ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE
March 12, 2004
8:00 a.m.

TAPE(S) 04-19&20

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. 316
"An Act relating to motor vehicle safety belt violations."
MOVED SB 316 OUT OF COMMITTEE

HOUSE BILL NO. 513
"An Act relating to the enforcement of support orders through suspension of drivers' licenses; changing the name of the child support enforcement agency to the child support services agency; amending Rules 90.3 and 90.5, Alaska Rules of Civil Procedure; and providing for an effective date."
HEARD AND HELD

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

CS FOR HOUSE BILL NO. 83(JUD)
"An Act adopting a version of the Revised Uniform Arbitration Act; relating to the state's existing Uniform Arbitration Act;

amending Rules 3, 18, 19, 20, and 21, Alaska Rules of Civil Procedure, Rule 601, Alaska Rules of Evidence, and Rule 402, Alaska Rules of Appellate Procedure; and providing for an effective date."

SCHEDULED BUT NOT HEARD

PREVIOUS COMMITTEE ACTION

BILL: SB 316
SHORT TITLE: SEAT BELT VIOLATION AS PRIMARY OFFENSE
SPONSOR(s): SENATOR(s) BUNDE

02/11/04	(S)	READ THE FIRST TIME - REFERRALS
02/11/04	(S)	STA, JUD
02/26/04	(S)	STA AT 3:30 PM BELTZ 211
02/26/04	(S)	Moved SB 316 Out of Committee
02/26/04	(S)	MINUTE(STA)
02/27/04	(S)	STA RPT 2DP 1NR
02/27/04	(S)	DP: STEVENS G, COWDERY; NR: STEDMAN
03/12/04	(S)	JUD AT 8:00 AM BUTROVICH 205

BILL: HB 513
SHORT TITLE: CSED NAME CHANGE/DRIVER'S LIC.SUSPENSION
SPONSOR(s): REPRESENTATIVE(s) KOTT

02/16/04	(H)	READ THE FIRST TIME - REFERRALS
02/16/04	(H)	JUD
02/23/04	(H)	JUD AT 1:00 PM CAPITOL 120
02/23/04	(H)	Moved Out of Committee
02/23/04	(H)	MINUTE(JUD)
02/24/04	(H)	JUD RPT 5DP 2NR
02/24/04	(H)	DP: SAMUELS, GRUENBERG, OGG, ANDERSON,
02/24/04	(H)	MCGUIRE; NR: GARA, HOLM
03/01/04	(H)	TRANSMITTED TO (S)
03/01/04	(H)	VERSION: HB 513
03/02/04	(S)	READ THE FIRST TIME - REFERRALS
03/02/04	(S)	JUD, FIN
03/12/04	(S)	JUD AT 8:00 AM BUTROVICH 205

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
03/10/04	(S)	Heard & Held
03/10/04	(S)	MINUTE(JUD)
03/12/04	(S)	JUD AT 8:00 AM BUTROVICH 205

WITNESS REGISTER

Senator Con Bunde
Alaska State Capitol
Juneau, AK 99801-1182
POSITION STATEMENT: Sponsor of SB 316

Ms. Susan Parkes
Deputy Attorney General
Department of Law
310 K Street
Anchorage, AK
POSITION STATEMENT: Answered questions about version H of SB 170

Ms. Linda Wilson
Public Defender Agency
Department of Administration
900 W 5th Ave.
Anchorage, AK
POSITION STATEMENT: Expressed concerns about version H of SB 170

Mr. Josh Fink
Director of Public Advocacy
Department of Administration

900 W 5th Ave Ste 525
Anchorage AK 99501-2090
POSITION STATEMENT: Expressed concerns about version H of SB 170

Mr. Paul Harris
Director of the Fairbanks Police Department
City of Fairbanks
800 Cushman St.
Fairbanks, AK 99701
POSITION STATEMENT: Supports SB 316, HB 513 and version H of SB 170

Mr. John Nain
Staff to Representative Pete Kott
Alaska State Capitol
Juneau, AK 99801-1182
POSITION STATEMENT: Presented HB 513 for the sponsor

Mr. John Mallonee
Acting Director
Child Support Enforcement Division (CSED)
900 W 5th Ave.
Anchorage, AK
POSITION STATEMENT: Answered questions about CSED procedures

Ms. Landa Bailey
Legislative Liaison to Commissioner Corbus
Department of Revenue
PO Box 110400
Juneau, AK 99811-0400
POSITION STATEMENT: Informed members that DOR has worked with Representative Kott on HB 513

ACTION NARRATIVE

TAPE 04-19, 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.

