority. There are states that have similar to what we have.... Many states use felony murder to get this type of a situation to a murder one level but California appears to have this, [as does] Montana, Wisconsin, and the Federal 11th Circuit. Interestingly, Florida has two felony murder laws - one where if it's a non-participant it's a murder in the first degree, if it's a participant it's murder in the second degree, so they make that kind of [distinction] as to whose life is worth more. So again, that's a new proposal.

MS. PARKES continued with the description of the changes made in version H.

Several sections deal with one of the critical problems facing Alaska, that being alcohol. Sections 26 and 28 propose that once a person is convicted of a felony DUI, every subsequent conviction would be a felony. Because of the current look-back provision and timing of prior convictions, a person could have 5 misdemeanor convictions and 1 felony conviction, and then get another misdemeanor DUI conviction. DOL believes that once a person has been convicted as a chronic, dangerous drunk driver, each further conviction should be a felony.

Sections 27 and 29 address a problem that has arisen in DUI prosecutions. A recent court opinion, Conrad v. State, allowed a new "big gulp" defense. Currently, the "big gulp" defense in a DUI case occurs if the defendant can prove he drank after driving so his blood alcohol level did not apply while driving.

In the Conrad case, the court said it was appropriate to allow a defendant to argue that he took a big gulp of alcohol just prior to driving and, when stopped by the police, his blood alcohol level (BAC) wasn't above the legal limit but by the time he was tested at the station his BAC rose above the legal limit. DOL does not believe that was the intent of the law and that it encourages a battle of the experts at the trial to talk about rising levels of breath alcohol.

Section 14 addresses the problem of drivers whose BAC is below the .08 level and get into a vehicular collision and seriously injure another person. Because they are not at the .08 level, a prosecutor cannot find that they acted recklessly but might prove they acted with criminal negligence. Under current law, such a driver can be charged with assault in the fourth degree, which is a misdemeanor. She noted that studies show that almost any amount of alcohol will begin to affect a person's judgment and ability to respond. She related that a person with a BAC of .05 might drive on slippery roads and cause a permanent disability to someone else, yet the prosecution can only charge the driver with assault in the fourth degree. The assault in the fourth degree statute speaks to physical injury due to criminal negligence with a dangerous instrument. DOL would like to add assault in the third degree to that statute to address such situations.

MS. PARKES told members the rest of the alcohol provisions address problems primarily found in rural communities. Many communities have banned or limited the use of alcohol. The provisions in the bill are aimed at strengthening communities' ability to do that. Sections 1 through 4 pertain to the local option statute. Some communities have chosen to lower the limits set in that statute. Sections 1 through 4 will allow the state to enforce lower limits set by a community.

Sections 5 and 6 will plug a loophole in local option laws that arose in a Bethel case. Under current local option laws, when a city chooses to go with a local option, it applies within a five-mile radius from the center of that municipality. However, because some smaller communities are very close together, that five-mile radius overlaps other communities that may have a conflicting or no local option law. The Bethel case brought to light that when local option areas conflict, none apply so the local option area would only apply to the village itself or the center of the municipality. Sections 5 and 6 provide that if local option laws overlap, the least restrictive law would apply

in the overlapping areas. If a local option area overlaps with a community without local option, no law would apply.

Section 8 aligns the current forfeiture law for bootlegging with the forfeiture law for drug dealing. Under current bootlegging provisions, cash and other negotiable instruments are not forfeited. Section 8 adds cash to the list of items that can be forfeited when the cash is a profit from bootlegging.

Section 11 also applies to forfeiture and allows the state to share forfeited items in bootlegging cases with municipal law enforcement agencies that assisted in the case. DOL hopes this will encourage cooperation among law enforcement agencies. In addition, it is sometimes not economically feasible to remove a seized item from a rural area.

Sections 9 and 10 strengthen the ability to forfeit vehicles, watercraft and aircraft for bootlegging. Currently a third party owner can claim he or she didn't know the vehicle was going to be used for bootlegging. This provision requires the third party to show he or she didn't know and didn't have reason to know, so that a third party cannot just turn a blind eye to what is going on. Sections 9 and 10 describe some of the ways a person should be on notice. For example, in Section 10, a third party could show that the offender had no prior criminal record for bootlegging or had not committed other violations.

