

ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE

February 29, 2008

1:32 p.m.

MEMBERS PRESENT

Senator Hollis French, Chair
Senator Charlie Huggins, Vice Chair
Senator Bill Wielechowski
Senator Gene Therriault

MEMBERS ABSENT

Senator Lesil McGuire

COMMITTEE CALENDAR

SENATE BILL NO. 185

"An Act relating to sex offenders and child kidnappers."

MOVED CSSB 185(STA) OUT OF COMMITTEE

SENATE BILL NO. 234

"An Act relating to the crimes of assault in the fourth degree and of resisting or interfering with arrest; relating to the determination of time of a conviction; relating to offenses concerning controlled substances; relating to issuance of search warrants; relating to persons found incompetent to stand trial concerning criminal conduct; relating to probation and to restitution for fish and game violations; relating to aggravating factors at sentencing; relating to criminal extradition authority of the governor; removing the statutory bar to prosecution of certain crimes; amending Rule 37(b), Alaska Rules of Criminal Procedure, relating to execution of warrants; and providing for an effective date."

HEARD AND HELD

SENATE BILL NO. 164

"An Act relating to disclosures required for the sale of a used motor vehicle, including a trailer, by a motor vehicle dealer."

HEARD AND HELD

PREVIOUS COMMITTEE ACTION

BILL: SB 185

SHORT TITLE: SEX OFFENDER/CHILD KIDNAPPER REGISTRATION

SPONSOR(s): SENATOR(s) WIELECHOWSKI

01/16/08 (S) PREFILE RELEASED 1/4/08
 01/16/08 (S) READ THE FIRST TIME - REFERRALS
 01/16/08 (S) STA, JUD, FIN
 02/07/08 (S) STA AT 9:00 AM BELTZ 211
 02/07/08 (S) Heard & Held
 02/07/08 (S) MINUTE(STA)
 02/12/08 (S) STA AT 9:00 AM BELTZ 211
 02/12/08 (S) Scheduled But Not Heard
 02/19/08 (S) STA RPT CS 3DP 2NR NEW TITLE
 02/19/08 (S) DP: MCGUIRE, FRENCH, STEVENS
 02/19/08 (S) NR: GREEN, BUNDE
 02/19/08 (S) STA AT 9:00 AM BELTZ 211
 02/19/08 (S) Moved CSSB 185(STA) Out of Committee
 02/19/08 (S) MINUTE(STA)
 02/27/08 (S) JUD AT 1:30 PM BELTZ 211
 02/27/08 (S) Heard & Held
 02/27/08 (S) MINUTE(JUD)

BILL: SB 234

SHORT TITLE: CRIMINAL LAW/PROCEDURE: OMNIBUS BILL
 SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

01/18/08 (S) READ THE FIRST TIME - REFERRALS
 01/18/08 (S) JUD, FIN
 02/22/08 (S) JUD AT 1:30 PM BELTZ 211
 02/22/08 (S) -- MEETING CANCELED --
 02/29/08 (S) JUD AT 1:30 PM BELTZ 211

BILL: SB 164

SHORT TITLE: USED MOTOR VEHICLE SALES
 SPONSOR(s): SENATOR(s) MCGUIRE

04/27/07 (S) READ THE FIRST TIME - REFERRALS
 04/27/07 (S) TRA, JUD
 02/12/08 (H) TRA AT 1:00 PM CAPITOL 17
 02/12/08 (S) Moved SB 164 Out of Committee
 02/12/08 (S) MINUTE(TRA)
 02/15/08 (S) TRA RPT 3DP 1NR
 02/15/08 (S) DP: KOOKESH, WILKEN, OLSON
 02/15/08 (S) NR: WIELECHOWSKI
 02/29/08 (S) JUD AT 1:30 PM BELTZ 211

WITNESS REGISTER

RICK SVOBODNY, Deputy Attorney General
 Criminal Division

Department of Law
Juneau, AK

POSITION STATEMENT: Provided sectional analysis for SB 234.

ANDREW PETERSON, Assistant Attorney General
Criminal Division
Office of Special Prosecutions & Appeals (OSPA)
Department of Law
Anchorage, AK

POSITION STATEMENT: Provided information related to SB 234.

