ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE
April 15, 2010
8:52 a.m.

MEMBERS PRESENT

Senator Hollis French, Chair
Senator Bill Wielechowski, Vice Chair
Senator John Coghill

MEMBERS ABSENT

Senator Dennis Egan
Senator Lesil McGuire

COMMITTEE CALENDAR

COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 348(JUD)
"An Act relating to the membership of the state personnel board."

- MOVED CSHB 348(JUD) OUT OF COMMITTEE

COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 381(JUD)
"An Act relating to self defense in any place where a person has a right to be."

- HEARD AND HELD

COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 324(FIN)
"An Act relating to the crime of failure to appear; relating to arrest for violating certain conditions of release; relating to release before trial, before sentence, and pending appeal; relating to material witnesses; relating to temporary release; relating to release on a petition to revoke probation; relating to the first appearance before a judicial officer after arrest; relating to service of process for domestic violence protective orders; making conforming amendments; amending Rules 5 and 41, Alaska Rules of Criminal Procedure, and Rules 206 and 603, Alaska Rules of Appellate Procedure; and providing for an effective date."

- MOVED SCS CSHB 324(JUD) OUT OF COMMITTEE

CS FOR SS FOR HOUSE BILL NO. 36(FIN) AM

"An Act relating to ballot initiative proposal applications, to ballot initiatives and to those who file or organize for the purpose of filing a ballot initiative proposal, and to election pamphlet information relating to certain propositions."

- SCHEDULED BUT NOT HEARD

PREVIOUS COMMITTEE ACTION

BILL: HB 348
SHORT TITLE: PERSONNEL BOARD MEMBERSHIP
SPONSOR(s): LYNN

02/17/10	(H)	READ THE FIRST TIME - REFERRALS
02/17/10	(H)	STA, JUD
03/11/10	(H)	STA AT 8:00 AM CAPITOL 106
03/11/10	(H)	Heard & Held
03/11/10	(H)	MINUTE(STA)
03/16/10	(H)	STA AT 8:00 AM CAPITOL 106
03/16/10	(H)	Moved CSHB 348(STA) Out of Committee
03/16/10	(H)	MINUTE(STA)
03/17/10	(H)	STA RPT CS(STA) 3DP 1NR 2AM
03/17/10	(H)	DP: PETERSEN, SEATON, LYNN
03/17/10	(H)	NR: GATTO
03/17/10	(H)	AM: GRUENBERG, P.WILSON
03/29/10	(H)	JUD AT 1:00 PM CAPITOL 120
03/29/10	(H)	Moved CSHB 348(JUD) Out of Committee
03/29/10	(H)	MINUTE(JUD)
03/31/10	(H)	JUD RPT CS(JUD) 4DP 2NR
03/31/10	(H)	DP: LYNN, GRUENBERG, GATTO, HOLMES
03/31/10	(H)	NR: HERRON, RAMRAS
04/07/10	(H)	TRANSMITTED TO (S)
04/07/10	(H)	VERSION: CSHB 348(JUD)
04/08/10	(S)	READ THE FIRST TIME - REFERRALS
04/08/10	(S)	STA, JUD
04/14/10	(S)	STA RPT 4NR
04/14/10	(S)	NR: MENARD, FRENCH, MEYER, KOOKESH
04/14/10	(S)	STA AT 9:00 AM BELTZ 105 (TSBldg)
04/14/10	(S)	Moved CSHB 348(JUD) Out of Committee
04/14/10	(S)	MINUTE(STA)
04/15/10	(S)	JUD AT 8:30 AM BUTROVICH 205

