ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE
March 31, 2004
1:07 p.m.

TAPE(S) 04-30,31

MEMBERS PRESENT

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

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

SENATE BILL NO. 170
"An Act relating to the Code of Criminal Procedure; relating to defenses, affirmative defenses, and justifications to certain criminal acts; relating to rights of prisoners after arrest; relating to discovery, immunity from prosecution, notice of defenses, admissibility of certain evidence, and right to representation in criminal proceedings; relating to sentencing, probation, and discretionary parole; amending Rule 16, Alaska Rules of Criminal Procedure, and Rules 404, 412, 609, and 803, Alaska Rules of Evidence; and providing for an effective date."
HEARD AND HELD

PREVIOUS COMMITTEE ACTION

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

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

04/15/03	(S)	MINUTE(JUD)
04/24/03	(S)	JUD AT 4:00 PM BUTROVICH 205
04/24/03	(S)	Heard & Held
04/24/03	(S)	MINUTE(JUD)
05/14/03	(S)	JUD AT 0:00 AM BELTZ 211
05/14/03	(S)	-- Meeting Postponed to 5/15/03 --
05/15/03	(S)	JUD AT 8:45 AM BELTZ 211
05/15/03	(S)	-- Meeting Rescheduled from 5/14/03 --
05/16/03	(S)	JUD AT 1:00 PM BELTZ 211
05/16/03	(S)	<Above Item Removed from Agenda>
05/16/03	(S)	MINUTE(JUD)
03/05/04	(S)	JUD AT 8:00 AM BUTROVICH 205
03/05/04	(S)	<Bill Hearing Postponed>
03/10/04	(S)	JUD AT 8:00 AM BUTROVICH 205
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
03/24/04	(S)	Heard & Held
03/24/04	(S)	MINUTE(JUD)
03/29/04	(S)	JUD AT 8:00 AM BUTROVICH 205
03/29/04	(S)	-- Meeting Canceled --
03/31/04	(S)	JUD AT 8:00 AM BUTROVICH 205
03/31/04	(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

Ms. Susan Parkes
Department of Law
310 K St., Suite 507
Anchorage, AK 99501
POSITION STATEMENT: Answered questions about the sections of SB 170

Ms. Linda Wilson
Public Defender Agency
Department of Administration
900 W 5th Ave., Suite 200
Anchorage, AK 99501-2090
POSITION STATEMENT: Expressed concerns about Sections 7, 17 and 19 and Amendment 5

Lt. Al Storey
Division of Alaska State Troopers
Department of Public Safety

3700 East Tudor Road
Anchorage, Alaska 99507
POSITION STATEMENT: Answered questions pertaining to Section 11

Ms. Patricia Ware
Division of Juvenile Justice
Department of Health &
Social Services
PO Box 110601
Juneau, AK 99801-0601
POSITION STATEMENT: Testified on Amendment 8

ACTION NARRATIVE

TAPE 04-30, SIDE A

SB 170-CRIMINAL LAW/SENTENCING/PROBATION/PAROLE

CHAIR RALPH SEEKINS reconvened the Senate Judiciary Standing Committee meeting to order at 1:07 p.m. for the purpose of considering SB 170. Senators Ogan, Ellis, French and Seekins were present. Chair Seekins said members would hear a sectional review of the bill and asked Ms. Wilson and Lt. Storey, who were listening on-line, to interrupt to ask questions when necessary.

The committee took a brief at-ease.

CHAIR SEEKINS provided the following sectional review.

Regarding Section 1, CHAIR SEEKINS said he checked to find out whether or not an established village, which is not a municipality, has a constitutional right to be able to adopt a more restrictive option. He was attempting to answer the question of whether groups of people, who are not an incorporated subdivision of the state, can establish the level of importation that would constitute a felony. He said at this point, he is satisfied that this provision is okay but deserves additional work down the road. He opined that in terms of defense, there would be a legitimate question if a person were charged.

Section 2 contains definitions. CHAIR SEEKINS asked if anyone found problems in Section 2. [No one did.]

Section 3 addresses adopting a lower amount [of alcoholic beverages]. CHAIR SEEKINS asked if anyone had problems with Section 3. [No one did.]

Section 4 enforces the lower limits of alcohol adopted by the locality. CHAIR SEEKINS asked if anyone had problems with Section 4. [No one did.]

Section 5 addresses overlapping local enforcement areas. CHAIR SEEKINS asked if anyone had problems with Section 5. [No one did.]

Section 6 again addresses overlapping local enforcement areas. CHAIR SEEKINS asked if anyone had problems with Section 6. [No one did.]

Section 7 makes the act of providing alcohol to a minor a class C felony. CHAIR SEEKINS asked if anyone had problems with Section 7. [No one did.]

Section 8 addresses forfeiture and adds cash, securities, negotiable instruments or other things of value used in financial transactions.