JED WHITTAKER
Anchorage, AK

POSITION STATEMENT: Spoke in opposition to Section 4 of SB 234.

RON ADLER, CEO/Director
Alaska Psychiatric Institute (API)
Anchorage, AK

POSITION STATEMENT: Testified that some provisions in SB 234 could cause capacity issues at API.

STEVE WEST, District Attorney
Ketchikan, AK

POSITION STATEMENT: Spoke in opposition to some provisions of SB 234.

TREVOR FULTON, Staff
to Senator McGuire
Alaska State Capitol
Juneau, AK

POSITION STATEMENT: Introduced SB 164 on behalf of the sponsor.

ED SNIFFEN, Assistant Attorney General
Civil Division
Department of Law (DOL)
Anchorage, AK

POSITION STATEMENT: Provided background information related to SB 164.

JOHN COOK, Legislative Director
Alaska Auto Dealers Association (AADA)
Anchorage, AK

POSITION STATEMENT: Spoke in support of SB 164.

ACTION NARRATIVE

CHAIR HOLLIS FRENCH called the Senate Judiciary Standing Committee meeting to order at [1:32:55 PM](#). Present at the call to order were Senators French, Therriault, Huggins, and Wielechowski.

SB 185-SEX OFFENDER/CHILD KIDNAPPER REGISTRATION

[1:33:15 PM](#)

CHAIR FRENCH announced the consideration of SB 185. Before the committee was CSSB 185(STA). He summarized that the bill was heard when the committee last met, public testimony was taken, and committee discussion took place. The Department of Public Safety has and the Department of Law will submit an updated fiscal note to reflect that notice of electronic address changes must be given within one day rather than five days. The fiscal impact did not change. Finding no further discussion or debate, he asked for a motion.

SENATOR WIELECHOWSKI motioned to report SB 185 from committee with individual recommendations and attached fiscal note(s).

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CHAIR FRENCH announced that without objection CSSB 185(STA) is moved from committee.

SB 234-CRIMINAL LAW/PROCEDURE: OMNIBUS BILL

[1:34:17 PM](#)

CHAIR FRENCH announced the consideration of SB 234.

RICK SVOBODNY, Deputy Attorney General, Criminal Division, Department of Law, told the committee that the theme for this bill is that, "Small changes make big differences." Although SB 234 doesn't make any major changes with respect to creating new crimes, redrafting sentencing provisions or dealing with criminal procedure, it does make small changes in each of those areas. Hopefully the small changes will have a big affect for crime victims, police officers investigating crimes, and prosecutors who are prosecuting crimes, he said. The bill is divided into three areas: new crimes, criminal proceedings, and sentencing.

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MR. SVOBODNY said that Sections 1 and 2 have a new way of looking at assault in the fourth degree, which is an A misdemeanor offense. This bill would change certain fourth degree assault offenses, if committed twice before in the

preceding 10 years, from an A misdemeanor to a C felony. It would only be fourth degree assaults where there has been physical contact between the offender and the victim. It does not include fear assaults, which are those where the victim is in fear of imminent physical injury. "This includes the situation where a person has beat their spouse once [and] been convicted, twice [and] been convicted, and then the third time it would change from an A misdemeanor to a C felony."

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SENATOR WIELECHOWSKI asked if any thought had been given to increasing the penalties for multiple first, second, and third degree assaults. He also asked if pleading to a crime would be considered a conviction.

MR. SVOBODNY said that DOL has always believed that the legislature's intent is that a conviction is counted at the point of sentencing, but that should be clarified in the bill. With respect to increasing the penalty for other offenses, he told members that the predicate crimes—the two prior offenses—could be murder in the first or second degree, manslaughter, or assault in the first or second degree. That's why there's a 10-year look back, he said. If someone was convicted of criminally negligent homicide and received a 5-year sentence, they'd be half way through that time period before they got out of jail. So DOL did think about broadening the scope to include other crimes against people like stalking and reckless endangerment, but decided it was better public policy to limit it to offenses where there was actual physical force impacted on the body of another.

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CHAIR FRENCH asked if fear assaults can be a predicate prior.

MR. SVOBODNY said yes.

CHAIR FRENCH summarized that an assault in the fourth degree fear assault or an assault in the third degree fear assault could count as priors but it has to be a pain assault for a misdemeanor to become a felony.