SB 316-SEAT BELT VIOLATION AS PRIMARY OFFENSE

SENATOR CON BUNDE, sponsor, told members SB 316 requires the enforcement of existing law. Alaska has a statute that requires motorists to wear seat belts when operating a motor vehicle.

However, law enforcement cannot enforce that law unless the motorist violates an additional law. He commented:

> Mr. Chairman, Alaska is, and I join them in this, a pretty Libertarian state, and people say it's my right if I want to put my head through a windshield and scramble my brains I ought to be able to do so. And again, that's an interesting trail of logic. If there's a passenger they are required by law, and it's a primary law, to have a seat belt. If there's a young person, there's a substantial penalty if they're not belted in. But we do this kind of thing with the driver that allows them to play a little roulette there. And I would agree that it's the driver's right to scramble their brains if they choose to if it didn't cost the state money. So, to put a little different spin on that old saw, your right to swing your fist ends where my nose begins. In this case, your right to swing your fist ends where my wallet begins.
>
> So, Mr. Chairman, I bring you SB 316. It changes our existing seat belt law from a secondary law to a primary law. As you likely know, that simply means that if you are stopped for another violation and you're not wearing a seat belt, then you're subject to the secondary law. This legislation would say that the police, if they were to observe you operating a motor vehicle without a seat belt, that is a cause to allow them to stop you and enforce Alaska's existing law that you require a seat belt.
>
> You will probably hear some testimony from law enforcement officials that say that they have the rear view mirror influence. Somebody will be stopped at a stop sign, stoplight, and they look in their rear view mirror and they see a police car and then they reach over and fasten their seat belt.
>
> I am suggesting that if this law were in effect, the primary seat belt law, perhaps they'd do that when they first got in the car and save Alaska and themselves a great deal of money. And let me just go over some of the financial aspects. Obviously, it will save lives. As a pilot I am sure you couldn't imagine operating an aircraft without fastening your seat belt because when vehicles that we are riding in stop, the

body that could be in motion would stay in motion and that'd be you and I and we'd go – projected from the vehicle. As a result of this legislation, it's likely that seat belt use will go up about 15 percent and that's a substantial number of lives when we talk about living Alaskans as human beings.

We'll also gain federal money if we pass this law. We will receive nearly $4 million to be used for road improvements with the passage of this law – a federal bribe, if you will, for us to entertain this but Alaskans have never been known to turn down free federal money and perhaps we ought not to do that. In addition, there is federal money available for an educational campaign about the importance of wearing seat belts. I don't know what occurred in Fairbanks – perhaps it was statewide, but certainly in the Anchorage area this past fall and winter they had a click-it or ticket campaign and it was a very vigorous campaign encouraging people to wear seat belts. And again, the net result is to save lives, not to gather a few funds from seat belt tickets.

The primary seat belt law has saved billions of dollars nationally in related accident costs. As someone with some knowledge of automobiles you understand that wearing a seat belt can protect the most precious part of that vehicle in a crash and that as we operate motor vehicles if we have a seat belt on and there's some sudden event, we're more likely to remain in control of that vehicle because we're belted in rather than sliding across the front seat, losing contact with pedals and steering wheels and that sort of thing.

Mr. Chairman, 85 percent of all of the costs in motor vehicle [accidents] are paid for by society through emergency services, medical services, rehabilitation treatment, health and automobile insurance premiums. Every time there unfortunately is an accident, it has impact on your and my insurance premium. The average cost to Alaskans last year of accidents that we weren't involved in was $820. Employers, of course, are impacted by this as well, and we should be cognizant of it.

> Mr. Chairman, this is a common sense bill. Showing their good judgment, nearly 70 percent of Alaskans support a primary seat belt law and I would ask you, sir, to allow law enforcement to enforce Alaska's laws and pass this bill creating a primary seat belt law.

CHAIR SEEKINS said he is constantly surprised at the number of his automobile customers who want their seat belt alarm signals disconnected.

SENATOR BUNDE said that raises the point that national highway data shows that adults who wear seat belts positively impact their children and passengers to wear them.

CHAIR SEEKINS asked if there is any opposition to this bill.