Section 11 sets out aggravated circumstances for which forfeiture becomes mandatory, i.e., if someone has a prior conviction for a similar offense. Section 11 contains an exception: if a vehicle is the sole means of support for a family in a village and the family has no culpability, the judge is not required to forfeit the vehicle.

CHAIR SEEKINS asked how the forfeiture provision applies to lien holders.

MS. PARKES replied:

> We're facing that in the DUI forfeitures and lien holders are treated as innocent third parties and so they keep their interest and we don't forfeit a vehicle, for example, in the DUIs. If we see the vehicle – that the loan on it is worth more than the car, you know - we give it back to the innocent third party. We don't forfeit those kinds of vehicles. The

intent is not to harm any innocent third party, like lien holders.

CHAIR SEEKINS asked if the intent is to protect the interest of an innocent third party.

MS. PARKES affirmed that is correct. She added that forfeiture is aimed at the interest of the defendant, or a third party who knew the vehicle would be used for illegal activity.

CHAIR SEEKINS asked if the bootlegging offense involved a $10,000 boat, how a bank with a $5,000 lien on the boat would protect its interests. He questioned whether the boat would be sold and if the proceeds would be used to pay the lien.

MS. PARKES said DOL works with the Alaska State Troopers (AST) on those details. Sometimes, especially given the proximity of the item, the state may choose not to forfeit because of the cost of moving the item. She deferred to the AST for the details.

CHAIR SEEKINS commented that Alaska is a deficiency state regarding repossessions, and that Federal Trade Commission statutes speak to how a repossessed vehicle would be sold and the interests protected.

MS. PARKES continued with her description of version H of SB 170.

Section 7 contains a proposal that recognizes how destructive alcohol is to young people in local option areas. Currently, furnishing alcohol to a minor is a class A misdemeanor anywhere in the state. This proposal makes that offense a class C felony in a community that has decided to go local option. DOL has found that no only is alcohol destructive to the health of a young person, it also makes he/she more likely to become the victim of a crime or to commit a crime.

Section 17 deals with third party custodians. Alaska judges release defendants on bail to the custody of third parties frequently. That statutory provision was created as an alternative release option for folks who cannot provide monetary bail. Third party custodians state under oath that they understand the conditions of release and promise to report violations of the conditions of release. DOL is finding that some third parties do an excellent job; however, others thumb their noses at the court and once outside the court building,

may never see the defendant again. As an example, she recounted that a felony DUI defendant was released to a third party and was stopped for to drunk driving with the third party in the passenger seat. This bill would create a new misdemeanor crime if a third party fails to report a violation immediately. The Municipality of Anchorage (MOA) has a similar ordinance, which works well and is used in egregious situations. DOL would like the opportunity to do the same. DOL wants to send the message that third party custody is a serious responsibility.

Section 32 pertains to disclosure of information about a juvenile adjudicated sex offender. The Human Services Section of DOL proposed this change because social workers have encountered situations in which they were unable to disclose information when the safety of children was at risk. Current statute does not allow any member of the public to be told about adjudication for a sex offense by a juvenile. Ms. Parkes said the records are not made public for good reason, however, when the safety of a child or vulnerable adult is at stake, the balance tips and the agency should be able to inform the public of the adjudication. She offered that releasing that information to someone who is considering hiring a babysitter who is an adjudicated sex offender is a good example.

CHAIR SEEKINS asked whether the public or only the person making the request would have the right to know.

MS. PARKES said the person making the request.

CHAIR SEEKINS asked if there are any boundaries on what that person can then disclose.

MS. PARKES said that is a good question. She does not believe any penalty provision exists for revealing that information and that is of concern.

SENATOR THERRIAULT asked if he hired a babysitter, could he contact an agency to inquire if that person was adjudicated.

MS. PARKES said DHSS would be the record keeper and is looking at how it would address some of these concerns. The details could be further elaborated in statute or regulation. Current provisions detail when schools or law enforcement can be notified.

8:45 a.m.

SENATOR FRENCH asked if the parent of an elementary school student could obtain that information on a high school student who walks through the neighborhood everyday on the way to school.

MS. PARKES said that is not the intent of this provision. The intent is to provide the information if a specific child or vulnerable adult is at risk. She repeated those details would have to be fleshed out by the agency.

SENATOR FRENCH asked if the intent is to prevent one-on-one contact or contact in very close proximity.

MS. PARKES said those are the types of situations she is aware of that prompted this proposal but, if others exist, they need to be fleshed out to assure that all appropriate situations are encompassed.