SENATOR OGAN asked if forfeiture would take place after adjudication.

MS. SUSAN PARKES, Deputy Attorney General, Criminal Division, Department of Law (DOL), replied, “Yes...There would be a hearing where a judge would make a finding that there was a nexus between the crime and the money, in order to forfeit it. Those sections just aren’t in this bill but there are sections that cover that.”

CHAIR SEEKINS noted no further questions or objections to Section 8.

Section 9 exempts certain things from forfeiture. [No questions or objections were heard.]

CHAIR SEEKINS asked Lt. Storey and Ms. Wilson to address Section 10.

MS. LINDA WILSON, Deputy Director, Public Defender Agency, Department of Administration (DOA), asked to comment on Section 7, which raises the crime of furnishing alcohol to a minor in a local option area to a class C felony. She said her concern is that furnishing alcohol to a minor anywhere in the state is a misdemeanor. She continued:

> The fact that it's in a local option area - it's just as bad here in Anchorage when somebody furnishes alcohol to a minor as it is in a local option area that's dry and I could see maybe an older brother or somebody giving it to a relative and they're going to be hit with a class C felony for this. One consequence I can see from this is that you are going to have a lot of Native people perhaps getting a C felony for the first time they've ever done something like this. In the other parts of the statute, it doesn't become a C felony unless you've got a prior violation. So I'm worried about [the] effect [this] is going to have on the Bush community.

MS. PARKES responded that DOL spoke with the head of the Bush caucus about the issue that this provision will put more Native people in jail. The Bush caucus is concerned about that possibility, however it supports this provision because alcohol is such a problem in the villages, which is why they go damp or dry.

SENATOR OGAN questioned whether Section 7 raises equal protection issues by treating people differently based on where they live.

CHAIR SEEKINS said he would agree to raise the crime to a C felony everywhere.

SENATOR FRENCH commented that another piece of legislation went through the Senate that treats parts of the state differently with respect to what vote is necessary to elect a mayor. He did not believe Section 7 would pose an equal protection problem because the first question that would be applied is whether that section is aimed at a certain race, and it is not. The next question is whether there is a rational basis for the law and the rational basis is that that particular part of the state voted to go dry. He said he believes there is a reason to punish someone more severely for furnishing a minor with alcohol in a dry area than in a wet area.

CHAIR SEEKINS asked Lt. Storey to describe his job with the Alaska State Troopers (AST).

LT. AL STOREY, AST, explained that he is currently working on the director's staff on legislative matters but he was the commander of the AST's drug and alcohol enforcement unit in the past.

SENATOR OGAN thanked Senator French for his counsel on the rational basis test.

CHAIR SEEKINS continued with the sectional analysis and explained that Section 11 applies to items of innocent parties that are subject to forfeiture. He noted he questioned whether or not the state could remand any portion of what has been forfeited to a municipal law enforcement agency rather than to the overriding local government, but his question has gone unanswered.

MS. PARKES noted that subsection (k) speaks to forfeited items being given to municipal law enforcement agencies.

CHAIR SEEKINS asked if accepting funds or items is allowable within the charters of local municipalities [for law enforcement agencies] versus giving those funds or items to the overriding government.

MS. PARKES deferred to Lt. Storey for an answer but noted that subsection (k) is identical to the provision in the current law under the drug forfeiture statute.

LT. STOREY affirmed that option is currently available to state troopers under the drug forfeiture law and is exercised frequently with the agencies that cooperate with the AST in drug investigations. The AST has not found any local agencies that are unable to receive forfeited funds but it has had discussions with the heads of those agencies to ensure that city ordinances do not require those funds be deposited into a general fund rather than be used for law enforcement efforts. He repeated that the AST has never had a problem with that and has found the locals to be very willing to receive those funds and use them for law enforcement purposes.

CHAIR SEEKINS noted there were no further questions or comments about Section 11.

Regarding Section 12, SENATOR OGAN asked if that section basically adds an “a” and an “and”. He asked for an explanation of the effect of those additions.

MS. PARKES told members that Section 12 is a conforming section to DOL’s proposal to make the violation of third party custodian duties a crime. Right now, DOL can go after a third party custodian for criminal contempt. Section 12 removes the criminal

contempt option, as it would no longer be necessary, assuming DOL's proposal is accepted.

SENATOR OGAN asked if that is tied to Section 17.

MS. PARKES affirmed that is correct.

SENATOR OGAN clarified that Section 12 does away with the criminal contempt charge, while Section 17 makes those violations class A or class B misdemeanors.

MS. PARKES agreed.

SENATOR OGAN asked for a description of the punishments for criminal contempt and class A and B misdemeanors.