MS. LINDA WILSON, Public Defender Agency, Department of Administration (DOA) said, at first blush, SB 316 appears to be very simple. However, the bill as presented only eliminates section (e) of the statute. Section (b) of that statute requires anyone under 16 riding in a vehicle to wear a seat belt and says that a violation of (b) can be the basis for being stopped. Therefore, Alaska's law is a hybrid: it is a primary law state for riders under 16, but a secondary law state for riders over 16. She pointed out that thirty other states are secondary states. Her primary concern is that changing Alaska's law to a primary law will allow police to stop a vehicle on the basis of a seat belt violation and open the door to "pretextual" stops. More often than not, the people who are stopped are people of color. She advised that although that is not the underlying intent of the bill, it could open the door to profiling and harassment. She noted that the current penalties for violating section (b) are a $15 fine and points against one's license. She suggested increasing the fine instead of changing the law.

MR. JOSH FINK, Director of Public Advocacy, Department of Administration, echoed Ms. Wilson's comments and said he supports the concept that everyone should wear seat belts but his concern with SB 316 is twofold. On a practical level, he is concerned that cars with lap seat belts would be stopped regularly.

His second and greater concern is that SB 316 will lead to a significant increase in the number of pretextual stops. As a former public defender in the Mat-Su Valley, MR. FINK said he is aware of people who have been stopped for all kinds of things like switching lanes without using a turn signal, and the

officers were fairly straightforward about the fact that they were not interested in citing drivers for those offenses, they were more interested in stopping vehicles to further investigate. He expressed concern that allowing the police to stop individuals for not wearing a seat belt is a pretext for stopping individuals for other reasons. He believes that will result in a backlash from the public. He maintained that Alaska is a big government state and this tool may cross the line.

SENATOR FRENCH asked Ms. Wilson and Mr. Fink if they are aware of any lawsuit filed by a minority person in civil court alleging harassment by law enforcement officers.

MS. WILSON said she and Mr. Fink deal in the criminal world, not the civil world, so if someone were to file a complaint against the police it would be filed with the police department. She pointed out that people of color in Alaska are over-represented in the criminal justice system and believes those statistics warrant some concern.

MR. FINK responded that he is not aware of any civil suits either but he is aware of many successful suppression motions on bad stops that were determined to be pretextual stops. He noted that teenagers and minorities are most often stopped.

SENATOR FRENCH said he followed the subject of pretextual stops when in law school, which divided the circuit court at that time. He noted:

> I was aware when it was subsequently resolved in the [U.S.] Supreme Court that pretextual stops really [aren't] the basis now of any legal challenge to a stop, is it? I mean that's been resolved. I think it was a unanimous supreme court decision that said that if there's a legal reason to pull a car over, you don't examine the motives of the officer in making the stop. You simply ask whether or not he had a legal basis for doing what he did. Is that right?

MR. FINK replied, "...That is not correct. The United States Supreme Court has ruled that way. Pretextual stops – the prohibition on pretextual stops is still alive in Alaska. The Court of Appeals and our supreme court have indicated that is still a valid basis at the present time."

CHAIR SEEKINS maintained that every committee member is concerned about giving a person with the wrong motives the

ability to harass someone else but the question is one of balance and safety. He believes enactment of this bill will have a positive effect on the health and safety of people using the highways. However, if the legislature sees the number of pretextual stops flourish, it would most likely contemplate some way to address that problem. He said sometimes the "might happens" stand in the way of good public policy. He questioned how long it would take a police officer to tell which model vehicles have lap seat belts rather than shoulder harnesses.

In response to Chair Seekins' comment that the legislature would be concerned if harassment did occur, MS. WILSON offered to send the committee data from states with a hybrid law. The State of Michigan recently changed its law and started with a pilot project to determine whether a basis for the concern of pretextual stops existed. She noted Michigan put a "safety valve" into its law to address that concern.

SENATOR BUNDE presented a publication by People Saving People and said the group's in-depth studies of various communities showed no shift in enforcement patterns that could be interpreted as harassment that resulted from changing to a primary law. He pointed out that since Alaska's law is a hybrid, a pattern of harassment would already exist. He said that although he understands the concern, he does not believe it is of a sufficient level to avoid changing to a primary law.

CHAIR SEEKINS asked if anyone else wanted to testify in opposition to SB 316. [No response was heard.] He then asked members to express any concerns about SB 316.