MR. SVOBODNY said that's correct. He added that getting too specific potentially raises the issues of Blakely with respect to what should have been tried to a jury before. Saying any previous assault wouldn't require figuring out specifically what those elements were in the assault in the third degree - whether it was a fear assault or actual physical injury assault.

SENATOR WIELECHOWSKI asked if there are ex post facto issues for assaults committed before this law is implemented.

MR. SVOBODNY said no; the issue has been litigated often with respect to the third DWI being a felony or the third theft being a felony. This doesn't create a new offense; it simply establishes that from this point forward someone who commits a third time assault is committing a felony assault.

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MR. SVOBODNY noted that Sections 12, 13, and 14 are conforming amendments to the assault in the fourth degree provisions.

Section 3 addresses prior convictions. It clarifies in statute that for the third theft to count as a felony theft, the date of the prior conviction is considered to occur on the date that the individual starts receiving the benefit of the sentence. The court of appeals has reviewed the legislative history in that regard and believes that is what the legislature intended.

CHAIR FRENCH pointed out that frequently there's a gap between the date of a guilty plea and the imposition of a sentence. It'd be during that time that a person might pick up a third theft charge, but it wouldn't be a felony under this statute since it's the day of sentencing that's the trigger.

MR. SVOBODNY agreed. Continuing, he said that Section 4 adds a new provision to the existing crime of resisting arrest. Now it can be committed three ways: 1) use of force, 2) any degree of criminal mischief, or 3) creating a substantial risk of serious physical injury.

SENATOR WIELECHOWSKI observed that a serial assaulter who is finally caught couldn't be punished under the provisions in Sections 1, 2, and 3.

MR. SVOBODNY agreed; there'd have to be two prior convictions within the time period that the legislature set.

CHAIR FRENCH said the committee will ponder that as it considers the bill. Returning to Section 4, he asked the genesis for adding disobeying a peace officer as a way of resisting arrest.

MR. SVOBODNY explained that what sometime happens when police try to make an arrest is that a person will lie down and passively resist. That escalates the danger to the police

because they have to pick the person up and haul them away. The Municipality of Anchorage and the City and Borough of Juneau both have passed ordinances identifying that behavior as resisting arrest. The Alaska State Troopers asked that this section conform to the ordinances from those municipalities.

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SENATOR WIELECHOWSKI asked if the presumption is that the order from the police officer is lawful. For example, when people are exercising their First Amendment right by legally protesting, it's wrong for a police officer to tell them to disperse.

MR. SVOBODNY said he believes the phrase "lawful order" would concern law enforcement officers because they don't want to be second-guessed six months later as to whether a person was resisting arrest. A person must intend to resist arrest and in so doing they disobey the police officer's order so the issue of the hypothetical demonstration wouldn't come up. A person who is exercising a free speech right and doesn't obey an order to move along isn't resisting arrest.

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MR. SVOBODNY explained that Section 5 adds Ambien and Soma [carisprodol and zolpidem] to the list of controlled substances so that under the DUI statutes the police can charge people for driving under the influence of these substances. Responding to a question, he explained that these are sleeping pills. He believes that Lunestra should also be added to the list of Schedule IV controlled substances.

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SENATOR WIELECHOWSKI commented that it must be difficult to prove these cases.

MR. SVOBODNY agreed it is a difficult problem. Oftentimes it's necessary for a toxicologist to explain whether the drug in a person's system is a therapeutic amount. Alaska has a contract with the Washington State crime lab to provide expert testimony in those sorts of cases. It's not like alcohol where it's fairly definitive at which point a person's ability is impaired. These tests can't be run at the state crime lab, he said.

SENATOR WIELECHOWSKI asked if he anticipates taking blood or other samples to verify the drug use.

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MR. SVOBODNY explained that police officers with special training look for things that indicate impaired driving. They look harder when the preliminary breath test (PBT) gives a .00 result yet there was erratic driving. They can take blood only after establishing sufficient probable cause to get a search warrant for blood. It's not the same as giving a breath test to test for alcohol, he said.

