ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE
March 24, 2004
8:08 a.m.

TAPE(S) 04-25,26

MEMBERS PRESENT

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

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

CS FOR HOUSE BILL NO. 414(JUD)
"An Act relating to filling a vacancy in the office of United States senator, and to the definition of 'political party.'"
HEARD AND HELD

SENATE BILL NO. 338
"An Act relating to actionable claims against state employees; relating to the state's defense and indemnification of its employees and former employees with respect to claims arising out of conduct that is within the scope of employment; amending the Public Employment Relations Act regarding claims against the state or state employees; and providing for an effective date."
MOVED CSSB 338(STA) OUT OF COMMITTEE

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: HB 414
SHORT TITLE: U.S.SENATE VACANCY/DEF OF POLITICAL PARTY
SPONSOR(s): JUDICIARY

01/28/04	(H)	READ THE FIRST TIME - REFERRALS
01/28/04	(H)	STA, JUD
02/03/04	(H)	STA AT 8:00 AM CAPITOL 102
02/03/04	(H)	Heard & Held
02/03/04	(H)	MINUTE(STA)
02/04/04	(H)	JUD AT 1:00 PM CAPITOL 120
02/04/04	(H)	-- Meeting Canceled --
02/05/04	(H)	STA AT 8:00 AM CAPITOL 102
02/05/04	(H)	Moved CSHB 414(STA) Out of Committee
02/05/04	(H)	MINUTE(STA)
02/09/04	(H)	JUD AT 1:00 PM CAPITOL 120
02/09/04	(H)	<Bill Hearing Postponed to 2/16/04>
02/12/04	(H)	STA RPT CS(STA) 3DP 1DNP 3NR
02/12/04	(H)	DP: SEATON, COGHILL, WEYHRAUCH;
02/12/04	(H)	DNP: BERKOWITZ; NR: GRUENBERG, HOLM,
02/12/04	(H)	LYNN
02/16/04	(H)	JUD AT 1:00 PM CAPITOL 120
02/16/04	(H)	Moved CSHB 414(JUD) Out of Committee
02/16/04	(H)	MINUTE(JUD)
02/18/04	(H)	JUD RPT CS(JUD) NT 5DP 2NR
02/18/04	(H)	DP: SAMUELS, ANDERSON, OGG, HOLM,
02/18/04	(H)	MCGUIRE; NR: GRUENBERG, GARA
03/04/04	(H)	TRANSMITTED TO (S)
03/04/04	(H)	VERSION: CSHB 414(JUD)
03/05/04	(S)	READ THE FIRST TIME - REFERRALS
03/05/04	(S)	STA, JUD
03/18/04	(S)	STA AT 3:30 PM BELTZ 211
03/18/04	(S)	Moved SCS CSHB 414(STA) Out of Committee
03/18/04	(S)	MINUTE(STA)
03/22/04	(S)	STA RPT SCS 3DP 1DNP SAME TITLE
03/22/04	(S)	DP: STEVENS G, COWDERY, STEDMAN;
03/22/04	(S)	DNP: GUESS
03/24/04	(S)	JUD AT 8:00 AM BUTROVICH 205

BILL: SB 338
SHORT TITLE: CLAIMS AGAINST STATE EMPLOYEES
SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

02/16/04	(S)	READ THE FIRST TIME - REFERRALS
02/16/04	(S)	STA, JUD

03/11/04	(S)	STA AT 3:30 PM BELTZ 211
03/11/04	(S)	Heard & Held
03/11/04	(S)	MINUTE(STA)
03/18/04	(S)	STA AT 3:30 PM BELTZ 211
03/18/04	(S)	Moved CSSB 338(STA) Out of Committee
03/18/04	(S)	MINUTE(STA)
03/19/04	(S)	STA RPT CS 4NR NEW TITLE
03/19/04	(S)	NR: STEVENS G, HOFFMAN, COWDERY, GUESS
03/24/04	(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
03/12/04	(S)	Heard & Held
03/12/04	(S)	MINUTE(JUD)
03/24/04	(S)	JUD AT 8:00 AM BUTROVICH 205

WITNESS REGISTER

Ms. Gail Voightlander
Assistant Attorney General

Department of Law
1031 W 4th Ave., Suite 200
Anchorage, AK 99501-1994
POSITION STATEMENT: Presented SB 338

Mr. Scott Nordstrand
Deputy Attorney General
Department of Law
1031 W 4th Ave., Suite 200
Anchorage, AK 99501-1994
POSITION STATEMENT: Answered questions pertaining to SB 338

Mr. Heath Hilyard
Staff to Representative McGuire
Alaska State Capitol
Juneau, AK 99801-1182
POSITION STATEMENT: Presented HB 414 for the sponsor

Ms. Vanessa Tondini
Staff to the House Judiciary Committee
Alaska State Capitol
Juneau, AK 99801-1182
POSITION STATEMENT: Answered questions about HB 414

Ms. Susan Parkes
Deputy Attorney General
Department of Law
1031 W 4th Ave., Suite 200
Anchorage, AK 99501-1994
POSITION STATEMENT: Answered questions about changes to SB 170

Mr. Dean Guaneli
Assistant Attorney General
Department of Law
PO Box 110300
Juneau, AK 99811-0300
POSITION STATEMENT: Answered questions about changes to SB 170

Ms. Barbara Brink
Public Defender Agency
Department of Administration
900 W 5th Ave., Suite 200
Anchorage, AK 99501-2090
POSITION STATEMENT: Expressed concerns about provisions in SB 170

Ms. Sidney Billingslea

Alaska Trial Lawyers
Anchorage, AK
POSITION STATEMENT: Expressed four concerns about SB 170

Ms. Allison Mendel
Alaska Trial Lawyers
Anchorage, AK
POSITION STATEMENT: Expressed concerns about SB 170

Ms. Carmen Clark
No Address Provided
POSITION STATEMENT: Suggested changes to SB 170

ACTION NARRATIVE

TAPE 04-25, SIDE A

CHAIR RALPH SEEKINS called the Senate Judiciary Standing Committee meeting to order at 8:08 a.m. All members were present. The first order of business to come before the committee was SB 338. He asked Ms. Voightlander to testify.