SENATOR FRENCH said he would like to read the case that Mr. Fink referred to in regard to pretextual stops.

CHAIR SEEKINS told members he would like to advance SB 316 from committee, as he believes it is good legislation as is. He offered to hold it in committee if Senator French would like more time to review it.

CHAIR SEEKINS announced that he would hold SB 316 in committee and asked Ms. Wilson and Mr. Fink to provide the requested information to committee members. He also informed participants who were waiting to testify in support of the bill that the committee understands the weight of their testimony.

SENATOR BUNDE asked that a representative from the law enforcement community testify on the subject of pretextual stops.

MR. PAUL HARRIS, Director of the Fairbanks Police Department, stated support for SB 316 and said the law enforcement community asks that this bill pass. The law enforcement community believes that having a law requiring people to wear seat belts without being able to enforce it is similar to having a law that prohibits a person from stealing that cannot be enforced unless that person uses the money for another criminal act. He informed members that Fairbanks passed a primary ordinance last year that was repealed after about three months. The police enforced it for those three months and saw increased seat belt use during that time. During that three months, he received many calls in opposition to that ordinance but not one complaint about police officers making a pretextual stop, nor did he hear that allegation from the district attorney in DUI or other cases. He noted the police are too busy to make pretextual stops but acknowledged police do look for reasons to stop a suspicious vehicle at times. That vehicle might be in a place where it should not be, or carrying people it shouldn't be. In most of those situations, any reasonable person would want to take a further look to feel more secure. He also suggested that people who feel that mandating seat belt use is inconvenient or a restriction of personal rights take a look at a person in a full body cast or with other serious injuries. He admitted as a police officer, he gets tired of picking up the pieces and of not being able to do anything until an accident occurs. SB 316 will allow police to take preventive action to save lives and reduce injuries.

SENATOR FRENCH asked Mr. Harris to offer advice on how to implement this law and prevent the backlash that occurred in Fairbanks.

MR. HARRIS said he understands the independence of Alaskans but believes SB 316 is the right thing to do. It will save the state money and protect citizens' rights. He said legislators should expect to hear constituents complain that their rights are being restricted but, as a police officer, he is asking them to do the right thing.

CHAIR SEEKINS said as a body shop owner, he has seen major damage done to vehicles yet the people involved sustained minor damage because they wore proper constraints. He noted those constraints could be improved and a lot of research is underway

to find ways to better protect people. He repeated it is important to balance this issue on the side of protection and that the legislature will need to address any use of this law for pretextual stops if that occurs. He again asked if anyone waiting to testify opposed SB 316. [No response was heard.] He noted he would be willing to move this legislation from committee today.

SENATOR FRENCH objected as he asked to see the material from Ms. Wilson.

SENATOR THERRIAULT suggested that Senator French agree to moving the bill while awaiting the information.

SENATOR FRENCH agreed.

SENATOR THERRIAULT moved SB 316 and attached fiscal notes from committee with individual recommendations.

CHAIR SEEKINS announced that without objection, the motion carried. He then told Senator French if he finds something onerous in the information he is waiting for, he would commit to addressing it at a later date.

8:45 a.m.

HB 513-CSED NAME CHANGE/DRIVER'S LIC.SUSPENSION

MR. JOHN NAIN, legislative staff to Representative Pete Kott, sponsor, gave the following explanation of the measure. HB 513 changes the name of the Child Support Enforcement Division (CSED) to Child Support Services Division to reflect the fact that the division does many more things than enforce child support. It establishes paternity and provides other services. Additionally, HB 513 will close a loophole in the driver’s license revocation program.

SENATOR THERRIAULT asked for an explanation of the changes to Rule 90.3.

MR. NAIN said the name change and driver’s license revocation provision are encompassed in that rule, therefore a two-thirds vote of the legislature is required to make any changes to the rule.

CHAIR SEEKINS commented that he received several calls from attorneys about HB 513 and asked the callers to contact

Representative Kott's office. Those attorneys had cases that involved paternity matters in which the fathers did not know they had children, one for 17 years. Those fathers were being charged hundreds of thousands of dollars of back child support. The attorneys suggested including a statute of limitations in the bill for fathers who were not informed they had children.