MS. PARKES said criminal contempt is punishable by up to six months in jail and a $300 fine. She continued:

> So by changing it to a class A misdemeanor, B misdemeanor actually, upping the penalties in some situations, lowering the potential penalty in others, what we're really trying to do is create a cleaner way to prosecute these cases. The criminal contempt statute, you have to reference Section 9, which is an unusual section to prosecute under and we don't believe that the elements of the offense are as cleanly laid out as making it a clear Title 11 offense, which prosecutors are used to dealing with.
>
> Also, when you charge someone with criminal contempt, years later if you look at their criminal printout, and you see criminal contempt, it's not clear. There [are] lots of kinds of criminal contempt, what the actual violation was. And what we're trying to do is have something where it will also be clear if years later someone proposes themselves as a third party custodian, if that's on their criminal history, we'll know they obviously didn't do their job in a prior case and that would be helpful for law enforcement.

SENATOR OGAN expressed concern about the change in Section 17 because he believes it might create a major disincentive to signing up as a third party custodian. He said sometimes it is better to get a person who has committed a minor crime into a more positive and structured environment, such as a family environment. In addition, it is a lot less expensive than

keeping people in jail, an environment that is not conducive to rehabilitation. He noted that not all "bad" guys are evil and that sometimes, good people do bad things.

MS. PARKES said the court already warns potential custodians that they are subject to criminal prosecution under the criminal contempt statute and the third party custodian agrees to report violations immediately. In that sense, SB 170 does not require anything new of third party custodians. DOL's position is that the change to a class A or B misdemeanor should not discourage anyone from becoming a third party custodian, unless that person does not intend to carry out his or her duties.

1:30 p.m.

SENATOR FRENCH echoed Ms. Parkes' remarks and pointed out that a third party custodian who neglects his or her duties is posing a fairly significant public safety risk. He said it is extremely frustrating to find a third party custodian who is not fulfilling his or her duties because there has to be a "hammer" to use when dealing with folks who have been charged with crimes such as sexual abuse of a minor or a DUI. He said the misdemeanor approach is the right approach because no one will go to jail for a first offense. However, it gives the court, law enforcement, and the district attorney some leverage.

CHAIR SEEKINS agreed the new criminal penalty might act as a deterrent to serving as a custodian, but he prefers to err on the side of creating a larger deterrent for people who do not live up to their responsibilities as third party custodians.

MS. WILSON told members that violating a third party custodial duty is currently a crime. It is very difficult to find people to agree to be third party custodians, and most of them take the job very seriously. She does not believe there is a need to increase the punishment because of the threat of a criminal contempt charge. She noted that a penalty of a $10,000 fine and one year in jail would dissuade many people who were reluctant to become third party custodians in the past.

MS. WILSON said that Ms. Parke's testimony about clarifying the contempt conviction in the criminal records computer system was the first she heard of that concern. She said a less onerous way to address that concern is to make the violation a class B misdemeanor. That would expose the violator to a $2,000 fine and 90 days in jail, which will encourage people to report violations but not dissuade them from becoming third party

custodians. She noted that the Judicial Council did a recent study and reviewed over 2,000 felonies committed in 1999. It found that one of the most significant factors in the number of days a person spent in jail was having, as a bail condition, a third party custodian requirement. Therefore, lack of third party custodians already keeps many more people in jail now, so making it harder to get a third party custodian will keep people in jail a lot longer. She suggested making a third party custodian violation a B misdemeanor and removing it from the criminal contempt world. That would provide a higher fine and clarify the criminal record but will not deter people from becoming a third party custodian.

CHAIR SEEKINS asked if anyone had a proposed amendment to Section 17. He said his opinion is that the offense should not be less than a class B misdemeanor.

SENATOR FRENCH thought DOL did a good job of splitting the offense out to an A misdemeanor if the person in custody is a felon and a B misdemeanor if the person in custody is a misdemeanant. He felt that Section 17 will not deter good third party custodians but may deter people who do not intend to do a good job.

MS. WILSON suggested another possible amendment to target those people who do not plan to take their custodial duties seriously, that being to add the word “intentionally” before the word “failed” on page 10, line 11.

CHAIR SEEKINS thought that would be difficult to prove.

SENATOR OGAN moved to adopt Ms. Wilson’s suggested amendment [Amendment 4] for the purpose of discussion. Amendment 4 reads as follows:

A M E N D M E N T 4

TO: SB 170

On page 10, line 11, insert the word “knowingly” before the word “fails”

SENATOR OGAN felt Amendment 4 will make the culpable mental state unambiguous.

CHAIR SEEKINS questioned whether one can ever negligently violate a condition set out by the court. He wondered if a

custodian chose not to report the disappearance of a person in custody that would be negligent rather than intentional.

MS. PARKES said that an Alaska statute says if the mental state is not specified, it is knowingly. She thought that is the appropriate mental state for Section 17. That way, if a custodian is asleep while the person in custody leaves, the custodian cannot report because he or she is unaware of it. What DOL is attempting to do is clarify that people are knowingly failing to act. She expressed concern that changing the mental state to intentionally will take it up a notch and be very hard to prove.