CHAIR SEEKINS stated:

> I could just see we could end up with a de facto registry put together by a community activist group. I'm just a little concerned that we have to make sure that there were some boundaries there I think, not that I want to protect...are sex offenders from being able to practice their craft in secret, but just for normal reasons I'm sure you understand.

MS. PARKES understood and said DOL believes the balance needs to tip for specific situations only.

Sections 15 and 16 also apply to juvenile sex offenders. Right now, any sex offense committed by someone 15 or under, whether that be contact or penetration, with a child who is three years younger or more, is a misdemeanor. DOL is proposing that penetration become a felony. That would bring the existing law into parity with adult laws. She pointed out a 15 year old could break into a home and steal a bike and be charged with a felony but would be charged with a misdemeanor for sexually penetrating a two year old. These cases would remain in the juvenile system. Sections 15 and 16 would also have ramifications if the juvenile committed an adult offense because adjudication as a juvenile would be used as an aggravator. She offered to answer questions.

SENATOR THERRIAULT asked for an explanation of how Sections 5 and 6 would work.

MS. PARKES explained that right now, when a municipality or established village votes to go with local option, a five-mile radius from the center of that village applies. However, current statute is written so that if the five-mile radius of two adjacent villages overlap and the local option conflicts, no five-mile radius exists for the local option area. Sections 5 and 6 would apply the least restrictive local option to an overlapping area. If the five-mile radius overlaps with an area having no local option law, the law would not be enforced onto the area with no local option.

CHAIR SEEKINS noted for the record that his son works for Ms. Parkes at DOL. He then expressed concern with the definition of an established village in AS 04.16.220 because an established village is virtually any community that is not within a municipality, a spot 15 miles outside of a municipality that is off the road system, or 50 miles if it is on the road system of another organized municipality of 25 people. He surmised if the Pilgrim family adds 8 more members, it could set alcohol importation levels for that area. As such, it is not really a political subdivision of the State of Alaska yet the group could set a standard under which a person could be charged with a felony.

TAPE 04-17, SIDE B

CHAIR SEEKINS questioned whether the Legislature can give an unincorporated group of 25 or more people that fits within that definition the ability to set standards for which another Alaskan could unknowingly become a felon. He said he is not trying to attack the ability to keep alcohol out of a dry community but questions at what level the Legislature can assign that duty as a state.

MS. PARKES responded that established villages are addressed throughout Title 4 but she could not answer the question and was not sure if case law has addressed the constitutional question. She offered that DOL would continue to research that question.

SENATOR THERRIAULT asked about the broad heading of Title 4.

MS. PARKES replied it is “Alcoholic Beverages.”

CHAIR SEEKINS read AS 04.21.080:

(9) "established village" means an area that does not contain any part of an incorporated city or another established village and that is

(A) an unincorporated community that is in the unorganized borough and that has 25 or more permanent residents; or

(B) an unincorporated community that is in an organized borough, has 25 or more permanent residents, and

(i) is on a road system and is located more than 50 miles outside the boundary limits of a unified municipality, or

(ii) is not on a road system and is located more than 15 miles outside the boundary limits of a unified municipality;

He repeated that Sections 5 and 6 give a group of 25 people the ability to determine what constitutes a felony in their community with no public notification or election process.

MS. PARKES noted that an election would be required.

CHAIR SEEKINS pointed out that the state has election law standards for municipalities and incorporated communities but they may not be in place for other communities that are not incorporated. He then announced that he would take public testimony at this time.

9:00 a.m.

MR. PAUL HARRIS, Director of the Fairbanks Police Department, stated support for version H of SB 170. He informed members that he began his law enforcement career in 1972 in Alaska, is a retired Alaska State Trooper, and is involved with the Alaska Police Officers Association, the Paternal Order of Alaska State Troopers, International Association of Chiefs of Police, and the Police Standards Council.

MR. HARRIS said he believes this legislation addresses many of the loopholes in law enforcement since the new criminal code was enacted. Alaska's local option laws have been used across the United States as a model. Those laws have worked well but the changes in SB 170 will add to it. Changing the forfeiture law to put alcohol on the same level as other drugs will take the profit motive away from bootleggers and give the statute teeth, as will the ability to take equipment and cash from bootleggers. He noted that the change to the felony murder rule and the

changes made to immunity and a self-defense claim will provide law enforcement with tremendous tools to get violent offenders off the streets.