MR. NAIN informed members that Representative Kott is in the process of looking at that issue but he is not willing to address it at this time, as the effects on the custodial and non-custodial parent and to the State of Alaska need further research. He said he has had to make phone calls to individuals to inform them they had children. In one case, a couple had a short relationship and the parents took the mother and moved to California. Eventually the family came to Alaska and at some point, the mother collected public assistance. The father was informed that he had a child six years [after it was born]. This individual was willing to support the child but was told that he suddenly had a $30,000 debt.

CHAIR SEEKINS noted in the case he was informed of, the state was proceeding against the father for back payment of public assistance that was provided for the child yet the father did not know of the child's existence. He asked if that could happen.

MR. NAIN said it could although it is rare that a father would be unaware of his child. He said the child support system is not 100 percent perfect. It has to deal with state laws and federal regulations and mandates that require acts of Congress to change. He said the agency tries to do the best job it can.

CHAIR SEEKINS said he has no problem exercising penalties against parents who deliberately ignore child support agreements or responsibilities but wonders whether a larger problem is festering.

SENATOR THERRIAULT asked if a statute of limitations would be allowable under the federal law.

MR. NAIN told members that other states have statutes of limitation on how far they can go back with regard to establishing paternity.

SENATOR THERRIAULT asked if the opportunity for abuse is fairly slim.

MR. NAIN said someone will figure out how to abuse the system, however he believes that will be the rare situation.

TAPE 04-19, SIDE B

SENATOR FRENCH asked for a quick rundown of the technical aspects of the license revocation and reinstatement provisions.

MR. JOHN MALLONEE, acting director of CSED, explained that CSED now gives an individual a 60-day notice before that person's name is added to the list of those who are not in substantial compliance. That is 150 days prior to the date the license is actually revoked. HB 513 will close a loophole that allows the person to wait until the 147th day to execute a payment agreement and make one payment, in which case the license is released and the process starts over. HB 513 will allow CSED to pick up where it left off so that after the 150th day, the individual would be noticed that CSED is going to revoke the release. The individual's only opportunity to clear up the matter would be to go to court.

SENATOR FRENCH asked if the bill contains a time period in which the person could make payments that would allow the 60-day notice clock to restart or whether HB 513 will create an absolute bar to restarting the clock so that going to court will be the only option available to the individual.

MR. MALLONEE said HB 513 creates a bar with no timeframe.

CHAIR SEEKINS asked Mr. Mallonee to comment on the earlier discussion about charging a father who did not know he had a child for retroactive child support.

MR. MALLONEE affirmed he is aware of cases in which a father did not realize he had a child. In the case of the father who was notified after 17 years, he assumes the court established the order. The court, when establishing child support, can go back to the birth of the child. If CSED is establishing an order administratively, the order starts from the time the custodial parent applies for service. However, if public assistance is involved, CSED can retroactively collect for up to six years.

CHAIR SEEKINS asked if there is a de facto statute of limitations to six years on a public assistance case.

MR. MALLONEE affirmed that is correct.

MS. LANDA BAILEY, legislative liaison to Commissioner William Corbus, Department of Revenue (DOR), told members that DOR is very thankful to be working with Representative Kott on this legislation. She deferred to Mr. Mallonee for technical questions and Diane Wendlandt for legal questions.

CHAIR SEEKINS told members that he told Ms. Wilson and Mr. Fink to provide written testimony to the committee so he would hold the bill in committee to await that testimony.

SENATOR FRENCH said he would speak to Mr. Mallonee in the meantime about finding a way to restart the 60—day clock if one has made good-faith payments for an extended period of time.

CHAIR SEEKINS announced that HB 513 would be held in committee and that the committee would take a 5-minute recess.

TAPE 04-20, SIDE A

SB 170-CRIMINAL LAW/SENTENCING/PROBATION/PAROLE

MS. LINDA WILSON, Public Defender Agency, Department of Administration (DOA), said she would complete the testimony she began on Wednesday morning and would focus on the forfeiture provisions in the bootlegging aspect of the bill. Members raised questions about the interests of lien holders of property that might be subject to forfeiture. She pointed out that Section 11 requires forfeiture of all aircraft and any vehicles or watercraft if the offender had a prior conviction or is on probation. She expressed concern that the person with a legitimate interest in the property subject to mandatory forfeiture will have to prove in court that he or she is an innocent party. She expects, given the example discussed on Wednesday of the forfeiture of a $10,000 truck with a $5,000 lien, the lien holder will probably have to pay the state for the $5,000 difference in the value of the truck and try to recoup the cost. She cautioned that it will require the lien holder and others with a legitimate interest in property to appear in court and result in more forfeiture hearings.