SENATOR FRENCH clarified that the mental state of "knowingly" is only one rung lower than "intentionally" so it's not as though the bar will be set much lower. He felt "knowingly" is the right standard.

SENATOR OGAN moved to amend Amendment 4 by replacing the word "intentionally" with the word "knowingly."

CHAIR SEEKINS announced that without objection, Section 17 would be amended to insert the word "knowingly" between the words "person" and "fails" on page 10, line 11.

CHAIR SEEKINS continued with his sectional analysis and reminded members that the committee had an extensive discussion about Section 13.

SENATOR FRENCH thought that Section 13 would make a good change to the law.

Regarding Section 14, SENATOR OGAN said he is concerned about the term "dangerous instrument" and moved to change that term to "deadly weapon" on page 9, line 16 [Amendment 5]. He noted that he had a lengthy discussion with Ms. Wilson about that change and is concerned that a person who had one drink could be charged with criminal negligence or other similar scenarios.

CHAIR SEEKINS asked if the term "deadly weapon" includes a specific list of weapons.

MS. PARKES told members that under AS 11.81, "deadly weapon" is defined as any firearm or anything designed for and capable of causing death or serious physical injury, including a knife, an axe, a club, metal knuckles or an explosive. She then pointed out that a "dangerous instrument" includes deadly weapons and

any thing that, under the circumstances in which it is used, attempted to be used, or threatened to be used, is capable of causing death or serious physical injury.

CHAIR SEEKINS asked if "dangerous instrument" is limited to the logical extension of the definition.

MS. PARKES said that is correct.

CHAIR SEEKINS said a car would not be included.

SENATOR FRENCH noted that a car is not designed to cause death.

CHAIR SEEKINS asked if a drunk who killed or seriously injured someone while driving a car would fall under this statute.

SENATOR FRENCH said a drunk driver who killed or seriously injured a person could be prosecuted under, "murder, murder 2, assault 1 and 2."

MS. PARKES explained the difference is that a person who is legally intoxicated is acting recklessly. Section 14 is one notch lower. Regarding Amendment 5, she said DOL's intent is to close a loophole in the law. All current assault statutes refer to dangerous instruments; none are limited to deadly weapons. She explained:

> Right now we have an assault in the fourth degree that says if someone commits assault in the fourth degree - if with criminal negligence that person causes physical injury to another person by means of a dangerous instrument. We have criminally negligent homicide but we have no criminally negligent assault statute where serious physical injury is caused and that's what this amendment is intended to close that gap.

SENATOR OGAN asked how Section 14 would apply to a person who violated a traffic ordinance and caused a serious physical injury.

MS. PARKES said a simple violation of a traffic law would not raise the offense to criminal negligence. According to the statute, a person acts with criminal negligence when the person fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. She read, "The risk must be of such a nature and degree that the failure

to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe." She pointed out that would not apply to a person who was momentarily distracted and swerved in the road.

CHAIR SEEKINS asked if driving impaired would be criminal negligence.

MS. PARKES thought driving impaired would be considered as reckless behavior. She said she understands members' concerns, but explained that DOL proposed this change because prosecutors have been unable to prove recklessness where someone is not legally impaired but has drugs or alcohol on board. She said in those cases, when someone is injured, the factors do not add up to recklessness, but DOL believes they add up to a gross deviation. She noted that Alaska does not have a situation that fits that scenario.

1:50 p.m.

SENATOR FRENCH remarked that he has seen a lot of fourth degree prosecutions but never used the criminal negligence part of it. He questioned when it would get used.

MS. PARKES said the only time DOL looked at using it was for situations in which a vehicular collision occurred but the driver wasn't legally impaired but was involved in bad driving or bad behavior. She said DOL was distressed to find that although sometimes people were seriously injured, the driver could only be charged with a misdemeanor. She admitted it is rare that DOL uses it.

SENATOR FRENCH maintained, "The more outrageous the driving, the easier it is to prove recklessness and then you just go with that statute...."

MS. PARKES agreed but said this will also allow the prosecution to offer a lesser included to the jury. If the prosecutor believes it is a borderline case of recklessness, this will give the jury the option to say the person was not reckless but was perhaps criminally negligent, rather than drop the charge to a misdemeanor if a person was injured seriously.

The committee took a brief at-ease.

TAPE 04-30, SIDE B

CHAIR SEEKINS informed members that Linda Wilson, Lt. Al Storey, Bill Miller of the Anchorage Police Department (APD), and Donna Garner from the Victims for Justice were on-line and participating in an “open mike” arrangement. He told Mr. Miller and Ms. Garner that his intent during this hearing is to allow for brief discussion on the sections of this bill. He asked them to comment on any section they had concerns with.

CHAIR SEEKINS asked if a person who had an accident because he or she fell asleep at the wheel would be charged with criminal negligence.