BILL: HB 381
SHORT TITLE: SELF DEFENSE
SPONSOR(s): NEUMAN

02/23/10	(H)	READ THE FIRST TIME - REFERRALS

02/23/10	(H)	JUD, FIN
03/15/10	(H)	JUD AT 1:00 PM CAPITOL 120
03/15/10	(H)	Heard & Held
03/15/10	(H)	MINUTE(JUD)
03/29/10	(H)	JUD RPT CS(JUD) NT 3DP 1DNP 2NR
03/29/10	(H)	DP: LYNN, GATTO, RAMRAS
03/29/10	(H)	DNP: HOLMES
03/29/10	(H)	NR: GRUENBERG, HERRON
03/29/10	(H)	JUD AT 1:00 PM CAPITOL 120
03/29/10	(H)	Moved CSHB 381(JUD) Out of Committee
03/29/10	(H)	MINUTE(JUD)
04/08/10	(H)	FIN AT 9:00 AM HOUSE FINANCE 519
04/08/10	(H)	Moved CSHB 381(JUD) Out of Committee
04/08/10	(H)	MINUTE(FIN)
04/09/10	(H)	FIN RPT CS(JUD) NT 6DP 1DNP 2NR
04/09/10	(H)	DP: THOMAS, N.FOSTER, KELLY, SALMON, STOLTZE, HAWKER
04/09/10	(H)	DNP: DOOGAN
04/09/10	(H)	NR: GARA, JOULE
04/12/10	(H)	TRANSMITTED TO (S)
04/12/10	(H)	VERSION: CSHB 381(JUD)
04/13/10	(S)	READ THE FIRST TIME - REFERRALS
04/13/10	(S)	JUD, FIN
04/15/10	(S)	JUD AT 8:30 AM BUTROVICH 205

BILL: HB 324
SHORT TITLE: FAILURE TO APPEAR; RELEASE PROCEDURES
SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

02/03/10	(H)	READ THE FIRST TIME - REFERRALS
02/03/10	(H)	JUD, FIN
03/19/10	(H)	JUD AT 1:00 PM CAPITOL 120
03/19/10	(H)	Heard & Held
03/19/10	(H)	MINUTE(JUD)
03/22/10	(H)	JUD AT 1:00 PM CAPITOL 120
03/22/10	(H)	Heard & Held
03/22/10	(H)	MINUTE(JUD)
03/26/10	(H)	JUD AT 1:00 PM CAPITOL 120
03/26/10	(H)	Moved CSHB 324(JUD) Out of Committee
03/26/10	(H)	MINUTE(JUD)
03/29/10	(H)	JUD RPT CS(JUD) 4DP 1NR 1AM
03/29/10	(H)	DP: LYNN, DAHLSTROM, GATTO, RAMRAS
03/29/10	(H)	NR: HERRON
03/29/10	(H)	AM: HOLMES
04/12/10	(H)	FIN AT 1:30 PM HOUSE FINANCE 519
04/12/10	(H)	Moved CSHB 324(FIN) Out of Committee
04/12/10	(H)	MINUTE(FIN)

04/13/10	(H)	FIN RPT CS(FIN) 8DP 2NR
04/13/10	(H)	DP: THOMAS, DOOGAN, JOULE, FAIRCLOUGH, KELLY, SALMON, STOLTZE, HAWKER
04/13/10	(H)	NR: GARA, N.FOSTER
04/14/10	(H)	NOTICE OF RECONSIDERATION WITHDRAWN
04/14/10	(H)	TRANSMITTED TO (S)
04/14/10	(H)	VERSION: CSHB 324(FIN)
04/14/10	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
04/14/10	(S)	<Pending Referral>
04/15/10	(S)	JUD AT 8:30 AM BUTROVICH 205

WITNESS REGISTER

REPRESENTATIVE BOB LYNN
Alaska State Legislature
Juneau, AK
POSITION STATEMENT: Sponsor of HB 348.

MICHAEL SICA, Staff
to Representative Lynn
Alaska State Legislature
Juneau, AK
POSITION STATEMENT: Provided information related to HB 348 on behalf of the sponsor.

ALPHEUS BULLARD, Attorney
Legislative Legal Services
Legislative Affairs Agency
Juneau, AK
POSITION STATEMENT: Provided information related to HB 348.

DOUGLAS WOOLIVER, Administrative Attorney
Alaska Court System, said
POSITION STATEMENT: Testified that the court doesn't have a position on HB 348, but it has reservations about this type of bill.

MIKE FORD, Assistant Attorney General
Department of Law (DOL)
Juneau, AK
POSITION STATEMENT: Raised concerns about HB 348.

WILLIAM MILKS, Attorney IV
Civil Division
Department of Law (DOL)
POSITION STATEMENT: Addressed separation of powers issues related to HB 348.

REPRESENTATIVE MARK NEUMAN
Alaska State Legislature
Juneau, AK
POSITION STATEMENT: Sponsor of HB 381.

GRIS SMITH, President
Alaska Pyrotechnic Guild
POSITION STATEMENT: Testified in support of HB 381.

SUSAN MCLEAN, Director
Criminal Division
Department of Law (DOL)
Anchorage, AK
POSITION STATEMENT: Explained the changes to HB 324 and testified in opposition to HB 381.