MS. WILSON turned to the self-defense provision and said she spoke a little bit about the criminal objectives and the drug transactions but the language in Section 18 (page 11) adds to the list of circumstances for which a person cannot raise a self-defense claim. She said subsection (B) is problematic because she does not believe a “purported transaction” is

defined in statute. She finds that term to be vague and is not sure why it was included.

MS. WILSON'S last concern was Section 32, which pertains to disclosure of information about juvenile sex offender cases. Section 32 would allow information that is now confidential to be shared if requested for the purpose of protecting a child or vulnerable adult. She echoed prior concerns expressed by committee members that this provision will "open the door" because of many opportunities for abuse of the provision. That section contains no confidentiality protection once the information is disclosed; it could be shared and publicized. She said everyone agrees that sex offenders, even juveniles, do not deserve sympathy, but the purpose of keeping information confidential is to try to rehabilitate those juveniles. Publicizing that information would be harmful to that goal.

CHAIR SEEKINS noted that the legal definition of "purported transaction" would be to present the appearance, often false, of being or intending to do something.

MR. JOSH FINK, Director of the Office of Public Advocacy, told members that he finds the immunity sections most problematic. He read a statement by the Alaska Supreme Court from the 1993 Gonzales case that encapsulates what that protection is:

> The privilege against self-incrimination applies where the answers elicited could support a conviction or might furnish a link in the chain of evidence leading to a conviction.

MR. FINK believes section 22(i) is patently unconstitutional, according to that statement. To mandate that a judge inform the prosecution what level of crime a potential witness would be given protection from if testifying would allow the prosecution to focus investigative resources on that individual via a process of elimination. He said that information could create a link in the chain that he believes would be struck down by the Alaska Supreme Court after an expensive litigation process.

MR. FINK then pointed to Section 18, regarding self-defense, and said he understands the intent but believes it is too broad. He does not believe one should lose the right to self-defense for a purported transaction – when one is in a situation that may have the appearance of criminal activity but is not. He said an example in which he does not believe the legislature would want to take a person's right to a self-defense claim is shoplifting.

He has defended a number of cases in the Mat-Su Valley in which over-zealous security guards assaulted teenagers shoplifting an item such as candy. The state dismissed the charges after reviewing the evidence of the assault. A second example is a 20-year old who might enter a bar with a fake Id and is attacked by a patron of the bar. He offered that one solution would be to require that the criminal activity be felonious.

MR. FINK said that Section 19 also deals with the self-defense claim and requires the judge to make a finding that the evidence is plausible. His concern is that fact-finding is in the providence of the jury; he does not believe judges should be allowed to usurp the jury's fact-finding responsibilities.

He then expressed significant concern that Section 14 would allow a felony prosecution when one is criminally negligent; the current standard is reckless behavior. The reckless standard requires the individual to be aware of and ignore the risk. Under the criminal negligence standard, an individual does not even have to be aware of the risk. He cautioned that the committee may be criminalizing an accident and questioned whether a person who hits a patch of black ice and goes off the road is felonious if a passenger is injured. He felt that section will criminalize behavior that Alaskans do not feel is criminal.

MR. FINK recounted that his father, when a member of the House in 1969, introduced the first legislation dealing with bail conditions with third parties. His understanding of the purpose of that legislation was to provide an alternative to those individuals without the financial wherewithal to afford bail. Since that time, it has morphed into a situation that involves a cash bail and third party. He pointed out in many of these cases, the requirements are already onerous; for example a third party would have to get permission to bring the defendant to work. Section 17 will make it more difficult to find a third party. He suggested the current law is sufficient. A third party who violates his or her duties can be held in contempt of court and could receive a $300 fine and 6 months in jail. He felt that the language regarding the immediate reporting of any violations is also problematic. The third party may not be aware of a violation at the exact time it occurred – such as when a child sneaks out of the home while everyone is sleeping.

CHAIR SEEKINS asked Mr. Fink if he believes it will be harder to find a third party custodian if the penalty for not reporting violations is greater and whether one could interpret that to

mean that a number of third party custodians do not take their responsibilities seriously.

MR. FINK said he believes most do take the responsibility seriously. He has heard of individuals who are becoming professional custodians but he has not seen any. He explained that currently, a judge tells a third party custodian that if he fails in his responsibilities, he is looking at the fine and jail term. Most custodians hesitate but agree to go ahead. He warned that if the fine and jail term increase, some third parties will decide not to participate.