MS. PARKES said the question gets back to whether the behavior was a gross deviation. In such cases in Anchorage, DOL never charged those drivers because DOL did not believe it could prove gross deviation just based on falling asleep. She noted if the sleep was coupled with alcohol or drug use, that might occur but, again, it would get down to the mental state and whether it could be proved beyond a reasonable doubt.

SENATOR OGAN commented that he has heard that people who use cell phones while driving are as dangerous as drivers with a blood alcohol level over .08.

CHAIR SEEKINS stated that if he supports this section it is with the intention that it not include anything but a gross deviation and not “a secretary on her way to work putting her make-up on and distracted for a moment or someone whose driving, trying to get back and snoozes, or someone who is using their cell phone, Senator Ogan....”

SENATOR OGAN said he has driven behind teenagers who were engaged in very distracting activity, to the point where he couldn’t tell who was driving.

MS. PARKES declined to comment.

CHAIR SEEKINS asked if there was further discussion about Amendment 5 [changing “dangerous instrument” to “deadly weapon”].

SENATOR FRENCH said the fact that there has been a statute on the books that parallels this provision, with the exception of serious physical injury, tells him this will not be subject to abuse. This provision will only put serious physical injury into the equation and is not an extravagant expansion of the law.

MS. WILSON said her concern is that she is hearing the message, "Trust the prosecutor, trust the prosecutor, they're not going to do this." However, she guarantees this provision will leave the door open for abuse. Reckless behavior can be charged as assault 1. Using criminal negligence will open the door "to the make-up, to the cell phone, to the – any consumption of alcohol and I think there could be an argument made that that's gross deviation...." She submitted that this provision will leave the door open to abuse.

CHAIR SEEKINS asked for a roll call vote. Amendment 5 failed with Senator Ogan in favor and Senators Ellis, French and Seekins opposed.

CHAIR SEEKINS moved on to Section 15. No committee members or members of the public expressed problems with that section.

CHAIR SEEKINS asked if anyone had concerns with Section 16. [No one did.]

CHAIR SEEKINS reminded members they already discussed Section 17 so moved on to Section 18 and informed members that Section 18 was amended.

SENATOR FRENCH asked if the committee was looking at an updated version that included those amendments.

CHAIR SEEKINS said the amendments adopted at the previous meeting have not yet been incorporated into version H. He noted that the committee had adopted four amendments at a previous meeting [on March 24].

MS. PARKES clarified that the first amendment was amended (on page 10, lines 29-31) and changed "dangerous instrument" to "deadly weapon."

CHAIR SEEKINS moved on to Section 19.

MS. WILSON commented:

> ...I don't think we need to have this section in there. I think that the 'some evidence' test is just fine the way it is. I think you're taking away from the jury. Their decision on the credibility or the plausibility of the self-defense claim, and that's where it should be left, is with the jury. If there's evidence to support self-defense, it should go to the

> jury. It shouldn't be kept from the jury by the judge who then is now going to decide plausibility and credibility. That's not the judge's function; it should be left to the jury. So, I just wanted to throw that comment in, you know, that we still have some concerns about that section.

SENATOR OGAN recalled some discussion about what evidence would be considered as "plausible" and asked if a statutory definition exists.

MS. WILSON said there is no statutory definition of "plausible evidence." She explained that Section 19 will make the judge decide the plausibility or the credibility of the evidence. If the judge thinks the evidence presented does not constitute a convincing self-defense claim, the judge will not give it to the jury when it is actually the jury's function to decide the issue of factual determination. He said allowing the judge to determine plausibility will show distrust of the jury because if the judge can't be convinced, the information will not go to the jury.

SENATOR OGAN asked how the current system works.

MS. WILSON said if a defendant can present some evidence to support a self-defense claim, which means any evidence that is put before the judge, the jury decides whether to buy that claim. Section 19 will make it harder to get the evidence to the jury because the judge will have to be convinced of its plausibility first.

SENATOR FRENCH commented that Section 19 raises the bar for a self-defense claim "one smidgeon." He is convinced the judges will construe Section 19 as narrowly as possible because no judge wants to preside over a trial in which a defendant does not get to present any plausible evidence. It is the judge's role to control the flow of evidence to a jury so that a trial does not become a free-for-all. He advised that self-defense claims come with a whole host of issues, including the character of the people involved, so there is reason to be careful about letting such claims in. He believes that Section 19 is not a major change to current law but it does move the bar a little bit higher than "any" evidence.

CHAIR SEEKINS asked if Section 19 says the judge can instruct the jury if the judge finds some plausible evidence to warrant

that a reasonable jury could find justification for the elements of self-defense.

SENATOR FRENCH said that is correct. He explained that a person on trial for murder may claim self-defense. The judge would ask for an explanation. If the judge finds that the explanation contained some plausible evidence of self-defense, the judge would allow the defendant to argue the self-defense claim before the jury. He pointed out that moreover, the prosecution would have to disprove the self-defense claim beyond a reasonable doubt.