RICK SVOBODNY, Deputy Attorney General
Criminal Division
Department of Law
Juneau, AK
POSITION STATEMENT: Commented on and offered suggestions related to HB 324.

ACTION NARRATIVE

8:52:56 AM

CHAIR HOLLIS FRENCH called the Senate Judiciary Standing Committee meeting to order at 8:52 a.m. Senators Coghill, Wielechowski, and French were present at the call to order.

HB 348-PERSONNEL BOARD MEMBERSHIP

8:53:19 AM
CHAIR FRENCH announced the consideration of HB 348. [CSHB 348(JUD) was before the committee.]

REPRESENTATIVE BOB LYNN, sponsor of HB 348, said this bill changes the way the governor appoints people to the three-member state personnel board and addresses the perception that the board is a creature of the governor. At present the governor can appoint any Alaskan to the board who is not a state employee. This provides little diversity of opinion and could result in a tie vote on sensitive issues if one member is absent.

HB 348 increases the size of the board to five members each of which is a member of the two largest political parties in the last gubernatorial election. Under the bill the governor would make an appointment from a list of three names provided by the chief justice of the supreme court. The governor could request additional names if he or she so desired. The legislature would confirm the appointee. He recapped that the bill basically does three things; it increases diversity, lessens the chance of tie vote, and protects the governor from improper perceptions.

8:56:50 AM
MICHAEL SICA, Staff to Representative Lynn, said HB 348 makes the state personnel board a more deliberative body and insulates the governor from any improper perception. The bill improves rather than changes the current process.

8:58:13 AM
DOUGLAS WOOLIVER, Administrative Attorney, Alaska Court System, said the court hasn't taken a position on HB 348, but has reservations about this type of bill. He acknowledged that there is precedent for the court to be involved in a similar process. The chief justice forwards names for the legislative ethics committee to the legislature for confirmation. The chief justice also makes the fifth appointment to the redistricting board. Although the process has worked fairly well, the court prefers to operate completely outside the political process.

MR. WOOLIVER highlighted that the court has further concern because the personnel board has an oversight role for personnel in the executive branch. Even a minor role in the personnel management of another branch is something the court doesn't relish. The court would prefer to see fewer rather than more of these bills, he said.

9:00:11 AM
MIKE FORD, Assistant Attorney General, Department of Law (DOL), said DOL has two primary concerns with HB 348. First is the legal concern with regard to separation of powers. He referenced the memo DOL provided on that point. Article III, Section 26 of the Alaska Constitution sets out a process for appointment and confirmation of board members. The bill adds an additional part to that process by requiring the chief justice to create a list of appointees. The governor would select from that list and the legislature would confirm the selection. DOL believes that process infringes on the governor's powers in a way that is not permissible under the state constitution. He cited Bradner v. Hammond, which relates to a prior effort by the legislature to

expand the list of people who are subject to confirmation. The court struck that down and in the opinion indicated that appointment is an executive process and power. The discussion in that case indicated that confirmations are the outer limit of the legislature's power.

9:02:23 AM
MR. FORD said DOL's second concern is that the bill wouldn't significantly change the current process. If there is an ethics complaint against the governor or lieutenant governor, the current process provides for the appointment of an independent body to review the complaint. That process would remain in place were HB 348 to become law. He suggested that the target of the bill might not be as tight as it should be.

9:03:01 AM
WILLIAM MILKS, Attorney IV, Civil Division, Department of Law (DOL), introduced himself.

CHAIR FRENCH said that after he heard the bill in a previous committee he asked legislative legal to review the separation of powers issue. He noted that Mr. Milks also sent a letter addressing the subject. The idea is that the governor has the constitutional power to appoint members of boards and commissions and any infringement is an issue of separation of powers. But as Mr. Milks' letter points out, there are many instances where the governor does not have the unfettered discretion to choose whom so ever he or she wants to serve on certain boards. He cited examples Mr. Milks' provided including nominations from certain village or city councils, appointments from organized labor submitted by unions, and appointments submitted by the Alaska Historical Society. With these examples it's difficult to see a large infringement on the governor's power to say that he or she must pick from a list offered by the chief justice of the supreme court. He asked Mr. Milks to comment.

MR. MILKS pointed out that Article III, section 26, of the Alaska Constitution gives the governor that authority, and the Alaska Supreme Court interpreted it rather strictly in one case. He acknowledged that there are a number of statutes that require the governor to make appointments to boards and commissions from lists supplied by other persons. But the fact that this has occurred does not mean that Bradner has been overruled or that Article II, section 26 does not apply. DOL is trying to lay out that for the quasi-judicial personnel board, section 26 applies.