He offered that adding a new section to the criminal code is always hard to deal with especially when it appears to put more restrictions on citizens, but in regard to violation of custodial duty, often crime suspects have value to the community, especially when employed. By allowing them to be released to third party custodians, they and their families do not suffer tremendous economic impacts. However, what often happens is a loose knit group of people in which one member has no criminal record becomes the third party custodian for anyone who gets in trouble. The current law has no teeth to get these custodians to report violations correctly. This new section will motivate those people to live up to the responsibilities of a third party. It will allow law enforcement to take action to ensure the third party is meeting the conditions imposed by the court. Mr. Harris said this will provide a great tool that law enforcement has needed for a long time.

MR. HARRIS repeated that the legislature did a great job revising the criminal code in the 1970s but every once in a while changes are necessary. This version will add tools for law enforcement to made the code work better.

MR. RAY BROWN, a partner in the law firm of Dillon and Findley, told members he was asked by the Public Defender Agency to speak on this bill. He informed members that he is the former training director of the Public Defender Agency and a former prosecutor. He is married to a retired state trooper and Susan Parkes and Anne Carpeneti, who put this bill together, are his friends. He said he primarily practices white-collar criminal defense in federal court. He said he has a significant degree of knowledge and expertise in the area of immunity as he argued at the state and trial court and the supreme court case of Gonzales v. State. The judicial decision from that case states that under Alaska’s Constitution, transactional immunity is required.

MR. BROWN said he has a great deal of empathy for [prosecutors] because it is very difficult to decide whether to grant immunity, particularly when multiple offenders are involved. Alaskans have chosen, via the constitution, not to compel a person to give information against him or herself.

SENATOR FRENCH clarified that Sections 20 through 22 pertain to immunity sections.

MR. BROWN continued. Gonzales v. State requires, before a person can be compelled to provide information or testimony, particularly if it provides a link to the successful prosecution of a case, that the person must be given transactional immunity. He firmly believes that Section [22] violates Gonzales v. State and would require a constitutional amendment to change transactional immunity to use immunity found in the federal system. He said many of the changes to the immunity section are an admirable desire of the prosecution, but he does not believe they would pass the Gonzales or transactional immunity muster.

As an example, MR. BROWN said in many of these cases, multiple defendants are involved with different levels of culpability. Perhaps the defendants included the killer, the person who sold the gun to the killer and was present at the scene, and a cocaine dealer who witnessed the shooting. If law enforcement officers could not figure out who the shooter was, they could do it through the process of elimination via the procedure proposed in Section 22 (i), which is unconstitutional. He hopes any solution to this problem would be gleaned through mutual discourse between the defense and prosecution and would satisfy the constitutional requirements and the prosecution's needs. He understands the prosecution's needs because the shooter could be given immunity while the two other less culpable people go to trial on the principal offense. He said he does not know how to get around that and also avoid spending thousands of dollars of state resources on a public defender, the Office of Public Advocacy and a private attorney to go to the Alaska Supreme Court to find out this provision is unconstitutional.

MR. BROWN said more importantly, by default, the worst offender may be given transactional immunity if the offender is compelled to comply with this statute and the case is appealed to the supreme court.

SENATOR FRENCH asked:

> Mr. Brown, are you saying this flat can't be done with the way our Constitution is written or is there some specific provision that you think runs afoul of Gonzales because, the way I read it, the judge and the witness's attorney go back and have an ex parte conversation to which the prosecutor is not privy. He's not there or she's not there when the conversation takes place. Assuming that's constitutional – assuming they can have that

> conversation, out of that conversation comes a disclosure to the DA that we're talking about an unclassified – an A, a B, a C felony or a misdemeanor and at that point the prosecutor isn't shooting in the dark when he makes an offer of immunity. He or she can decide I'm not going to risk an unclassified or an A felony, that's up in the murder range. We're not going to do an immunity there and you can go away with your Fifth Amendment privilege and I'm stuck with that. But if it's a misdemeanor or a C felony, it sounds to me like it's a marijuana problem or a crack cocaine problem, and I'll risk that. It may be something more serious but I'll risk that. So I guess I'm not sure whether it's just a blanket unconstitutionality that you believe is the problem or something specific.