^#SB338

SB 338-CLAIMS AGAINST STATE EMPLOYEES

MS. GAIL VOIGHTLANDER, Assistant Attorney General, Department of Law (DOL), told members that she is the supervising attorney for the tort and workers' compensation section of DOL and is therefore familiar with the litigation that arises in tort lawsuits filed against the state and state employees. SB 338 provides the ability, at the commencement of a lawsuit, to dismiss individually named state employees and substitute in the state as the defendant. The federal government handles claims against individually sued employees in that way under the Federal Tort Claim Act.

MS. VOIGHTLANDER walked members through an example of a typical case in which several state employees, including a nurse, who work at the Anchorage jail, are sued for negligence in providing medical care to the inmates. Under existing law, the plaintiff can name whomever he wants to name as a defendant in the action. Typically, up to five state employees may be individually named in lawsuits filed by inmates. Under SB 338, if the state employees named in the action were acting within the course of their employment, the attorney general would certify that to be

the case. Those defendants would be dismissed and the state would be substituted in as the defendant.

MS. VOIGHTLANDER said the implications of dismissal from a lawsuit for an employee are that the employee no longer has to worry about the lawsuit, the amount of time the employee has to work on the case is diminished, and employees no longer have to disclose that they are a party in litigation on loan applications. In certain cases in the past, employees have had mortgage loans at least slowed up because of that disclosure.

More importantly, the public will be well served by SB 338. The individually sued state employees who are no longer defendants are less distracted from giving the public their full attention. She said at any given point in time, DOL is defending in excess of 100 individually named state employees in lawsuits. These include correctional officers, Department of Transportation heavy equipment operators, medical staff in correctional facilities, social workers, managers, and division directors up to commissioners. Lawsuits can also involve retired state employees or employees who have left state service for other employment. When those people are sued, they must take time off from other jobs to defend in the action.

MS. VOIGHTLANDER maintained that SB 338 will make efficient use of the state's time and resources by converting a claim against any number of state employees into one against the state. Typically, the state is already named in the lawsuit, primarily for the reason of vicarious liability for the actions of its employees. She noted that in her experience defending these cases for the state since 1987, being individually sued is a big distraction for employees. In addition, her workload is increased by the fact that she has to keep the individual employees informed of the progress of the case, get their input on major strategy decisions and involve them in responding to discovery requests. SB 338 will create a more efficient use of both employees' and attorneys' time. She said given the choice, she believes most employees would prefer to be dismissed from a case.

SENATOR OGAN asked Ms. Voightlander to respond to the argument that dismissing employees from such lawsuits will essentially grant them immunity and minimize any motivation to be more careful. He maintained that some people are motivated by greed when they file such lawsuits but others have legitimate cases. He pointed out that at one time, some of the employees at the Pioneers Homes were irresponsible.

MS. VOIGHTLANDER had a number of responses to that concern. She said first, any state employee who is not performing on the job is subject to discipline. That is always a route to correct a state employee who is not properly charging his or her duties. Second, in terms of litigation as a corrective process, under the collective bargaining agreement, employees are defended and indemnified by the state for negligent acts. SB 338 will not change the economic picture against the employee; it only changes the employee's involvement in the lawsuit. Therefore, lawsuits alleging negligence are defended by the state. She added that the attorney general would not certify an individual employee and dismiss that employee from the lawsuit under SB 338 if the employee was not acting in his or her course of employment. In addition, the bill does not cover actions for violation of federally protected constitutional rights. This parallels the federal provision, which does not involve the certification process for those types of claims. A violation of civil rights claims requires more than mere negligence, in terms of the conduct that is alleged to be in violation of a person's constitutional rights. In addition, the state cannot be a defendant in 1983 actions so for those state employees who allegedly violated a person's federal constitutional rights, this certification process does not apply. She concluded that in her years of defending these cases, when a legitimate claim of negligence is found, the problem is often systemic or due to the way business was conducted and so one employee was not accountable.

SENATOR OGAN said it is his opinion that disciplining classified state employees is almost impossible because of the collective bargaining agreement, which also indemnifies them. He felt that setup discourages the good workers by covering for the bad ones and lowers the common denominator.

CHAIR SEEKINS asked if the common practice, when a suit against a state department is brought, is that the suit usually names the commissioner, perhaps the regional director and a lot of people who have no knowledge of the transaction.

MS. VOIGHTLANDER said that is exactly her experience. Often the litany of defendants in the action includes the commissioner and director and then line employees, who most often had no knowledge of the transaction at issue. She has defended lawsuits filed against individual state employees by inmates who alleged that a certain corrections officer did something at a certain

facility when she was able to determine that officer wasn't even employed at that facility during that time period.

CHAIR SEEKINS asked if not all people who are sued are covered under the collective bargaining agreement.

MS. VOIGHTLANDER said that is correct. Many employees are varying levels of state service are not subject to collective bargaining. Some collective bargaining agreements do not even address defense and indemnity.

CHAIR SEEKINS asked Ms. Voightlander to address the chart in members' packets entitled, SB 338 - HOW IT WORKS, which says when the claim for damages comes up, the attorney general will decide whether to insert itself in place of the employees.

MS. VOIGHTLANDER explained that when a lawsuit is filed in the court and served upon the defendants, the individually sued state employees would notify DOL. The attorney general would review the allegations and the complaint, and interview people to determine whether the employees were acting within the scope of his or her employment. If the attorney general certifies that an employee was acting within the scope of employment, that employee is dismissed as a defendant in the action and the state is substituted. If the attorney general determines that an employee was not acting within the scope of his or her employment, no certification would occur and the state employee would remain as an individual defendant in the action. However, SB 338 contains the mechanism used by the federal government so that the state employee may challenge the attorney general's decision to not certify by petitioning to the Superior Court. If the Superior Court determines the state employee was acting within the scope of employment, the employee is dismissed from the lawsuit and the state is substituted in. If the court affirms the attorney general's decision, the employee remains a defendant in the action.

CHAIR SEEKINS indicated that the explanation makes him feel more comfortable with the process but in his industry, when a customer is dissatisfied with the product, the customer would sue him, the dealership and the Ford Motor Company, which goes through a process to determine whether or not Ford Motor Company would want to assume the defense for the dealership and any of its employees. The determination is based on whether the problem was product related or performance related on the part of the dealership. He thought that is a common procedure within the franchise world. Additionally, it is fairly common practice for

attorneys to name as many people as they can in trying to find "as many pockets as they can to raid in a situation like this." He felt SB 338 presents a reasonable procedure.