MR. SVOBODNY said Section 6 deals with the application of search warrants. He explained that when Internet providers that are headquartered outside Alaska are asked to provide subscriber information, they want a subpoena or some type of documentation before providing the information. In dealing with sexual offenses against children by online enticement or child pornography, the recent trend is for the court to say it doesn't have jurisdiction to grant a search warrant for that information. Judges are saying the same thing for white collar crimes when the documents are produced in Delaware, he said. The practical issue is that a company will provide those documents and even if they don't, Alaska has the opportunity to go to a Delaware court with a search warrant issued by an Alaska court and ask for full faith and credit.

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MR. SVOBODNY explained that several years ago the legislature expanded the extraterritorial ability of the courts to grant search warrants on state ferries outside state boundaries. Case law was clear, but if a local jurisdiction didn't want to help then this state would make a decision about going into another state's court saying that Alaska courts be given full faith and credit and that an order allowing the search warrant be executed. It's a technical issue but it's one that deals with child pornography, child enticements, and white collar crime, he said.

MR. SVOBODNY said Section 7 is also a search warrant issue. Currently a police officer can obtain a search warrant by telephone if he or she can show that: 1) presenting the affidavit or testimony in person would result in a delay in the execution of the search warrant, and 2) that the evidence would be destroyed in the time it would take the officer to get to the court in person. He said a case recently came to his attention where the police were 8 hours up river at a marijuana growing operation. The police used a satellite phone to call the court and get a search warrant. "We lost because we weren't able to show that within the 8 hours to get down river to get the search

warrant that the evidence wouldn't be destroyed in that period of time," he said.

CHAIR FRENCH asked if his use of the term "lost" meant that the evidence was suppressed.

MR. SVOBODNY replied that's correct, and he believes the court followed the statute.

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SENATOR WIELECHOWSKI commented he's in favor of providing law enforcement with all the tools it needs, but he also wants to protect individuals' rights. This essentially gives law enforcement carte blanche. He questioned why it's not possible to call a judge on the telephone and give a short presentation about what would be lost and why. The judge would then make a finding. "We're taking away citizens' rights here and that concerns me when we do that," he said.

MR. SVOBODNY agreed that citizens' rights shouldn't be limited, but this isn't asking for anything more than modern methods for transacting business. The police still have to gather evidence and convince a judge that there is probable cause to believe that evidence of a crime or fruits of a crime are at a particular and specific location. That provision only applies for telephonic search warrants. This just changes the technique of getting the information to the judge, he said.

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CHAIR FRENCH said regardless of whether it's in person or by telephone or facsimile, the evidence has to convince the judge that there's probable cause that a crime has been committed and that evidence is being hidden.

MR. SVOBODNY agreed; the only change is the mechanics for getting the information in front of a judge.

CHAIR FRENCH opined that there will be instances where a search warrant won't be issued because the facts aren't sufficient or they can't be elucidated further through questioning by the judge. This may be the weakest form of an application for a search warrant, but it's a tool in the toolbox, he said.

SENATOR WIELECHOWSKI asked if the purpose for including Sections 1 and 2 is that there have been abuses historically.

MR. SVOBODNY surmised that the legislature took the conservative approach. At the time that this was enacted most states didn't allow search warrants by telephone or facsimile. That is still true today. Most states require written application for a search warrant and many states, including Alaska, allow live testimony. In Alaska, one court of appeals judge has said repeatedly that it's better to have the officer physically present. He said he'd buy into that if the officer were testifying, but in applying for a search warrant the law says the officer can submit a written affidavit. "It seems that you would have a better feel for the evidence if you actually had the person on the phone and could ask questions and get answers and you could hear how their voice is...," he said.

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SENATOR WIELECHOWSKI offered the view that because of the size of the state and the difficulty of getting to a court house or magistrate's office, it's appropriate that Alaska allow search warrants by phone. All this says is the delay might result in loss or destruction of evidence or might interfere with an investigation. His worry centers on an individual's privacy rights. Before a police officer enters a home or business he wants to make sure that officer has gone through Fourth Amendment procedures. This seems to be reasonably written and he doesn't see the difficulty in picking up the phone and making a case to the judge. If the officer can't provide proof, then he or she probably doesn't deserve to get a search warrant, he said.