CHAIR SEEKINS pointed out the penalty applies if the custodian does not report an activity the custodian knew was a violation of the conditions, not for being unaware.

MR. FINK repeated the bill requires immediate reporting. He would prefer that the section require immediate reporting when the party becomes aware of the violation or adding the word "knowingly" before "failed."

SENATOR FRENCH asked, in regard to Mr. Fink's objections to Section 19, and the amount of evidence necessary for a judge to allow a self-defense instruction to be given to the jury, whether the judge must already engage in fact-finding because the judge must find a scintilla of evidence. This provision would require just a little bit more. He also asked Mr. Fink if he thinks every time a self-defense jury instruction is requested, the judge should give one.

MR. FINK said not in every case. Currently, some evidence must be provided so the threshold is very, very low. He said the system isn't broken. He believes allowing 12 minds to evaluate the question is better than one. He repeated addressing the question of self-defense is the jury's role.

CHAIR SEEKINS asked:

> Mr. Fink, do you have any concern when you take a look at this amendment? This specifically amends 11.81.330(a), the use of non-deadly force. But if I look at 11.81.335, the justification for the use of deadly force in self-defense is ... when to the extent the use of non-deadly force is justified under 11.81.330. So those two statutes are kind of tied together in that this also applies to the use of deadly force as well. Am I reading that correctly?

MR. FINK said he believes so.

CHAIR SEEKINS asked if the new standard would apply to deadly or non-deadly self-defense.

MR. FINK said that is correct.

There being no further questions of Mr. Fink, CHAIR SEEKINS asked Susan Parkes to testify.

MS. SUSAN PARKES, Deputy Attorney General, Department of Law (DOL), asked to respond to a few issues raised by testifiers. First, regarding the immunity concerns, DOL has taken another look at the Gonzales case. DOL believes the bill is constitutional as written but has an amendment to offer that may provide a "more conscious" approach. She said the amendment uses more cautious language so that instead of the judge specifying the level of the offense that the First and Fifth Amendment would apply to, the judge would indicate whether it is a higher level felony, meaning an unclassified or A felony, a lower level felony, meaning a B or C felony, or a misdemeanor. DOL believes with that amount of direction, the prosecution could responsibly decide whether to grant immunity. DOL also believes that may address the concern about the link in the chain of evidence.

CHAIR SEEKINS interjected that the proposed amendment was distributed to members.

MS. PARKES continued by saying that regarding the assault in the 3rd degree provision that would create a felony assault using the standard of criminal negligence, the state currently has a felony homicide statute, AS 11.41.130, so that if a person's criminally negligent behavior caused the death of another person, that person would be prosecuted for a class B felony. She pointed out that under existing statutes, a person who acts in a criminally negligent manner can be prosecuted for a felony so the change is not a huge leap. DOL is proposing to fill a gap in the assault statutes as currently written.

MS. PARKES addressed the self-defense provision and informed members that the current purpose of judges in the court is to make decisions about what information will be put before a jury. SB 170 does not propose to change a judge's role but creates a higher standard for a self-defense claim to be put before a jury to avoid unnecessary delays and unmeritorious claims. It is not

a burden-shifting proposal, it simply asks for plausible evidence.

She said the purported transaction language was included in the bill to address what is known as a "drug rip-off scenario." A person may think s/he is arriving at a location to be involved in a drug deal when in actuality there are no drugs on the premises. The point is when people meet to engage in a drug deal, they are engaging in a dangerous activity that often results in an injury or death. If a person intends to engage in a drug deal, whether it is real or purported, that person could not claim self-defense. The purpose of the gang provision [would be to disallow a claim of self-defense] if force was used to further a criminal objective. Regarding its application to the example of prostitution, a prostitute who is attacked by a customer and defends herself would not be furthering her prostitution, so a self-defense claim would be permissible. However, if groups of individuals are fighting over territories or retaliating over drug dealings or other similar scenarios, then any force used would be inherent to the criminal activities.