MR. BROWN said the first part of Senator French's question relates to what is referred to as a Kastigar hearing in federal court. Those hearings are held to determine whether there is a legitimate exercise of a Fifth Amendment right, that is, whether or not there is any legitimate and real exposure to criminal prosecution. He believes the first part is constitutionally permissible where an offer of proof is made to the trial court. However, he knows no way around the second part because in the example he gave, the killer would be an unclassified felon, the cocaine dealer would probably be a class B felon, and the other person a misdemeanant at the scene. He explained, "And [if] the law enforcement officers weren't sure who had done it, the easiest way to do - would be, with those three people, is to say it's an unclassified felony – they can target their focus of attention on that person and that's the problem with this." He repeated he believes that portion is unconstitutional and he sees no way around it.

CHAIR SEEKINS asked whether that would still constitute a problem if that process takes place once the case is in court and not during the investigation. He thought Mr. Brown was saying the police officer would use the information to "find the ace in the deck" during the investigation process but he reads it to apply to a person who is already in court and refusing to testify.

MR. BROWN said he reads it so that the information could be used in conjunction with a grand jury investigation, pre-indictment or post-indictment. He pointed out that even at the trial court level, if multiple defendants were being tried, the investigation would be ongoing. This provision would allow more

focused attention on a specific defendant. He believes it would be used primarily in charging decisions or by a grand jury when determining who to prosecute and what to prosecute for.

CHAIR SEEKINS asked Ms. Parkes to comment on the intent.

MS. PARKES replied:

> The intent is, as you've indicated, the intent is once we get to court - or yes, we've subpoenaed people to come and testify to a grand jury, they then tell us, and at that point we've made a charging decision. We've determined who our defendant is. We've got charges filed. This is not intended to be an investigative tool. It's intended to be a tool to be able to put our case on.

MR. BROWN said he still does not think that satisfies or passes constitutional muster. He added, "It does alleviate some of my concern. If they're saying that they will never use it and it can't be used in an investigative stage or at the indictment stage, that certainly would alleviate the utility of it but it still doesn't address the constitutional concerns."

SENATOR THERRIAULT asked Mr. Brown if his concern is that it can be used in particular circumstances of a crime, or whether he sees it as a blanket problem.

MR. BROWN said it is a blanket problem, not as it applies to what he referred to as the Kastigar hearing, but as it provides that information to the prosecuting parties at any level of the prosecution. He repeated that once a person is compelled to testify and given transactional immunity, that person cannot be prosecuted for a crime. He advised:

> So, if you compel somebody to give this information and they do, and I'm right that it's unconstitutional, you are immunizing that person from prosecution. It will result in a reversal of their conviction and they will go unprosecuted. That's a big concern here. And again, I do think that people should sit down and discuss this because I think it's the most important provision of this bill because it has the most serious ramifications because it deals with the Fifth Amendment and the Alaska Constitution on compelled testimony.

MR. BROWN said this is beyond a technicality. The people made the choice via the constitutional convention by enacting more restriction on compelled testimony. He said if use immunity is the goal, which passes federal constitutional muster under the Fifth Amendment, the constitution would have to be amended. He said he raised the issue because he believes it could result in a travesty: the main culprit going free because he or she was compelled to give information.

MR. BROWN said his last concern deals with making felons out of persons with less than a .08 BAC who are involved in a vehicular accident that causes serious physical injury. He believes that Alaska's definition of "dangerous instrument" comes from the Oregon statutes. The definition first included a gun or a weapon; it was expanded to include feet under certain circumstances and a car when coupled with intoxication. He said his concern is that the intent is to prosecute people with any amount of alcohol in their system when involved in a motor vehicle accident that causes serious physical injury. He noted if he has a glass of wine with dinner and, while driving home on a slippery road, hit someone who stepped in front of his car, he could be charged with a felony. He believes restaurateurs would share his concern. He said if that is not the intent of SB 170, he would like to hear that on the record; if it is, he hopes that full-page ads run in the newspapers to inform people of the change in the law.

9:25 a.m.

MS. CINDY CASHEN, Executive Director of Mothers Against Drunk Drivers (MADD) Juneau Chapter, said she was representing four MADD chapters throughout Alaska: Anchorage, Mat-Su, Fairbanks, and Juneau. In response to Mr. Brown's comments about driving while impaired, MADD encourages people who choose to have more than one drink per hour to get a designated driver. People who choose to drink more than that put their own and others' lives at risk. Alaska's DUI law leads other states in dealing with drunk driving. The consecutive jail time for each death in a drunk driving accident hits home with her because a drunk driver killed her father and his passenger. Her family and the passenger's family feel enraged because although the driver's sentence was passed down consecutively, the judge decided the sentence was too harsh and made the sentences concurrent so that they total 3½ years. She said when a person chooses to drink and drive and takes someone's life, that person should pay the price as Alaskans deserve restorative justice.