SENATOR FRENCH noted Ms. Voightlander mentioned that Section 1983 claims would not be covered by this bill. He asked if she was referring to claims that allege a violation of the U.S. Constitution by a state employee and, if so, for an example of such a claim.

MS. VOIGHTLANDER said most commonly, DOL sees lawsuits filed on the basis of Section 1983 law, a federal law that may be enforced either in state or federal court against Department of Corrections' employees and Alaska State Troopers. The cases usually arise out of searches, arrest procedures, the initiation of investigation, and prosecution and they are randomly filed against judges, although judges have absolute immunity for judicial acts. She concluded, "So the areas we most frequently have Section 1983 allegations, numerically at least, would probably be pro se inmates filings against correctional staff, whether correctional officers or the medical providers.

SENATOR FRENCH said it is his understanding that some types of claims an individual can sue a state employee for would be lost in this bill. Those claims could not be maintained once the state substitutes itself in. He asked her to list those types of claims, should SB 338 be enacted.

MS. VOIGHTLANDER cited the excluded claims under AS 09.50.250, which is the sovereign immunity statute for the state:

- Claims having to do with discretionary decisions or policy decisions
- Damages caused by imposition or establishment of a quarantine by the state
- Claims that arise out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, liable, slander, misrepresentation, deceit, or interference with contract rights.

MS. VOIGHTLANDER pointed out that if a state employee under the definitional section was not acting within the course of employment, such as with intentional misconduct, no certification would occur and the individual employee would remain a defendant in the action. The claim could be made against the employee, but not against the state.

SENATOR FRENCH encapsulated that a state employee cannot commit assault, battery, abuse, slander, or deceit without falling outside the scope of his or her employment.

MS. VOIGHTLANDER said it depends on the nature of the facts and whether the requirement of those specific torts would take them outside the definition of course and scope. She said she believes there are some fact patterns that would not do so and that the attorney general does not base his or her decision on the mere allegation. He said although someone may allege an assault by a state trooper, it may be determined that no tort was committed because the trooper was authorized to use reasonable force.

CHAIR SEEKINS pointed out that an undercover narcotics officer would be authorized to use deceit; otherwise he could not perform his job duties.

SENATOR FRENCH asked how SB 338 might affect lawsuits about hiring decisions if a state employee feels he or she has been hired or fired inappropriately.

MS. VOIGHTLANDER responded that Senator French's question falls under the area of labor relations, an area in which she has less expertise. If the employee is subject to collective bargaining, that issue would be grieved rather than filed as a lawsuit. The type of tort that is alleged in an instance where an ex-state employee is suing the state for wrongful discharge is not in the list of exemptions. The Alaska case law that has interpreted what is a discretionary act by the state looks to the formulation of policy or the allocation of resources as the germane issue. She indicated those cases are always very fact intensive and she does not believe that is an area that is dismissed as a matter of law because of the discretionary policy call under AS 09.52.050.

SENATOR FRENCH said he was looking for assurance that a state employee will not lose his or her ability to sue the state for wrongful discharge. He clarified that the employee will continue to be able to maintain the claim against the state but not against the individual supervisor.

MS. VOIGHTLANDER replied that Jan DeYoung was available to answer questions in that area.

MS. JAN DEYOUNG, Assistant Attorney General, told members she works in the employment area and defends the state against lawsuits filed by individual employees.

MR. SCOTT NORDSTRAND, Deputy Attorney General, Civil Division, told members he could answer the question as he worked in employment law for several years before taking his current position. He maintained that the kinds of claims that are asserted by employees are almost exclusively contract claims. He continued:

> It's the very rare case where you wind up with tort claims. I've seen cases where you could sue a third party for say, intentional interference with contractual relationship, you know, an attempt to say somehow my supervisor interfered with my contract of employment with the state or any employer. It doesn't really work. So I think in terms of tort claims, you rarely see – or in terms of employment, you rarely see anything other than contract claims, for example for the breach of a specific contract for a term or more commonly the ever popular breach of the covenant to good faith and fair dealing. Those kinds of things are the kinds of claims you would see - and you wouldn't, in employment cases, generally see claims against individuals because the claim is against the employer. The employer is generally not a supervisor, per se. There are attorneys that do that on occasion and try to find torts that they can allege but it's very rare so I don't think it would really be affected by this bill in any meaningful way. Thank you.

CHAIR SEEKINS said as a state employee, he would feel much more comfortable about his relationship with his employer knowing the employer, if relatively certain that he was working within the scope of his employment, would come to his aid in defense.

SENATOR FRENCH agreed and noted that many district attorneys have been sued over the years for things that happened in court. Those cases are difficult and drag out, and take a lot of time away from the district attorneys' work. He feels SB 338 is a good reform in general.

SENATOR THERRIAULT moved SB 338 from committee with individual recommendations and its attached zero fiscal note.

CHAIR SEEKINS announced that without objection, the motion carried. The committee took a short recess.
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^#HB414

HB 414-U.S.SENATE VACANCY/DEF OF POLITICAL PARTY

Upon reconvening, CHAIR SEEKINS informed members the committee would introduce HB 414 today and get it on the record, but not take public testimony.

MR. HEATH HILYARD, staff to Representative Lesil McGuire, Chair of the House Judiciary Committee, explained the amendments adopted by the Senate State Affairs Committee. The Senate State Affairs Committee adopted an amendment by Senator Guess that removed language on page 3, line 31, through page 4, line 10, which pertains to the recognition of political parties and the elections associated with that. SCS CSHB 414(STA) essentially leaves the new process for a special election for filling vacancies in the U.S. Senate intact and provides for temporary appointments.

MR. HILYARD explained that Section 9 recognizes a political party as one with registered voters in the state equal in number to at least three percent of the total votes cast for governor at the preceding election at which a governor is elected.

CHAIR SEEKINS affirmed that version V was before the committee.

MS. VANESSA TONDINI, staff to the House Judiciary Committee, offered to answer questions.