MS. PARKES responded to the concerns about the third party custodian provision by saying that the common sense interpretation of what is meant by that language is clear. In this state, a judge would not allow charges to be filed against a third party if it was impossible to report. She said in her experience, the court tells third parties that it is not their responsibility to control this person and keep them housebound; they are simply expected to immediately report violations they become aware of and if they do not, they are open to prosecution. It has not been her experience that judges lay out the specific penalties. DOL is proposing to make it a specific statute in Title 11 for several reasons, not the least of which is because it would create a clean, specific statute for third parties, unlike the criminal intent statute. It will allow for a cleaner prosecution and will clearly describe what was involved on someone's record.

SENATOR FRENCH asked, with respect to subsection (a) in the self defense provision, Ms. Parkes' opinion of the suggestion made by Ms. Wilson and Mr. Fink that it apply only to felony charges so that it would not apply to shoplifters, prostitutes or a person with a small amount of marijuana.

MS. PARKES said she has concerns about that, as it would apply to subsection (b). She noted that even marijuana deals often

turn deadly because drug dealers tend to carry guns. However, she would be open to that consideration as it applies to subsection (a). She noted DOL struggled with that language when drafting the bill and looked to the statutory definition of street gangs to try to find language that would be enforceable and clear. She repeated the suggestion is worth consideration.

SENATOR FRENCH questioned how the plausible evidence standard would work:

> Under current law, a judge must ask him or herself whether there is some evidence – or I think it's frequently a scintilla of evidence, to support a self-defense claim. The standard proposed by this bill is that some plausible evidence - and just using subsection (b) as an example to work my way through how this would work should the law change, would the judge ask whether there's some plausible evidence that there was no drug deal in the works in order for a self-defense claim to get to the jury? Is that the logical way you'd sort of have to pose the question?

MS. PARKES answered that is her understanding of how it would apply.

CHAIR SEEKINS asked if the word "purported" means that the jury reasonably believed that a transaction was going to take place.

MS. PARKES agreed and explained, "We can see it both ways. We see the seller who doesn't really come with the product to sell planning to rob the buyer or the buyer coming to rob for the drugs without ever planning to pay for them."

SENATOR FRENCH questioned whether Ms. Parkes had the chance to talk to the folks who would draft the regulations on the provision that allows disclosure of adjudication information for a juvenile sex crime about which scenarios that would apply to.

MS. PARKES said she is involved in ongoing discussions with Patty Ware, the Director of the Division of Juvenile Services in DHSS, who has come up with some proposals. DOL feels confident that it can provide an amendment that will satisfy its public safety concerns and DHSS's concern to limit the scope of disclosure.

CHAIR SEEKINS asked, under SB 170, if he attempted to engage in an illegal transaction with Senator French and a fight ensued,

whether he could claim self-defense because Senator French pulled his gun first.

MS. PARKES indicated she would need to know what the illegal activity was but, if it was a drug deal or purported drug deal, he could claim self-defense.

CHAIR SEEKINS asked, “Are we trying to get to some point where we are saying the person knew there was dangerous activity that would take place or could take place or just that they knew it was an illegal transaction?”

MS. PARKES maintained that DOL is trying to get at situations in which people know they are engaging in an inherently dangerous activity where violence is often likely to occur.

SENATOR FRENCH commented that the drug-dealing scenario referred to earlier could have been a situation where an experienced drug dealer killed a more innocent individual but could not be prosecuted because of a self-defense allegation, or one could imagine that the younger, more vulnerable individual killed the experienced drug dealer in an attempt to defend himself but could not assert a self-defense claim. He acknowledged that he is wrestling to find a way to maintain a self-defense claim for a more culpable individual.

CHAIR SEEKINS then asked if this bill simply bars self-defense versus making it an affirmative defense.

MS. PARKES said it would bar a self-defense claim if the defendant cannot come up with some plausible evidence that suggests otherwise.

CHAIR SEEKINS referred to Section 14, assault in the third degree (page 9), and said line 2 reads, “causes physical injury” while line 15 reads, “causes serious physical injury.” He asked the difference between the two terms.

MS. PARKES said physical injury is defined to mean physical pain or an impairment of physical condition – often referred to as bumps and bruises. Serious physical injury is defined as “physical injury that causes serious and protracted disfigurement, protracted impairment of health, protracted loss or impairment of the function of a body member or organ or that unlawfully terminate the pregnancy.” She added that case law has interpreted protracted impairment of health to mean an impairment that takes six to eight weeks to heal.

CHAIR SEEKINS announced that the Senate was about to begin its floor session so the committee would reschedule SB 170. He adjourned the meeting at 9:55 a.m.