MR. SVOBODNY pointed out that the officer would get the search warrant now if he or she personally appeared before the judge. Search rules aren't being changed. An officer who walks across the street and writes out an affidavit doesn't have to say that it's likely that the evidence will be destroyed in order to get the search warrant. That is only a requirement if the officer applies for a search warrant by calling the judge or magistrate on the telephone. That is a statutory requirement, not a constitutional requirement, he said.

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CHAIR FRENCH said it's a good policy debate and there's likely to be more. He asked Mr. Svobodny to continue the sectional analysis.

MR. SVOBODNY explained that Sections 8, 9, 10, 11, 19, and 20 deal with the circumstance where a person has been found incompetent to stand trial. He cited examples. Under these

provisions, before a person who is incompetent to stand trial is released back to the community the district attorney is supposed to be given notice that the release will occur within 10 days. If a person is found incompetent to stand trial, an evaluation is to be done for a determination of whether he or she should be committed and treated at API. If counsel proves that a person is found incompetent to stand trial, there is a rebuttable presumption that he or she is mentally ill and a danger to him or herself or the community. That's the standard for a determination of whether the person should or should not be committed, he said.

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CHAIR FRENCH asked what the legal difference is between a finding of incompetent to stand trial and a verdict of not guilty by reason of insanity. He said it seems that with one you're pushed out of the system at the start and the other you go through the system and get pushed out at the end. Both seem to have a similar mental state.

MR. SVOBODNY said if a person is found guilty but mentally ill they're sent to API for evaluation but if a person is not guilty by reason of insanity they're sent home.

CHAIR FRENCH observed that it's about the same because they both go home.

MR. SVOBODNY said he believes that present law says that if a person is found not guilty by reason of insanity there has to be an evaluation.

CHAIR FRENCH said he'd hold that issue for a future hearing.

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MR. SVOBODNY relayed that Ms. Carpeneti, Department of Law (DOL), has worked with the Office of Public Advocacy (OPA) and the Public Defender Agency (PDA) to address the concern that this is too broad. They have worked on a proposed amendment to limit court involvement to felony offenses as opposed to all offenses and he believes it's a good approach. The limitation makes sense for minor offenses such as trespassing, but the community needs protection from people who have convinced a court they aren't competent to stand trial yet they've committed arson, murder or other serious crimes.

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MR. SVOBODNY said Section 11 clarifies that the court can put a person who has been convicted of a violation on probation. Currently there is no provision for that. Section 18 allows the court to order a person who is convicted of violating laws or regulations under Title 16 for unlawful taking of game to pay restitution for the unlawful taking.

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ANDREW PETERSON, Assistant Attorney General, Criminal Division, Office of Special Prosecutions & Appeals (OSPA) explained that for hunting and fishing violations the troopers generally like to see small violation fines and restitution for the animal, which is often donated to charity. Current law doesn't allow for restitution for the animal, but the change in Section 18 would allow that.

SENATOR HUGGINS, noting that the restitution for unlawful taking of a moose is \$1,000, questioned whether that might not keep some people from self reporting an unintended but unlawful taking.

MR. PETERSON said a number of factors figure into charging decisions. When it's an honest mistake we like the discretion to reduce the fine from a misdemeanor to a small violation, he said. The statute says the court may impose restitution, it's not mandatory.

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SENATOR HUGGINS asked what a small fine might be for taking an undersize moose.

MR. PETERSON replied it'd probably be \$250. Some fines have gone lower and some higher. Generally on a 49.5 inch moose there isn't a fine, but if no fine is imposed it essentially becomes legal. Even though it's forfeit there's no real risk to the hunter and that becomes a slippery slope, he said.

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MR. SVOBODNY said Section 15 begins the sentencing provisions. It clarifies in statute that "aggravated assaultive behavior" is a felony offense.

Section 16 defines in statute what the U.S. Supreme Court said in the Blakely decision with respect to what has to be tried to a jury. This says that repeated sexual assaults as an aggravating factor is not something that needs to be tried to a jury. The court can make the determination if there are

convictions. If they aren't convictions they'd have to be decided by a jury. This conforms statutory language to case law language, he said.

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SENATOR THERRIAULT asked if there's been a particular problem with the prosecution that highlighted the need for this clarification.