SENATOR FRENCH asked for an explanation of the last sentence in Section 3, which reads, “If a special election is not called for the reasons set out in AS 15.40.140, the individual shall fill the vacancy temporarily until the results of the next general election are certified.”

MR. HILYARD said that sentence is in reference to Section 2 on page 1.

SENATOR FRENCH asked for a description of the circumstances under which that sentence could apply.

CHAIR SEEKINS interjected that it appears that the position would be filled temporarily with a place keeper if the vacancy occurs in a shorter timeframe.

MR. HILYARD affirmed that would occur if a vacancy occurs on day 59 prior to a primary election.

CHAIR SEEKINS thought it is reasonable to want full state representation in the U.S. Senate in case of a critical vote.

MR. HILYARD replied:

> Exactly...My understanding is we're at 59 days from the time of the primary. That could stipulate that we – with regard to a special election...it would then fall back to the general election, at which point there would be an election to fill the vacancy. That's my reading, that's my understanding....

MS. TONDINI added that provision was added by the House Judiciary Committee to cover a situation in which there is not enough time to place a candidate on the ballot and for the governor to call a special election before the primary. In that situation, a temporary appointment would be put in place to ensure that the state is represented at all times.

There being no further questions, CHAIR SEEKINS announced he would take public testimony on the bill at a later date.
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^#SB170

SB 170-CRIMINAL LAW/SENTENCING/PROBATION/PAROLE

CHAIR SEEKINS announced the committee would take up SB 170.

MS. SUSAN PARKES, Deputy Attorney General, Criminal Division Department of Law (DOL), informed members that DOL provided some proposed amendments to the committee.

CHAIR SEEKINS numbered the amendments and asked members if they want to address them as a package.

SENATOR THERRIAULT moved Amendment 1, which reads as follows. He asked for an explanation from DOL.

A M E N D M E N T 1

TO: CSSB 170(JUD) (23-GS1024\H)

Page 10, lines 29-31, and Page 11, lines 1-4:

Delete all material and insert the following:

"(4) the force applied was the result of using a dangerous instrument that the person claiming the defense of justification possessed while

(A) acting alone or with others to further a felony criminal objective of the person or one or more other persons; or

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

TAPE 04-25, SIDE B

MS. PARKES explained that Amendment 1 makes changes to the self-defense provision to address concerns raised by testifiers and committee members about the broadness of the original provision. The amendment adds to that provision by saying a self-defense claim does not apply if the force applied was the result of using a dangerous instrument by the person claiming the self-defense. It also adds a gang activity provision and a provision dealing with drug-transactions that are felonious conduct. That was added to address concerns about minor or misdemeanor conduct.

SENATOR FRENCH asked Ms. Parkes why DOL chose the phrase "dangerous instrument" over "firearm" in defining who cannot claim self-defense. He noted he was asking because the committee was trying to address gang shootings, in which both parties are carrying guns and both parties claim self-defense. He continued, "I understand dangerous instrument is a knife, a club, or what else but sometimes a dangerous instrument can be a pair of hands if you use them the wrong way and so maybe you can just talk about why it's dangerous instrument and not firearm."

MS. PARKES replied that the broader term was used because there are situations where other instruments are used. She explained:

> Really, the change was to acknowledge that the person is coming to the transaction, the incident, anticipating violence and, although guns are the primary problem, people come to a transaction anticipating violence and come armed with any variety of things and that was really what we were trying to address. If you're going to say someone can't use self-defense, we wanted it to be in a situation where they were coming anticipating violence and that may be with a gun or a knife and so it was more broadly defined. The other reason is, although they may come with a knife, the person they're meeting, or the other people they're involved with may have guns and, again, it's just trying to address the situation where people are coming anticipating violence.

SENATOR OGAN commented that most people who carry weapons for self-defense for legitimate purposes do so because they anticipate violence. He asked if this amendment means the person was acting alone or with others to further felony criminal objectives and therefore, the person would not only have to anticipate violence, the person would have to have a culpable mental state to commit a felony.

MS. PARKES said that is correct.

CHAIR SEEKINS suggested adding to the end of (B), "in which the individual was a participant."

MS. PARKES felt that the word "participating" at the beginning of (B) was adequate.

SENATOR OGAN asked for the definition of a felony transaction and whether the person has to be convicted of that felony or could just be a bystander. He questioned how that would play out in a scenario in which a person unwittingly goes to a party and somebody else next to him transacts a drug deal and suddenly guns appear.

MS. PARKES acknowledged that is a very real scenario that could arise. She told members:

> No, someone who just happened to be at the wrong place at the wrong time, this would not apply to them and

> that's why they have to be acting alone or with others to further the felony criminal objective. You have to have that criminal objective as your mental state or subsection (B) – we want it clear that it's a person participating in the transaction, not the bystander who gets caught up in it. How this would work is if someone were given a self-defense instruction by the court, which with our other provision would mean they raised some plausible evidence that it wasn't a drug transaction or they weren't a participant, then the state would have the burden of proving beyond a reasonable doubt to get a conviction that they were part of this criminal objective or they were part of this felony drug transaction. So the burden would be on the state to prove that.

SENATOR FRENCH returned to the issue of "dangerous instrument" and said his concern is that term can mean a pair of hands or a boot. He noted the word "firearm" is probably the narrowest definition, and suggested using the term "deadly weapon," which includes knives, clubs, and guns. He asked if that term would satisfy DOL's need to be able to go after people who come to a situation heavily armed but would exclude the person who is forced to defend himself with his hands or feet against a person who is armed with a knife or gun.

MS. PARKES said it would address DOL's concerns. She noted, "The intent isn't to be able to say well, you come armed with your hands so suddenly you're at risk and then you decide to choke someone and use them as a dangerous instrument – that was not our intent because as you pointed out, anyone comes armed with their hands and feet and so substituting deadly weapon...."

CHAIR SEEKINS interrupted and commented that in relation to subsection (B), if, in the process of fleeing, he ran over someone with his car and killed that person, his car would be considered a dangerous instrument but not necessarily a deadly weapon.

SENATOR OGAN argued that might not be directly related and was not self-defense.

SENATOR FRENCH thought he would not be able to claim self-defense.

CHAIR SEEKINS thought he would if the person was pointing a gun at him.