CHAIR FRENCH asked Mr. Milks if he is suggesting that the statutes he cited in his letter are unconstitutional.

MR. MILKS replied he is suggesting that the fact that the statutes exist does not mean that the Bradner case or Article III are not controlling.

9:06:33 AM
SENATOR COGHILL said he'd like to know how the constitution was applied and under what test the supreme court made the decision.

MR. MILKS explained that Bradner v. Hammond was a case dealing with legislation passed that made the appointment of deputy department heads and certain division directors subject to confirmation. The Alaska Supreme Court cited sections 25 and 26 of Article III and held that the appointment of executive branch officials is an executive function and not subject to confirmation.

SENATOR COGHILL asked how bringing the third branch of government into the appointment process would be viewed under that criterion.

CHAIR FRENCH said he believes that DOL would argue that the governor should have unfettered discretion in appointing members of boards and commissions and any restrictions to that would be an infringement on executive power.

SENATOR COGHILL asked if the chief justice submits a list to the governor for appointments other than for the ethics committee.

CHAIR FRENCH consulted Mr. Wooliver and related that the ethics committee is the only instance. The apportionment board is in the constitution.

SENATOR COGHILL questioned whether the legislature has the legal authority to make a directive in that regard.

CHAIR FRENCH replied that's the question the bill poses.

MR. FORD said the court made the point in Bradner that the appointment process is purely an executive function. That function is delegated to the legislature for purposes of confirmation, but the court described that as the outer limit of legislative authority. Adding this new process would seem to be inconsistent with Bradner, he said.

9:11:17 AM
SENATOR COGHILL observed that the legislature has the right to veto confirmations.

CHAIR FRENCH said he shares the sponsor's concern that because this board is appointed by the governor to hear complaints against the executive branch, there can be a perception that it stands as a buffer rather than a watchdog. There are likely examples other than those cited by Mr. Milks where the legislature has told the governor that he or she has to appoint someone from a list. The executive branch has accepted that for decades, which undermines the separation of powers argument.

SENATOR COGHILL said he understands the rationale, but he believes it would be unwise to think that politics won't get involved if the governor has to pick from a list of people from particular parties.

CHAIR FRENCH called a point of order saying he isn't sure there is no political aspect to the appointments.

SENATOR COGHILL pointed out the new language on page one.

CHAIR FRENCH withdrew the point of order.

SENATOR COGHILL noted the significant philosophical clashes during the recent joint session confirmations and opined that the legislature would thoroughly challenge appointments if it thought that a board was being stacked. There's an honest check on the governor stacking this board, and having to pick from political parties might bring about what the bill is trying to avoid, he said.

9:15:06 AM
CHAIR FRENCH said the point is taken.

MR. FORD said that just one of the issues that could result from adding a third step to the process is that the governor could repeatedly reject the names on the list.

CHAIR FRENCH asked the sponsor if he would like to respond to any of the points that were made.

REPRESENTATIVE LYNN explained that the object of bringing in more than one political party was to increase the diversity of opinion. Some of the current members are undeclared or nonpartisan, which brings in a broad range of political

perspectives. He suggested that Mr. Bullard could provide prospective on the statements made by the Department of Law.

MR. SICA said he understands Senator Coghill's concern about injecting politics into the process, but he wonders it might be just as much an issue to exclude someone based on political party.

SENATOR COGHILL commented that the list describing fairness could become quite long.

9:19:25 AM
SENATOR WIELECHOWSKI offered the view that this is about as close as you'll get to removing politics from the process.

At ease from 9:20 a.m. to 9:24 a.m.

CHAIR FRENCH moved Amendment 1, labeled 26-LS1360\S.3, and objected for discussion purposes.

Amendment 1

OFFERED IN THE SENATE BY SENATOR FRENCH
TO: CSHB 348(JUD)

Page 1, line 6:
Delete "**selected**"
Insert "**submitted**"

Page 1, line 8, following "**nominations.**":
Insert "**If the chief justice declines to submit additional nominees, the governor shall appoint a nominee from a list of nominees previously submitted by the chief justice for the vacancy.**"

Page 1, line 12:
Delete "**at which a governor was elected**"

9:24:27 AM
CHAIR FRENCH asked Mr. Bullard if he believes that this amendment may make the separation of powers issue more rather than less pronounced.