MR. SVOBODNY replied there has been that problem and the court of appeals has given that definition. Putting it into statutory form makes it easier to reference, particularly in court.

Section 17 provides statutory authority for the governor to delegate his or her extradition responsibilities to a staff member. Alaska is the only state where the governor actually signs extradition warrants. This establishes that the appointment must be in writing and filed with the lieutenant governor.

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MR. SVOBODNY said Section 21 repeals AS 11.71.310 and AS 12.20.010. Those prohibit state prosecutions for violations of state law if the federal government has prosecuted the same act under a federal violation. For example, Alaska currently could not prosecute an oil company for a criminal law violation if the federal government made a charge first. That applies throughout criminal law, he said.

SENATOR HUGGINS asked about double jeopardy.

MR. SVOBODNY explained that the state is a separate sovereign. As long as there are elements of the crime and there's a territorial connection, there is no double jeopardy issue.

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SENATOR HUGGINS said he certainly believes that the state should have the ability to recover corrosion damage from an oil company, but there was some rationale for putting this provision in statute and for it lasting such a long time. He'd like to know what the rationale might have been.

MR. SVOBODNY suggested that it's the visceral reaction to double jeopardy. Someone shouldn't be penalized twice for the same conduct even though the victims may have substantially different and competing interests. For example, in drug prosecutions the federal government, as a victim, may be looking at forfeiture of

drug dealer assets and the state, as a victim, may simply want the dealer off the street.

SENATOR HUGGINS asked how this might impact the ordinary person.

MR. SVOBODNY explained that in the last several years the federal government has cherry-picked, leaving the more difficult drug and child pornography cases to the state.

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SENATOR WIELECHOWSKI asked if passing this provision puts Alaska in line with other states.

MR. SVOBODNY replied he doesn't have that information, but it's a one-way street with respect to the state versus the federal government. The federal government has always maintained that if the state charges first it still has authority to bring charges later on.

CHAIR FRENCH highlighted the Rodney King trial. The state prosecution failed and the federal government followed up with a prosecution.

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SENATOR WIELECHOWSKI questioned the repeal of AS 12.35.015(f) in Section 21. He read the following:

(f) Absent a finding of bad faith, evidence obtained under a warrant issued under this section is not subject to a motion to suppress on the ground that the circumstances did not support its issuance under (a) of this section.

MR. SVOBODNY explained that repealing subsection(f) conforms to the amendment in Section 7 that allows a court to issue search warrants by telephone and other electronic means. Subsection (f) won't be needed any longer if you're saying the police officer is going to get search warrants by telephone, he said.

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CHAIR FRENCH suggested postponing an in-depth discussion of that point to a later time.

MR. SVOBODNY said Section 22 changes a court rule to allow a judge more discretion in timing for the return of a search warrant.

CHAIR FRENCH thanked Mr. Svobodny and said he'd be invited back when the bill was heard next.

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JED WHITTAKER, Anchorage resident testifying on his own behalf, said he wants to speak against the amended language in Section 4 that adds disobeying an order of a police officer to resisting arrest. Referring to the saying that the U.S. Constitution is only as good as the corner policeman, he noted over the last 20 years police have become militarized and prison populations have doubled. Police officers have changed attitude and it borders on paranoia and sometimes belligerence, he said. If a police officer tells a person they're under arrest it's fairly straightforward. But under this new provision if a person isn't put under arrest and the police issue an order that isn't followed, then that person would be resisting arrest. "I don't think that's good," he said. The second reason he has a problem with the language is if a person is taking picture of an arrest and the police want to seize the camera, that person is guilty of resisting arrest. Citizens have an obligation to prevent police brutality, which means they must be able to observe and take pictures of the police whether the police want that or not. The final reason he doesn't support the change is because the cost of incarceration is astronomical. "How many people need to go to prison so that everybody feels safe?" he asked.

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RON ADLER, CEO/Director, Alaska Psychiatric Institute (API), said although the Department of Health and Social Services (DHSS) supports the intent of this legislation, he would point out that the sections relative to sending to API individuals who are incompetent to stand trial and presumably mentally ill could cause capacity issues at the hospital in the future. The number of people that could be sent to API as a result of this bill is undetermined and the forensic unit at the hospital is typically at capacity with a waiting list. "This could result in additional planning for changes in the facility or additional facilities in the state," he said.