SENATOR OGAN felt that would be self-defense.

CHAIR SEEKINS questioned how that would apply if he intended to buy drugs from that person.

SENATOR FRENCH thought the bill, as written, would preclude him from claiming self-defense but the proposed amendment would allow him to.

CHAIR SEEKINS questioned whether a car would be considered a deadly weapon or a dangerous instrument and said he wants that included.

MS. PARKES clarified if the committee members want to include that kind of a scenario, they would not want to change the amendment to read dangerous instrument instead of deadly weapon. She then commented that bricks and pipes are not always covered under deadly weapons but would be covered under dangerous instrument.

CHAIR SEEKINS said his next question is about using a baseball bat as a club. He indicated that his objective is to say if you were there, and while committing a felony kill someone, it will be very difficult to claim self-defense. He added, “I’m just trying not to say, well it’s okay to run somebody over if you’ve got a gun pointed at you and you’re in the middle of a – but it wouldn’t be okay to shoot them....”

SENATOR ELLIS asked Ms. Parkes to elaborate on the term “purported transaction” and who decides what that is.

MS. PARKES explained that section is meant to address a situation in which one person thinks he is going to a drug transaction while the other party intends to rob that person rather than sell him drugs. She said many violent outbreaks occur because of a “rip-off.”

SENATOR ELLIS asked if other states handle those situations by using “purported transaction” in their statutes.

MS. PARKES was not sure but noted that Mr. Guaneli and others in DOL prepared that language.

SENATOR ELLIS expressed concern that “purported transaction” is a subjective term and he questioned how that would be determined within the workings of a case.

MS. PARKES replied, “I think, given its common sense meaning, people are coming there anticipating a felony drug transaction, a purported transaction, is what we intended with the language.”

SENATOR OGAN expressed concern that a normally rational person would not pull a knife on a person with a gun. Or, in the example of the car, if the person in the car has no weapon but hits the person with a gun with the car, his attitude is “more power to him, at least he had the common sense to not bring a gun to a drug transaction and possibly endanger other people. But under that scenario, I hope he does run the guy over and kills him too. That’s one less person the state has to....”

CHAIR SEEKINS said he somewhat agrees but both parties may have had guns. He said generally speaking, people who intend to commit felony transactions know there’s a risk involved. He stated, “I agree sometimes the best thing would be for these people to be put away for a long time on both sides of the issue. If one of them is dead, one of them is put away for a long time when they were committing felonies, we’ve probably served a better public purpose than if one of them gets off.”

SENATOR FRENCH said he preferred to err on the side of caution so moved to amend Amendment 1 by replacing “dangerous instrument” with “deadly weapon”. He then read the definition of “deadly weapon” under AS 11.81.900: Firearm, or anything designed for and capable of causing death or serious physical injury, including a knife, axe, club, metal knuckles, or an explosive. He felt that change will keep the focus on the gang issue and leave out folks who have to use their hands to get themselves out of a bad situation.

CHAIR SEEKINS objected.

SENATOR OGAN told members he agreed with Senator French on this issue.

A roll call vote was taken. The motion carried with SENATORS OGAN, FRENCH and ELLIS voting yea, and SENATORS THERRIAULT and SEEKINS voting nay. Therefore, Amendment 1 was amended.

There being no further discussion about Amendment 1 amended, a roll call vote was taken. The motion to adopt Amendment 1 as amended carried with Senators Therriault, Ellis, French, Ogan and Seekins in favor.

SENATOR THERRIAULT moved to adopt Amendment 2 (which reads as follows), and asked for an explanation from department staff.

A M E N D M E N T 2

OFFERED IN THE SENATE
TO: CSSB 170(JUD)(23-GS1024\H)

Page 18, lines 5-31, and Page 19, lines 1-17:

Delete all material and insert:

"Sec. 32. AS 47.12.310(c) is amended to read:

A state or municipal law enforcement agency

(1) shall disclose information regarding a case that is needed by the person or agency charged with making a preliminary investigation for the information of the court under this chapter;
(2) may disclose to the public information regarding a criminal offense in which a minor is a suspect, victim, or witness if the minor is not identified by the disclosure;
(3) may disclose to school officials information regarding a case as may be necessary to protect the safety of school students and staff or to enable the school to provide appropriate counseling and supportive services to meet the needs of a minor about whom information is disclosed.
(4) **Or a state or municipal agency or employee** may disclose to the public information regarding a case as may be necessary to protect the safety of the public; and
(5) May disclose to a victim or to the victim's insurance company information, including copies of reports, as necessary for civil litigation or insurance claims pursued by or against the victim."

MS. PARKES told members that DOL made a proposal that would allow a state agency or employee, upon the request of a member of the public, to provide information about a juvenile adjudication for a sex offense as necessary to protect the safety of a child or a vulnerable adult. Amendment 2 comes after consultation with the Department of Health and Social Services (DHSS) Juvenile Justice Division. Division

staff were concerned that as drafted, the disclosure would be mandatory, and that members of the public could misuse the information. The division wanted more discretion to set policy about disclosure. Amendment 2 makes disclosure discretionary by saying a state or municipal agency or employee may disclose to the public information regarding a case as may be necessary to protect the safety of the public. It allows the division to set up in regulation how it will disclose information. She indicated that the situation that prompted this proposal was one in which social workers were visiting homes where juvenile sex offenders were babysitting or given access to vulnerable adults and children. The social workers could not provide that information to the public.

SENATOR FRENCH said the bill was written specific to adjudication for a sexual offense but that is not referenced in Amendment 2. He asked, "I take it there's some other piece of law somewhere that sucks that information into 'a case'?"

MS. PARKES replied, "If you look at the statute as it's currently written, this adds a provision. They talk about providing information about a case to law enforcement [indisc.] so it's a phrase they already use in interpreting how to release information. It does broaden it from just adjudication to being able to talk about cases, say where a juvenile is currently charged but hasn't yet been adjudicated. We actually think it gives the agency more flexibility to provide information to protect the public."

SENATOR FRENCH asked if Amendment 2 will incorporate social workers into the broader group above the law enforcement community.

MS. PARKES said that is correct; the intent is to allow social workers and other state employees that may have that information and are interacting with the public [to disclose that information].