ALPHEUS BULLARD, Attorney, Legislative Legal Services, Legislative Affairs Agency, noted that the committee discussion has focused more on the executive's appointment authority and the law as determined by the Bradner decision. However, it isn't

in doubt that the legislature can usually prescribe reasonable qualifications for members of boards, commissions, and state authorities. Under the terms of HB 348, the governor would be required to appoint from a list, but that would be subject to his or her right to request additional names, putting this more as a qualification. At the point that the legislature requires the governor to appoint from one or two lists, it has exacerbated existing separation of powers concerns in determining who will be appointed to the board.

CHAIR FRENCH asked if the answer is yes; the amendment would make the separation of powers issue more rather than less pronounced.

MR. BULLARD answered yes.

CHAIR FRENCH withdrew Amendment 1.

He referenced the footnote on page 2 in Mr. Bullard's memo that noted that there are several state boards and commissions that are currently chosen by the governor from lists submitted by other persons. Mr. Milks made the same point in his letter, which reaffirms the current practice. He further noted that the first full paragraph on the second page of Mr. Bullard's memo highlights that between 1981 and 1988 at least three attorneys general opinions or letters of advice have accepted that "the legislature may prescribe reasonable qualifications for gubernatorial appointments to boards or commissions." He opined that the sponsor has done a good job in trying to increase public confidence in this board.

CHAIR FRENCH found no further questions, comments, or testimony and closed public testimony. Describing the bill as a fair balance, he asked for a motion.

SENATOR WIELECHOWSKI moved to report CS for HB 348 from committee with individual recommendations and attached fiscal note(s).

9:29:00 AM
SENATOR COGHILL objected to state that he appreciates the reason that the bill was introduced, but he doesn't necessarily agree that inserting the court in the process and placing a mandate on the governor will actually be helpful. The sponsor statement convinced him that this is the right thing to do, but the legal backup raised more questions than answers. Until he is convinced

otherwise, he will be a "do not pass." He removed his objection to moving the bill from committee.

CHAIR FRENCH announced that without further objection, CSHB 348(JUD) moved from the Senate Judiciary Standing Committee.

At ease from 9:30 a.m. to 9:31 a.m.

HB 381-SELF DEFENSE

9:31:52 AM
CHAIR FRENCH announced the consideration of HB 381.

REPRESENTATIVE MARK NEUMAN, sponsor of HB 381, said the bill has undergone changes since it was introduced. Ms. Carpeneti, who is with the Department of Law, brought several concerns to his attention and the proposed committee substitute was drafted to address those concerns.

The current statute says there is no duty to retreat on premises that you own or lease, where you reside, or where you're a guest. The bill expands that to include anyplace you have a legal right to be. While the bill proposes to amend AS 11.81.335(b), subsection (a) provides the justifications.

9:34:10 AM
REPRESENTATIVE NEUMAN said 16 states have tried to clarify where a person can be and legally defend him or herself because there has been confusion about that. The current law says that you must retreat if you're able to do so safely, but that's asking for a snap decision in a panic-filled moment. You have a right to defend yourself in your home and the bill proposes to extend that right to a street or a park or anywhere you have a legal right to be. "Did you use deadly force? It better be justified," he said.

REPRESENTATIVE NEUMAN reported that current Alaska law permits the use of deadly force in self defense and a few instances of murder, rape, kidnapping, physical injury, or robbery. HB 381 tries to allow you to defend yourself before that happens. "If you're involved in one of those situations, you can defend yourself right now, but it's before that happens. That's the critical part," he said.

The title is very clean and clear: "An Act relating to self defense in any place where a person has a right to be."

9:37:21 AM
CHAIR FRENCH asked if he believes that anyone ever has a duty to retreat and how he views that as comporting with the right to use deadly force.

REPRESENTATIVE NEUMAN replied a duty to retreat means that you should try to escape a situation if you're able to do so. Most reasonable people would do that. If you find that you have to defend yourself with deadly force, Alaska law says you have that right but only if you're in your home or place of work. HB 381 proposes to extend that right to other locations where you have a legal right to be.

9:39:58 AM
SENATOR COGHILL said he agrees that the duty to retreat is a serious duty but he wonders about the legal protections a person might have when they're faced with very aggressive behavior and they have to make a split-second decision. He asked if there's a problem now where the burden to retreat is on the victim rather than on the perpetrator.