CHAIR FRENCH asked what the forensic unit is and what capacity it has.

MR. ADLER explained that it's a medium-security 10-bed unit. Two beds are permanently occupied by (NGRIs). Those are individuals who have been found not guilty by reason of insanity. A lot of restoration-to-competency and culpability exams are done within

the unit because the only licensed forensic specialist in the state works there.

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STEVE WEST, District Attorney, Ketchikan, said his testimony relates to Sections 8, 9, and 10 and persons who are found incompetent to stand trial. He explained that this issue arose in Ketchikan in 2003 and 2004 when a man committed five arsons. In 2004 he was charged with the arsons and admitted to starting all the fires. He was found incompetent to stand trial. As district attorney he asked API to commit the arsonist. API interviewed the man and did not commit him because the man told the interviewers that he wouldn't start any more fires. He was released and within six months he was charged with arson in a nearby community. According to his record he's been setting fires since he was a teenager and he has no doubt that he'll do it again. It's interesting that he wouldn't have an insanity defense, but he isn't competent to understand court proceedings so he isn't competent to stand trial. This bill will correct that type of problem, he said.

CHAIR FRENCH announced he would hold SB 234 for a subsequent hearing.

SB 164-USED MOTOR VEHICLE SALES

[2:50:57 PM](#)

CHAIR FRENCH announced the consideration of SB 164.

TREVOR FULTON, staff to Senator McGuire, introduced SB 164 on behalf of the sponsor. He explained that the bill removes from statute outdated language governing the sale of used motor vehicles without reducing consumer protections. The bill repeals AS 45.25.464(c), which says that dealers must post three disclosures on used vehicles they intend to sell: 1) the vehicle is not subject to Alaska's "lemon law," 2) the vehicle is not covered under a manufacturer warranty, and 3) the vehicle was not manufactured for sale in a foreign country.

MR. FULTON said the disclosures were mandated in response to an influx of Canadian vehicles that were sold as new. He understands that was occurring up until about 2000. Industry and the Department of Law agree that this is no longer an issue. In fact, all three disclosures are information that's readily available to consumers. These mandated postings are an inconvenience and they may be leaving dealers exposed to legal suit because failure to post the information in subsection (c)

amounts to unfair trade practices. Unfair trade practices allows lawsuits demanding treble damages and reimbursement of legal costs even though the consumer may have suffered no actual harm or damage. "When the state starts unnecessarily burdening Alaskan businesses while providing no additional consumer protection, the sponsor believes it's time to reevaluate."

CHAIR FRENCH asked Mr. Sniffen to give his view of the bill.

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ED SNIFFEN, Assistant Attorney General, Civil Division, Department of Law (DOL) said he's responsible for enforcing the Alaska Consumer Protection Act and the antitrust statute with a particular emphasis on regulating auto dealers in Alaska. He said that Mr. Fulton accurately described how this legislation came about, but he'd like to highlight information that DOL has received since it sent a letter to the sponsor. Initially DOL didn't understand how the statute was passed with reference to a disclosure requirement that extended to all used vehicles as opposed to just "current model" used vehicles. DOL has since communicated with Representative Gruenberg who recalls adding that language because he wanted to extend the protection to all used cars. DOL will speak to the Representative about his concerns to make sure they are addressed but, as Mr. Fulton said, the protections in subsection (c) are already required in a number of other ways. He noted that when the "current model" vehicle language was removed from Title 8 several years ago it created an issue with this statute. But for the most part industry has self-corrected in the sense that the harms caused by selling current model vehicles without the required disclosures have been removed. He offered to go into further detail.

2:57:07 PM

CHAIR FRENCH referred to two documents in the packet. The first has a "little sticker" and the next has a "big sticker." He asked if the little sticker is being affected.

MR. SNIFFEN said yes; the big sticker has the disclosures that are required under federal law. It has boxes for the dealer to check stating the vehicle will be sold as is with no warranty or with either a full or limited warranty. It's the little sticker that would no longer be required under this bill.

CHAIR FRENCH recapped that the little sticker says three things about the vehicle: 1) it's not subject to the lemon laws; 2) it's not covered under a warranty; and 3) it's not built Canada.