CHAIR SEEKINS asked if that would preclude the defendant from being able to present the elements of self-defense, or whether it would go to the instructions to the jury.

SENATOR FRENCH said both. The judge would prevent the defense attorney from arguing that the defendant was acting in self–defense if there was no plausible evidence. The judge would act as the gatekeeper of information and the rule maker.

MS. WILSON responded that if the judge believes the evidence is insufficient or not plausible, then no evidence of self-defense can come before the jury and no instruction goes before the jury.

SENATOR OGAN said if someone is charged with a crime, the police and prosecutor have already decided that no plausible evidence of self-defense exists or the person would not be charged. He recalled the case at Big Lake and said he believes the right of self-defense is an unalienable right. He then moved to strike Section 19 in its entirety [Amendment 6].

SENATOR FRENCH objected and said he agrees that self-defense is an unalienable right but Section 19 will not change that. It simply says that when a person is on trial, that person must provide some evidence. He added:

> I think the Big Lake case is a perfect example. There is no way a judge is ever going to keep that self-defense claim away from a jury if it happened inside the place where a person lives, there's intruders in there, it's dark at night, and there's just no way under that [circumstance] and all that guy has to say is I was afraid and I thought they were armed and BOOM, you're going to the jury 'cause of the darkness.

> But to change the situation a little bit and make it into a Wal-Mart parking lot, it's bright daylight, the guys wearing a T-shirt and a pair of shorts and someone else shoots him to death, and he says well it was self-defense, he was walking toward me. Well, that's just out of the bounds of reality and you don't get to confuse the jury with a self-defense claim. So, I see the system working pretty well right now and this is just raising it a smidgeon.

CHAIR SEEKINS said he has a problem with affirmative defense and this moves a bit toward this but it is not outside the boundaries of his comfort level.

SENATOR OGAN said his point is that Section 19 lets the judge make that determination rather than the jury. He stated, "I guess I'm a sucker for erring on the side of caution when it comes to self-defense."

CHAIR SEEKINS asked for a roll call vote. The motion to strike Section 19 [Amendment 6] carried with Senators Ellis, Ogan, and Seekins voting yes, and Senator French voting no.

CHAIR SEEKINS asked for comments on Section 20. There being none, he moved to Section 21.

SENATOR FRENCH said he finds Section 21 to be troublesome. He read the Gonzales case and a few other Supreme Court cases related to self-incrimination after Mr. Ray Brown testified on this section, and became convinced that allowing the judge to disclose to a prosecutor what level of crime the witness is being given immunity for could become a "link in the chain" to prosecuting the witness. For that reason, he proposed an amendment to subsection (i) of Section 21 to read:

A M E N D M E N T 7

> On page 12, lines 22-24, insert a period after the word "finding" and strike the remainder of the paragraph.

He explained that the purpose of Amendment 7 is to not allow the judge to inform the prosecution of the category of offense.

CHAIR SEEKINS objected for the purpose of discussion.

SENATOR FRENCH pointed out that many states have struggled with this issue and one of the more interesting cases he read on this issue was the Oliver North case. Mr. North was compelled to testify before Congress about the Iran Contra affair and given immunity but was later prosecuted.

SENATOR FRENCH noted that his point is that under the Alaska Constitution, a person cannot be compelled to give testimony unless the state has taken measures to remove the hazard of incrimination, which means testimony can only be compelled after immunity has been granted. He furthered:

> And an individual faces a hazard of incrimination whenever the answers elicited for a conviction might furnish a link in the chain of evidence. Now frequently what we're talking about here is kind of non-testimonial – or non-evidentiary – use of compelled testimony. He's not going to be put on the stand to testify but he's going to be pulled back into the judge's chambers and be forced to tell the judge what he knows about the crime and then that information is conveyed to the prosecutors – the level of crime. And so I would call that non-evidentiary use of compelled testimony and Gonzales says non-evidentiary use includes assistance in focusing the investigation, deciding to initiate prosecution, interpreting evidence, and otherwise planning trial strategy.
>
> And let me just give you a real short hypothetical about how I think this could be misused. It involves murder inside a drug house - three people inside the drug house – four people, one gets shot to death. So there are three people alive. There's a 911 call from the neighbor's house and they say I just heard a shooting next door, you better come quick. The neighbor watches the door, nobody comes or goes in between the time the cops get there and the cops show up and there [are] three people inside. And let's say there's a bag of marijuana in one corner and let's say there's a bloody gun underneath the bed and the bag of marijuana's got some fingerprints on it and the bloody gun's got two sets of prints on it. And they run all of the prints and they realize the prints belong to defendant A on the marijuana bag and then the bloody gun's got two sets of prints on it. So you put defendant A on trial for marijuana possession and you