SENATOR FRENCH asked what guidelines will constrain their discretion.

MS. PARKES repeated that DHSS specifically requested flexibility to allow agencies to set those policies.

SENATOR OGAN questioned how Amendment 2 amends existing statute by deleting material.

MS. PARKES explained that Amendment 2 deletes lines from the bill, not the statute.

SENATOR OGAN asked if AS 47.12.310(b) will remain the same but a sentence will be added to .310(c).

MS. PARKES said that is correct.

CHAIR SEEKINS questioned how an agency would prevent the disclosed information from being posted on telephone poles.

MS. PARKES indicated that nothing in Amendment 2 could prevent that from happening; the agencies themselves want to establish that kind of protection through policy and regulations. She repeated that is the agencies' concern and is why they did not want disclosure to be mandatory. She believes the agencies have ideas on how to accomplish that goal.

CHAIR SEEKINS asked, "What if they don't?"

MS. PARKES said the person requesting the information could disseminate it and she is not aware of any criminal prohibition or statute that could be used to go after them.

CHAIR SEEKINS questioned what would happen if there were no regulations or policy against it.

MS. PARKES indicated that Amendment 2 was requested by DHSS and deferred to the department for an answer.

CHAIR SEEKINS pointed out he is not unnecessarily trying to protect the minor and allow inappropriate contact but his concern is that there is the possibility that a juvenile with a relatively minor offense could be the victim of a witch-hunt.

SENATOR FRENCH noted that under current law, a state or municipal law enforcement agency has the discretion to disclose information to school officials if necessary to protect the safety of school officials, staff, [and students]. He noted the difficulty of finding a balance between protecting the public from a potential juvenile predator and protecting the juvenile's ability to be rehabilitated for a mistake made early in life.

CHAIR SEEKINS agreed; and added there is a difference between a predator and someone who may have broken the law at a young age. He questioned, "If we're being very careful about the details into which we – how we pour something into the sieve, why aren't we being careful about the details of how we do it?"

SENATOR FRENCH suggested hearing from a DHSS staff person.

SENATOR OGAN expressed concern that Amendment 2 broadens the scope of who can disclose in the name of public safety, regardless of the seriousness of the crime. He said he would be more comfortable with that provision if it specified a certain level of crime, such as a felony assault against a person.

CHAIR SEEKINS asked Mr. Guaneli to testify.

MR. DEAN GUANELI, Assistant Attorney with the Criminal Division of the Department of Law, suggested adding an effective date section to the bill that says this provision does not take effect until DHSS adopts regulations to implement the change in law enacted by that section.

SENATOR OGAN asked if the provision deals with any level of crime so that an employee could arbitrarily decide whether that person is a threat to the public.

MR. GUANELI replied:

> I think that – this information is confidential and I think that what the statute says is 'as may be necessary to protect the public.' I think that's the thing that really ought to be addressed in a regulation – the level of the threat that is involved, how the agency goes about weighing that level of threat. And I think that's something that really the public process leading to those regulations would address. I'm not certain that it's something that we can completely anticipate right here in this forum.

SENATOR OGAN asked, since particular crimes are not specified in the provision, [choosing which crimes to disclose] will be left to the discretion of the employee.

MR. GUANELI thought that was correct.

MS. PARKES responded that the proposed bill addresses the fact that right now any sexual abuse of a minor perpetuated by a juvenile is a misdemeanor. DOL is proposing to make penetration a felony while contact would remain a misdemeanor. She said that is why she has concerns about trying to distinguish between a felony and misdemeanor [in regard to this provision].

SENATOR OGAN said he would feel more comfortable if Amendment 2 contained some parameters on what crimes can be disclosed because, right now, it will allow any state employee to

arbitrarily disclose anything about anybody. He maintained that if Amendment 2 passes without parameters, DHSS should look to the committee record to determine the committee's intent.

SENATOR FRENCH noted the first line of Section 32 in version H says, "A state or municipal agency or employee..." while the first line of Amendment 2(c)(4) reads, "A state or municipal agency or employee..." and questioned whether that distinction was made consciously.

MR. GUANELI thought the addition of the word "or employee" was intended to mean that a particular employee could disclose the information so that disclosure would not require some sort of an agency proclamation.

SENATOR FRENCH interjected, "It seems like, the way it's written, the whole statute is about an agency. I don't know how it works now – if APD releases information, does it come from a person, a sergeant, or does it come from the agency? And it may ease some of Senator Ogan's concerns to know that this is more of an agency decision, that is, it's been passed up through a little procedure and it isn't one, you know, social worker kind of on a personal mission to release information."

MS. PARKES responded that DOL would not oppose deleting "or employee" to clarify that it is to be a policy decision of the agency.

CHAIR SEEKINS agreed and said he does not have faith that the regulatory process will always carry out the intent of the legislature.

SENATOR OGAN moved to amend Amendment 2(c)(4) to read, "A state or municipal agency or authorized employee..." so that the agency has identified an authorized who will provide the disclosures. He continued, "...so the agency identifies, okay, for these disclosures you go to this desk and that person understands what the policy of the agency is so you don't have these – any – say a social worker who doesn't like the particular family or whatever and that gives me more comfort that they're carrying out the policy of the agency, rather than just any employee arbitrarily."

CHAIR SEEKINS announced that without objection, Amendment 2 was amended.

SENATOR OGAN asked that DHSS draft regulations that specify the types of crimes that will be disclosed, those being violent crimes against person crimes.

CHAIR SEEKINS asked Ms. Parkes if DOL would draft a conceptual amendment to address DOL's suggestion that an effective date clause be added to the bill so that Amendment 2 does not take effect until regulations have been adopted.

MS. PARKES agreed.

CHAIR SEEKINS requested a roll call vote. The motion to adopt Amendment 2 as amended carried with Senators Ellis, French, Ogan and Seekins in favor.

SENATOR OGAN moved to adopt Amendment 3, which reads as follows.

A M E N D M E N T 3

OFFERED IN THE SENATE
TO: CSSB 170(JUD) (WORK DRAFT 23-GS1024\H)

Page 11, following line 29:

Insert the following:

"**(3) 'higher level felony' means an unclassified or a class A felony;**

(4) 'lower-level felony' means a class B or a class C felony."