MS. CASHEN told members that MADD supports a community's right to adopt lower limits of alcohol possession and importation. That effort falls under the concept of community policing where larger groups of community members are able to take ownership and deal with drinking and driving. MADD also supports stricter sanctions for habitual drunk drivers who choose to endanger themselves and others. MADD also supports increased penalties for those who choose to drink and drive and seriously injure an innocent victim.

MS. CASHEN told members, in response to earlier testimony, a person's ability to drive is impacted within a matter of minutes of drinking alcohol. A person who drinks alcohol and drives has chosen to break the law, even if driving while impaired as opposed to driving while intoxicated. She noted in 2002, between 500 and 700 people were killed [by drivers with] BAC levels between .01 and .08. She believes the families of those victims believe those drivers should be held accountable. MADD supports more consequences for people who choose to contribute [to the delinquency] of minors. Teenagers who drink are four times more likely to have problems with alcohol later in life.

CHAIR SEEKINS affirmed that the judiciary will no longer be able to decide that a penalty is too harsh and make sentences concurrent if this bill is enacted. He asked Ms. Cashen if she is advocating that a person who has a glass of wine with dinner and then injures a person while driving home should be prosecuted under this bill.

MS. CASHEN responded no. She clarified that MADD is not pro-prohibition. Most of its members drink responsibly but they do not drink and drive. She pointed out:

> It takes approximately one hour and we won't say exactly because it depends on what you've had, your body fat, your height, your weight and so on. So if you've had a glass of wine...and at least one hour has passed, fine - that's fine. But if you've had a glass or two of wine and then you leave within that hour, give someone else the keys because after one drink, your level of coordination is already impaired....

MS. PARKES interjected that she was not implying that a person with any amount of alcohol in their system who is involved in a car accident would be prosecuted. The prosecution would have to prove a state of criminal negligence, a mental standard used in criminal law. Therefore, a number of factors would play in;

alcohol would be just one piece of the factual puzzle that could be used to make a finding of criminal negligence.

CHAIR SEEKINS indicated he noticed two factors, reckless and criminal negligence.

MS. PARKES response was inaudible but pertained to putting a person in fear with a dangerous instrument.

CHAIR SEEKINS asked about speeding in a car.

MS. PARKES said that normally arises with brandishing a gun or if a person charges a person with a car. Criminal negligence is an alternative theory, which is one step down but would require a dangerous instrument and serious physical injury, not just placing a person in fear. She repeated that she did not mean to imply that driving after drinking one glass of wine would result in prosecution.

SENATOR THERRIAULT asked, “So this entire statute – it’s broader than just DWI. We’re focusing on the DWI and if [he reads] ‘a person commits a crime of assault in the third degree if that person recklessly’ – on the new language, recklessly is not part of the sentence. You just jump from person down to criminal negligence.”

CHAIR SEEKINS said current law applies if a person places someone in fear of his or her life or personal injury, which could mean speeding. The new standard includes “with criminal negligence.” He asked Ms. Parkes to define criminal negligence.

SENATOR FRENCH stated, “...I think criminal negligence is knew or should have known whereas recklessness is aware of and disregard of substantial and unjustifiable risk so it’s just a little bit higher.”

MS. PARKES read the statutory definition, “A person acts with criminal negligence, with respect to a result or a circumstance described by a provision of law, when the person fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists.”

CHAIR SEEKINS asked if a person who knew he had a low tolerance for alcohol and drove with a BAC lower than .08 would be considered as criminally negligent.

MS. PARKES said he would in her judgment.

SENATOR THERRIAULT questioned whether talking on a cell phone while driving would fall under this application.

MS. PARKES said it would if the state could prove the driver was taking an unjustifiable risk. She recalled a current case in the court system in which the driver may have been watching a DVD while driving.

CHAIR SEEKINS took further testimony.