> call the other two people inside the house as witnesses to find out what he was doing with the marijuana. And when you call them as witnesses, of course they take the Fifth Amendment. And then they're going to go back to the judge's chambers and the judge is going to say well what did you do and one will tell him I murdered the guy. Then he brings the other guy and he says what did you do? And he says well I just took the gun and threw it underneath the bed. So the judge comes back out after having talked to these guys and says this guy over here, he's got immunity for a high level felony. This guy over here, he's got immunity for a low level felony. The prosecutor goes oh, okay, that guy's the murderer, he's the shooter, and that guy there just threw the gun underneath the bed and away we go. Neither one gets immunity and they both get prosecuted.
>
> That's, you know, a good person could shoot holes in a hypothetical but it's an example, I think, of how this law could be used to prosecute someone based on their own testimony.

MS. PARKES disagreed with Senator French and Mr. Brown's analysis of the Gonzales case. The court found, in the Gonzales case, the state's use derivative use immunity was unconstitutional and said the state must give transactional immunity. The court opinion contained strong language that said bad things could flow from forcing someone to testify by giving that person transactional immunity. Therefore, a person cannot be prosecuted for the crime he or she is given immunity for using anything that person says while testifying – period. In Section 21, DOL is asking for very minor information about the level of offense the prosecution would be granting immunity for to get, what is often, very important evidence in a case. Regarding the scenario that Senator French described, she noted that every law can be misused so such a scenario of misuse could be devised for any statute on the books. In that example, she said that the prosecutor would already know that of the two sets of fingerprints on the gun, one set belongs to the killer. The police would have been investigating that. If a judge tells the prosecutor one witness has immunity for a high level felony that is not evidence that can be used at a trial. She thought the "link in the chain" argument is very tenuous and pointed out that a witness may be concerned about being cross examined about drug use while on the witness stand.

She thought from a policy point of view, it is irresponsible that prosecutors are expected to be able to make decisions about whether or not to grant immunity with absolutely no information. Because of that, prosecutors do not give immunity because a person who is given immunity could take the stand and confess to a homicide and that person could not be prosecuted. For victims, that means important evidence is not introduced at trial. She believes that not allowing prosecutors to know the level of crime when granting immunity is a disservice to victims and to the state.

SENATOR FRENCH said if he believed every district attorney in the state was of Ms. Parkes' caliber, he would not be worried, but he knows the Supreme Court will look at that provision and strike it down. He said he wants to vote for this bill on the Senate floor but does not want to have to do so when it contains a provision he has reservations about.

CHAIR SEEKINS asked Ms. Parkes' if there is any other way to disclose information about the level of offense that is less definitive.

MS. PARKES' said under the analysis laid out by Senator French, no information could be given.

SENATOR OGAN expressed regret that this one subject is not a separate bill because the committee could spend a lot of time discussing that one issue alone.

CHAIR SEEKINS said he has no problem with it if DOL believes it is constitutional.

SENATOR OGAN said his point was that legislators have a duty to put a constitutional litmus test on the laws of the state, rather than giving the courts the arduous duty of undoing a job done poorly.

CHAIR SEEKINS agreed but said he tends to believe that Section 21 may be constitutional. He then asked for a roll call on adopting Amendment 7. The motion to adopt Amendment 7 carried with Senators Ellis, French, and Ogan in favor, and Senator Seekins opposed.

CHAIR SEEKINS brought up Section 23 but there was no comment. He then explained that Section 24 deals with consecutive sentencing.

SENATOR FRENCH asked if that applies to each count or each victim and whether this entire section is new.

MS. PARKES reminded members that Section 24 is identical to what was in last year's crime bill. Her understanding is that the consecutive sentence is for each additional offense.

SENATOR FRENCH said he had no further concerns with Section 24.

No members had concerns with Section 25.

Regarding Section 26, SENATOR FRENCH commented that this section says once a person has been convicted of a C felony for DWI, the next DWI conviction would automatically be a felony, no matter how much time lapsed between the two. He said he has given this section a lot of thought and is aware of teenagers who have been convicted of 3 DWIs before they become adults, but he decided the bottom line is that the core behavior must stop and that the need for public safety overrides the offender being kept on the hook for future DWIs.

SENATOR OGAN recounted a scenario in which a respectable, hard working type guy was pulled over for a minor traffic offense after attending a reception. He had been convicted of a DWI 20 years ago so would be looking at another felony, even though his blood alcohol level (BAC) was .08.

SENATOR FRENCH said the Anchorage Police Department (APD) gives a class to teach cadets how to detect alcohol consumption in people, which he attended once. He guaranteed Senator Ogan that a BAC of .08 would require a person to drink five or six drinks, which is not having one or two drinks at a reception. He felt if a person had a felony DWI as a young person, it should be that person's lifetime commitment to not drink and drive. He repeated that he prefers to err on the side of public safety.