And the big sticker is pretty clear about "no warranty" versus "warranty." He asked what part of that big sticker tells a consumer that the vehicle wasn't built in Canada.

MR. SNIFFEN replied he's unaware of any part of the big sticker that has that information, but the requirement wouldn't change. "Auto dealers would still have to post a requirement on the car if the vehicle was manufactured for sale in Canada or another foreign country." That requirement comes from AS 45.25.470 so they're duplicative. Removing the requirement from one section doesn't remove it from the other.

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CHAIR FRENCH asked what part of the big sticker would tell a consumer that the car isn't subject to Alaska's lemon law protections.

MR. SNIFFEN replied it's not explicit so it's not as clear. The lemon law protections are in fact warranty protections that apply only to new cars. When the "no warranty" box is checked on the big sticker, by assumption that is telling the consumer that the lemon law would not apply. He isn't aware of any state that requires that specific kind of disclosure.

CHAIR FRENCH asked if he's comfortable with that.

MR. SNIFFEN said he is comfortable because he doesn't know that consumers rely on that kind of information when they decide to buy or not buy a vehicle. The lemon laws have a very specific application. Consumers have certain rights when they buy a new vehicle and manufacturers are required to include that information in the owner's manual. "When it comes to used cars, that bit of information is just not that harmful to consumers to not have because it wouldn't apply anyway," he said.

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CHAIR FRENCH questioned why the bill is retroactive.

MR. SNIFFEN explained that DOL understands that when this provision passed it wasn't meant to apply to all used vehicle sales. It was intended to apply only to "current model" used cars. Some dealers though that was the correct application of the law and so they didn't make those disclosures. They started doing it once they realized the disclosures had to be put on every use car, but there was a period of time before that information got around. As a result a lot of dealers are exposed to significant liability for having failed to disclose properly.

This law would provide protection to those dealers if a claim isn't already pending.

CHAIR FRENCH asked if the State of Alaska has brought action to enforce this law as it stood.

MR. SNIFFEN said one action is pending in the state supreme court on appeal. It was a case DOL brought against Lithia Dealerships that centered on different issues. As part of the settlement DOL recognized that Lithia failed to make some of the disclosures and asked for injunctive relief. They need to make these disclosures going forward until the law changes or it's no longer necessary, he said.

CHAIR FRENCH acknowledged that he's suggesting a retroactive clause and asked if the state envisions further actions against other dealerships.

MR. SNIFFEN said that's correct. Even in the current case against Lithia Dealerships, very little consumer harm was assigned to the failure to make the disclosures. DOL didn't identify any transactions where consumers wouldn't have gone forward with the vehicle purchase had they had that information. If DOL does come across information that indicates that consumers would have relied on information had the disclosures been made, it would consider taking action. If the bill is applied retroactively and no suit is pending he believes there would still be good grounds to proceed because "all of these things are probably required by something else." Failure to disclose that the vehicle is manufactured for sale in Canada or a foreign country is the provision that can cause the most harm because warranty is affected. Most manufacturers have addressed that problem by extending coverage, but for a time it was an issue for Alaskans who purchased vehicles in Canada. "But that requirement is already required and will continue to be required," he said.

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JOHN COOK, Legislative Director, Alaska Auto Dealers Association (AADA), reiterated that all the disclosures that are required on the small sticker are either unnecessary or redundant. The lemon law applies only to new vehicles so putting that disclosure on the vehicle is negative and necessary. The warranty disclosure is covered in the FTC sticker that every used vehicle in the U.S. is required to display. Also, AS 45.25.470 requires that all vehicles manufactured for sale in Canada have that disclosed. With regard to retroactivity, he agrees with Mr.

Sniffen. Most used car dealers had no idea when the legislation passed [in 2004] that it contained a requirement for a second sticker on all used cars. They learned about it when a lawsuit was filed. Because it's an unfair trade practice there's a two-year look back period. It leaves dealers exposed yet there is no tangible benefit to anyone. A company like Lithia can probably withstand a class action suit, but the majority of the AADA membership would have difficulty withstanding a suit of this nature.

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CHAIR FRENCH announced he would hold SB 164 for a subsequent hearing.

There being no further business to come before the committee, Chair French adjourned the meeting at [3:10:15 PM](#).