TAPE 04-18, SIDE A

LT. AL STOREY, Alaska State Troopers, Department of Public Safety (DPS), stated support for the Governor's crime bill. DPS is most interested in the local option sections (1-11). During his 24 years with the AST, 18 were within the drug and alcohol enforcement area, so he is very familiar with specific concerns about alcohol in the western regions of the state. He supports anything the state can do to help rural communities exercise a local option. Sections 1 through 11 contain tools that will enhance DPS's ability to help those residents help themselves. He noted, regarding forfeiting money made from bootlegging, far more money is made per dollar invested in the alcohol business in Alaska than in the drug business. A person can buy a $10 bottle of liquor in Anchorage and sell it in the far reaches of the state for up to $150. He repeated this bill will provide a tool to take away the incentive to bootleg.

Regarding Section 13, felony murder charges, LT. STOREY said that home invasions are becoming commonplace in Alaska. DPS believes the criminals involved embolden and encourage each other and that they should be held culpable for the death of a partner as well as an innocent victim. Again, he believes this will provide a good tool to curb home invasions.

LT. STOREY believes that attaching the criminal negligence standard to accidents involving drivers with alcohol levels below .08 BAC will provide a good tool so that certain accidents can be investigated as felonies and the offenders can be prosecuted appropriately.

DPS supports the concept of Sections 15 and 16, raising the offense of sexual abuse of a minor from a class A to a class C felony. DPS also supports Section 18 (self defense claim).

MS. LINDA WILSON, Deputy Director of the Alaska Public Defender Agency, reemphasized Mr. Brown's concern that the immunity section of the bill is unconstitutional. Enacting a bill with an unconstitutional provision is problematic because a lot of money will be spent on litigation to prove that it is unconstitutional. The offending section is Section 22(i). The Alaska Constitution guarantees the right against self-incrimination. To compel a person to testify, the constitution requires that person be given transactional immunity to ensure that right. When the judge tells the prosecutor the level of offense, that would be sharing information that violates the right against self-incrimination and is a link in the chain. She surmised that the level of the offense that was disclosed was a class A or B felony in a case in a small village. If an investigation is ongoing, the prosecution might not give the witness transactional immunity yet the offense information could be used to further the investigation. The Alaska Supreme Court has emphasized that is unconstitutional.

MS. WILSON highlighted the agency's other concerns with SB 170.

- The self-defense provision adds to the list of things that exclude a person from raising a self-defense claim. The additions to the list could have unintended consequences. For example, a person cannot claim self-defense if acting alone or with others to further criminal objectives. Although this provision is aimed at gang activity, many other situations could occur that could prevent a person from legitimately raising a self-defense claim. Two 20 year olds who were drinking alcohol at a home or a person using a small amount of marijuana could not use a self-defense claim because they would be furthering the criminal objective. She suggested targeting the section to criminal activities that are felony offenses.
- Her second concern with the self-defense provision is the attempt to redefine "some evidence" to "plausible evidence." Questions of credibility belong to the jury, not the judge. Adding the word "plausible" gives the judge a lot of room to take that question away from the jury.
- Raising an act that is done with criminal negligence and a dangerous instrument that causes physical injury to assault to the third degree, a class B felony, could have numerous unintended consequences. Initially, it appeared the focus of the bill was directed toward people who were driving under the influence of alcohol but not necessarily intoxicated. That provision does not require that any alcohol be involved. It could apply to a person talking on

a cell phone or a parent could attend to a child in a car. Criminal negligence is the lowest level of the criminal intent category.

- It is often difficult to find third party custodians and that is most often the reason people sit in jail much longer, particularly indigent persons. Increasing the consequences for violations will deter many people from fulfilling that role. The current penalty for violation of custodial conditions is contempt, with exposure to a $300 fine or six months imprisonment, which is a sufficient consequence. Raising the penalty to a $10,000 fine or a one-year jail term will result in fewer custodians and more people being held in jail.
- The felony DUI section needs to be targeted to address chronic repeat offenders. She suggested placing a time limit of 15 or 25 years on that provision so that if a youth is convicted of a felony DUI and is charged with another DUI 25 years later, the later DUI would not automatically become a felony.
- The provision that makes furnishing alcohol to a minor in a local option area a felony charge is not evenhanded since the same offense elsewhere is a misdemeanor. She suggested raising the penalty to a felony for a second offender.

CHAIR SEEKINS announced that the committee would have to adjourn to attend the floor session. He asked Ms. Wilson to submit the remainder of her comments in writing. He then adjourned the meeting at 10:02 a.m.
#