Page 12, lines 23 and 24:

Following "applies:":

Delete all material and insert the following:

"a higher-level felony, a lower-level felony, or a misdemeanor."

CHAIR SEEKINS objected for the purpose of discussion.

MS. PARKES told members that Amendment 3 deals with the immunity proposal, as was discussed at prior hearings. She explained:

We proposed a procedure where a witness who is claiming immunity goes into a hearing with a judge. They're appointed an attorney and in a private hearing that's closed without a prosecutor present a judge hears a proffer of testimony as to why the person has a Fifth Amendment privilege. If a judge finds that there's a Fifth Amendment privilege, the way the bill is currently drafted, the only information that the judge gives to the prosecution about the Fifth Amendment privilege is what level of crime the person's Fifth Amendment applies to. In the bill as it's currently written, the prosecution is told if it's an unclassified or A felony, it would be a C. There were some concerns raised at the prior hearing that that might be too specific of information - that it might be able to point the state in the direction of who the worst player in a group is. And, to address that concern yet still give the state some information that would allow them to responsibly exercise their power to give immunity or not, we're proposing that instead of being told specifically the level of offense, the state be told that it's a higher level felony, meaning an A or an unclassified, a lower level felony, meaning a B or a C, or a misdemeanor. That's the only change.

SENATOR FRENCH noted that he has concerns about that section but none about Amendment 3.

CHAIR SEEKINS announced that with no objection to Amendment 3, it was adopted.

SENATOR FRENCH moved to adopt Amendment 4, which reads as follows.

A M E N D M E N T 4

OFFERED IN THE SENATE
TO: CSSB 170(JUD) (WORK DRAFT 3/8/2004)

Delete Page 15, line 31 to page 16, lines 1-3

Insert in its place:

(S) In a prosecution under (a) of this section, a person may introduce evidence of having consumed alcohol before operating or driving the motor vehicle,

aircraft or watercraft, to rebut or explain the results of a chemical test, but it is not a defense that the chemical test did not measure the blood alcohol at the time of the operating or driving.

Add a new section and renumber other sections accordingly:

*Sec. ___. AS 28.35.030(a is amended to read:

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

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

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

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

MS. PARKES explained that Amendment 4 addresses the "big gulp defense" proposal discussed at prior hearings. The current law says if a person is given an intoximeter test within 4 hours of driving and is .08 or above, that person is legally intoxicated. However, the courts have allowed people to argue that they "took a big gulp" right before driving and although the intoximeter was accurate at the time taken, the person's blood alcohol level was lower than that. DOL does not believe the intent of the legislation was to get into the middle of a battle of experts so Amendment 4 would do away with that defense and overturn a case called "Conrad," issued by the Court of Appeals. DOL found, during discussion at prior hearings, that it drafted the proposal so broadly that it would exclude people from

introducing legitimate evidence. Therefore, it has revised the proposal [Amendment 4] so that it would specifically say that a person may introduce evidence to rebut or explain the results of a chemical test but that it is not a defense that the chemical test did not measure the blood alcohol at the time of the operating or driving. That will allow people to attack the accuracy of the intoximeter but [not the timing] of the test if driving. She explained in the Conrad case, the [court] looked at the "when" language of the statute. DOL is proposing to substitute "if" for "when".

TAPE 04-26, SIDE A

CHAIR SEEKINS announced that with no objection to Amendment 4, it was adopted. He opened the meeting for public testimony.

MS. BARBARA BRINK, Alaska Public Defender Agency, told members her concerns about the amendments echo the committee members' concerns. She has trouble determining that people give up their right of self-defense because they are engaged in unlawful conduct. She fears this policy decision somewhat promotes vigilantism. She said the scale is imbalanced when people involved in low-level criminal activities cannot claim that right. She said she appreciates the change to "deadly weapon" made to that amendment.

Regarding disclosure of information [in Amendment 2], she felt it is critical to amend it to say that nothing in this section allows the disclosure of public information unless and until the regulations are drafted and policy is set by DHSS.

MS. BRINK'S final concern was that she does not believe anything can be done to make the immunity provision constitutional. She believes the Alaska Supreme Court has said quite clearly in the Gonzales case that the State of Alaska's standard is higher than the federal standard and that people may not be prosecuted for anything regarding the subject matter of their testimony if given immunity. She added, "I think that informing the prosecutor what level of felony or what level of offense is involved does become a link in the chain. I guess the person who has a valid Fifth Amendment right [sic] will render this section of the bill unconstitutional."

MS. SIDNEY BILLINGSLEA, representing the Alaska Trial Lawyers, made the following four points.

- The statement made that minors convicted of sex offenses are convicted only of misdemeanors is incorrect because minors under the age of 18 who cannot be waived under Title 47 can be convicted of class B and C felonies.
- Regarding Section 13, murder in the second degree, where the committee is considering excluding co-committers of crimes for felonies, including attempted felonies, a potential unintended consequence is the inclusion of people who are committing crimes. She explained that most burglaries in Alaska happen between the hours of 2:00 p.m. and 6:00 p.m., which are the hours after school and before parents arrive home. Most perpetrators of residential burglaries are young males between the ages of 15 and 20. She cautioned that if two teenagers, who are fairly decent people but are committing a stupid, juvenile act, break into a home of a friend and startle the homeowner who shoots one of them, the other teenager can be prosecuted as an adult for murder in the second degree.
- Regarding the self-defense section, she pointed out that all Alaskans are citizens who are presumed innocent, have equal protection to the laws, and have the right to life, liberty, and the pursuit of happiness. To presume to take away some of those fundamental rights from a class of citizens who are purported to be involved in a crime is not a good way to conduct business in Alaska.
- Regarding the immunity section, she believes if the state has investigated a case sufficiently to decide who to charge and who should be a witness, the state must have data on those individuals to decide whether the witnesses are important or not. At the point the witness needs to be given immunity to help convict the worse offender, the state needs to make that decision and provide the witness with immunity. The goal of the state would be the greater good of punishing the greater perpetrator. To find out what type of felony the witness may or may not have been involved in would provide the state with an investigative instrument that she does not trust the state with because the state could decide not to grant immunity.

There being no questions of Ms. Billingslea, CHAIR SEEKINS called the next testifier.