CHAIR SEEKINS said he is aware of cases similar to the one Senator Ogan described and, in both cases, the offender pled to lesser offenses.

SENATOR OGAN asked if a person could plead to a lesser offense under Section 26.

MS. PARKES said that is always possible but the prosecutor could not let that person plead to a misdemeanor DWI. Often the reduction is to a reckless driving offense.

SENATOR OGAN indicated that he is not soft on habitual alcohol users in any way.

CHAIR SEEKINS echoed Senator Ogan's remarks.

MS. PARKES reminded members that they adopted Amendment 4 because Section 27 was drafted too broadly.

SENATOR FRENCH expressed concern that the committee's intent may not be reflected in that language. He questioned whether anyone can attack the intoxication test. He said he totally supports the intent of the amendment, that being to keep someone from saying they had four shots of whiskey and drove home before the alcohol had any effect.

SENATOR OGAN asked what Section 29 does.

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MS. PARKES said Section 29 contains conforming language to Amendment 4. It references subsection (s) to indicate that except for that subsection, the rest of the statute is not to be construed to limit the introduction of any other competent evidence because subsection (s) does limit it to a degree.

Members had no questions about Sections 30 or 31.

SENATOR FRENCH asked if Section 32 was amended.

MS. PARKES said it was but the Department of Health and Social Services (DHSS) has another amendment to address a concern about whether regulations would be drafted to determine what information state or municipal authorized employees could release.

CHAIR SEEKINS numbered the DOL proposal as Amendment 8, which reads as follows:

A M E N D M E N T 8

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:

(c) 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 authorized 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.

CHAIR SEEKINS moved Amendment 8 for the purpose of discussion.

MS. PATTY WARE, Director of the Division of Juvenile Justice, DHSS, introduced herself.

MS. PARKES explained to members that Amendment 8 was drafted to say that this provision would not apply until regulations were drafted and that only a state or municipal agency or authorized employee could release the information to indicate "it couldn't just be any employee willy-nilly letting information out may disclose to the public information...." That is a little broader than originally drafted, but it is not much of an extension of what DHSS can currently do.

MS. WARE pointed out that under AS 47.12.315, DHSS can already release a fair amount of information on juveniles who have committed certain offenses. Amendment 8 does not broaden the scope of information; it only allows other DHSS employees, who are not currently authorized, to release that information when there are concerns about public safety.

SENATOR FRENCH asked for examples of when information would and would not be released.

CHAIR SEEKINS interjected to say that Amendment 8 is intended to replace Amendment 2.

MS. WARE told members that the Division of Juvenile Justice (DJJ) used to be part of what is now the Office of Children's Services (OCS). When there were concerns about child protection and both agencies were combined, the information could be released. She said one good example of the intent of Amendment 8 is that it will allow OCS social workers that have concerns about protection of the public to release information that can already be publicly disclosed through a DJJ employee.

SENATOR FRENCH asked to whom, specifically, the information would be released.

MS. WARE said the specifics will be put in regulation. DHSS will be very careful about who can release the information and will make sure the regulations are consistent with existing statute. She noted that under AS 47.12.315 now, information can only be released if the offender is 13 years or older and committed certain crimes. In that case, the name, the nature of the offense, and what will be done about that offense can be released to the public. Those parameters would remain in place as DHSS is committed to making sure it is maintaining appropriate confidentiality.

SENATOR FRENCH maintained that Amendment 8 will not necessarily broaden the disclosure provision; it will merely move the responsibility from one agency to another.

MS. WARE said that is correct.

CHAIR SEEKINS asked if it already applies to municipal laws under current law.

MS. WARE said the current law refers to “a state or municipal law enforcement agency” so Amendment 8 basically removes “law enforcement” and broadens the authorization to other employees.

MS. WILSON said she supports Amendment 8 in the sense that requiring department regulations to be promulgated tightens it up but she still has some concerns. She noted that it originally addressed sexual assault and sexual abuse cases. Now, it applies to any case. Right now under AS 47.12.310, only state and municipal law enforcement agencies can release the information for the purpose of protecting the public. Amendment 8 will expand that ability to OCS and no longer limits disclosure to serious offenses. She appreciates the requirement for regulations but would feel more comfortable if it didn’t authorize release of information on any case.

CHAIR SEEKINS noted without further objection to Amendment 8, it was adopted.

Members had no concerns with Sections 32.

MS. PARKES told members that Section 33 contains conforming language for the sentencing provisions.

CHAIR SEEKINS noted that Section 34 contains conforming language and Section 35 contains the effective date.

There being no additional comments, CHAIR SEEKINS announced his intent to have a final work draft that incorporates all of the amendments prepared and distributed to members and that he would bring SB 170 up on Friday for final consideration. He thanked all members and adjourned the meeting at 2:55 p.m.