MS. ALLISON MENDEL, representing the Alaska Trial Lawyers and herself, asked to speak to Section 19, which relates to jury instructions about self-defense. She informed members that she primarily does appellate criminal law in the federal courts.

She views the bill's biggest weakness as the fact that it is based upon an attempt to reverse the results of particular appellate cases that the prosecutors did not like. She cautioned that it is very difficult to draft a bill that fixes the result of a specific case without having many unintended consequences, Section 19 being a good example. She stated:

> First of all, appellate cases – criminal cases are always the defendant appealing because a prosecutor can't appeal a jury verdict so it doesn't even come to your attention until the defendant has won an appellate case. Then the question is why did the defendant win and what can we do about it so it doesn't happen again. But, if you're going to avoid the expert appellate decision, what you have to do is provide clear guidance to the trial judge in terms that everyone understands and won't lead to a lot more appellate cases. I think Section 19 clearly doesn't do that. It talks about the judge, prior to agreeing to give a jury instruction, finding - quote unquote - plausible evidence to warrant a jury instruction on self-defense. Plausible evidence is not a term of art as far as I know, or anyone I've talked to. We don't know what plausible evidence is and therefore any case after this bill, there'd be a question on appeal whether the evidence was plausible or not.
>
> Ms. Parkes in her presenting this bill to the House committee, I wasn't around when she explained this to the Senate committee, says that this adopts the federal standards. It doesn't. There is nothing about plausible evidence in the federal standards. The federal standard talks about whether a reasonable jury could find self-defense so the federal system just works differently. This does not adopt federal standards; it adopts a standard that no one knows what it is and no one can understand. It also inexplicably, I think, expresses distrust of the jury in determining whether there's a self-defense claim at all. I don't understand why this committee would want to have the judge run interference for the jury and say well, I don't want the jury to think about this self-defense claim. I want the judge to decide if it's a good one or not and that seems to me to run against the values of the State of Alaska and our laws in general – let

> the facts go to the jury, let the jury decide. I don't see a harm in letting the jury decide the self-defense claim. If it's completely implausible, why would the jury find it as self-defense? I don't know of any cases that illustrate how the jury finds self-defense on the basis of no evidence. I think that this section is unnecessary and I think it does more damage than repair to the law. Thank you.

MS. CARMEN CLARK, testifying on her own behalf, directed her testimony toward the "big gulp defense" amendment. She informed members she practices as a criminal defense attorney primarily involving DUI cases and listed a long resume including jobs as the chief prosecutor for the Municipality of Anchorage and the National Highway Traffic Safety Administration Alaska DWI attorney for four years. She explained in the Conrad case, the prosecutor argued that it didn't matter whether or not the driver was over the limit when driving, as long as the driver was over the limit within four hours after the arrest. She indicated that DOL is asking the legislature to change the DWI so that it will not matter what the driver's legal limit is while driving.

MS. CLARK pointed out the Conrad case was unusual. In the normal DWI case, the driver is arrested and is asked to submit to a breath test approximately one hour after the arrest. The State of Alaska crime lab documentation and notebooks for instructing state troopers and police officers say that alcohol is eliminated at .02 per hour. That means the only way one could argue he or she was below .08 at the time of driving would be if the breath test registered at or below .10 at the time tested. She maintained that in her experience, three years ago, the average blood alcohol concentration of someone arrested for DWI in Alaska was .18, which is why it is unlikely that a case similar to the Conrad case will come up often. She pointed out:

> But when it does come up, it's the difference between one drink, or a man who weighs 180 pounds could get to .08 – if you're talking four to five drinks and that includes with food. So what the Department of Law is asking you to do is not eliminate the requirement for experts because experts do not show up in most DWI cases – most DWI cases don't even go to trial. What they're asking you to do is at that very fine line between the amount of alcohol we believe is illegal to drink and

drive and that very fine amount when you're suddenly over – and for most people at .08 they don't even show any signs [indisc.] – man, you really shouldn't drive, give me your keys. So, I'm asking you to leave it the way it is. There [are] going to be very few cases where the breath test concentration is tested within the usual hour after arrest. It's going to be so low that a person might actually be able to say that they weren't over the legal limit when they were driving. And that even gets more reduced because at the time of arrest, the officer usually goes through a series of questions, asking the person when they stopped driving. Almost nobody has alcohol in the car, which is really the only way to do this defense if you're going to be able to do it very successfully.

So, they're asking you to change the definition of DWI so that it doesn't matter whether or not you are intoxicated or impaired at the time of driving so long as somehow within the subsequent four hours you were intoxicated or had a legally impaired breath alcohol concentration. So I'm asking you to reject that.

And then I had a very quick comment. With regard to the purported drug crime, I think you all should table that whole thing. Send it off and ask them to redraft it. I sat through hours and hours of testimony and hours and hours of questions and it doesn't appear that anybody here knows – we understand what the purpose is but nobody understands if it's drafted very well. So I think the question about how do other states do it was a good one. I think that whole part should simply be tabled, send the Department of Law off to do some investigation and come back with a bill that's less vague and less confusing as to how it works.

And then the other thing that I'd like to point out has to do with – I heard two different philosophies going on in the testimony over the last many hours that I've sat through. One is this idea of personal responsibility for people who [indisc.] become engaged in drug activity, which I think was part of purported drug dealing and a part of the reason while we're trying to reduce that self-defense

> claim. I find that philosophy definitely at odds with the new felony murder rule that's been proposed. If I go along with you on a bank robbery, if I've assumed a risk [indisc.], it seems inappropriate for my co-defendant to be responsible for my death. So that's my last point and then I think it's been [indisc.] covered a great deal about the whole concept of negligent driving causing severe physical injury being a felony and I'd like the court to – I'm sorry, I call you the court because you're addressing [indisc.], but essentially I'd like you all to also reject that particular proposal. It is currently a misdemeanor, which I think is a significant enough crime for someone who might be speeding over the limit, have a moose step in front of them and have their passenger have seat belt [indisc.], which, under this law would be a felony....

CHAIR SEEKINS asked Ms. Clark to send him a summary of her comments for distribution to committee members.

He then announced that the committee would dedicate its meeting on Monday, March 29, to SB 170. He adjourned the meeting at 10:15 a.m.
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