REPRESENTATIVE NEUMAN said it is a problem because Alaska law says you must retreat if you know you can do so with complete safety. He said his measure is to ask if you were justified in using deadly force.

SENATOR COGHILL said part of the concern is with aggressive behavior and the other part is that a split second decision is easily deliberated in court, but it wasn't made under that circumstance. He asked if the duty to retreat had been tested in court enough to understand how it falls out.

REPRESENTATIVE NEUMAN reiterated that 16 states have passed similar legislation. He relayed that his staff informed him that the duty to retreat is only a legal issue after it's established that deadly force was justified.

SENATOR COGHILL reiterated that it would be interesting to know how the court has interpreted the law.

9:45:27 AM
SUSAN MCLEAN, Director, Criminal Division, Department of Law (DOL), confirmed that in the state of Alaska you absolutely have the right to self defense. It is not an affirmative defense. It is part of the state's case to prove that the defendant did not act in self defense. If the state fails to prove that using force was not in self defense, the state never gets to a defense

case because a judgment of acquittal could be entered. Because of that, you never see cases where self defense was obvious; the person isn't charged.

HB 381 and similar laws have been characterized as stand-your-ground laws - and this is a trend - but it's not about standing your ground. It's about shooting first. Prosecutors nationwide are opposed to this type of law and the Alaska Department of Law is similarly opposed. It promotes and condones a level of violence that may not have been necessary. Self defense is complicated law; in a trial if there is any evidence whatsoever that there may have been self defense, the jury must be given instructions about self defense and can consider that. This proposal pertains just to the use of deadly force. This is a situation where a human life was taken.

9:48:21 AM
MS. MCLEAN explained that in common law there was a duty to retreat. In Medieval times that meant that a person had to retreat to the wall before using deadly force. This law is old and long-standing because human life is sacred. A life shouldn't be taken lightly and it shouldn't be taken when it's not necessary. As the sponsor said, most reasonable people would retreat, but HB 381 says they don't have to act reasonably and retreat. "That's why we're so greatly opposed to it," she said.

Current law says there is no duty to retreat in the home or other enumerated places. But the premise is that if you know can retreat with complete safety, then you may not use deadly force. That rule applies in every location but a person's castle - their home.

MS. MCLEAN clarified that DOL's view of "knowing" is that if a person says that in the heat of the moment they didn't know they could retreat with complete safety, then the person has a defense. The jury may agree that the person didn't see that he could retreat with safety; therefore his belief was reasonable; therefore his use of deadly force was justified - even if displaced.

The sponsor and others have said that this legislation would spare people the burden of coming to court if the situation is close. "I would submit to you that's a bad reason," she said. This is about taking a human live balanced against why it had to happen.

9:51:37 AM

MS. MCLEAN said it's easy to think about this in personal terms and that as a law abiding citizen you should be able to defend yourself if someone is aggressive and you're afraid. The law is on your side in that instance and DOL supports that. But this legislation will apply to people who are not law abiding. It will apply to gang members who would have a defense for shooting on sight were this legislation to pass. She cited a hypothetical example.

CHAIR FRENCH asked what happens when a bullet that's aimed and fired in self defense doesn't hit the intended target but an innocent bystander.

MS. MCLEAN said if self defense was justified, then the fact that an innocent bystander was killed is justified. It's a complete defense; you're not guilty.

Florida was the first state to pass a similar law in 2005 and a recent University of Miami law review article concluded that it's difficult to measure what isn't getting charged. The author talked about the scenario of two gang members and an innocent nine-year-old child who was shot and killed. Both shooters raised self defense and both were acquitted.

GRIS SMITH, President, Alaska Pyrotechnic Guild, said the organization is 100 percent in support of HB 381. Today it seems that crooks have all the legal rights while victims have minimal rights. This bill evens the score, he said.

9:55:39 AM
CHAIR FRENCH recessed the meeting to the call of the chair.

3:33:53 PM
CHAIR FRENCH reconvened the Senate Judiciary Standing Committee meeting at 3:33 p.m. Senators Coghill, Wielechowski, and French were present at the call to order.

HB 324-FAILURE TO APPEAR; RELEASE PROCEDURES

3:34:06 PM
CHAIR FRENCH announced the consideration of HB 324 and noted that the committee heard the companion Senate bill, SB 252, [in February]. [CSHB 324(FIN) was before the committee.]

SUSAN MCLEAN, Director, Criminal Division, Department of Law (DOL), said HB 324 relates to bail and conditions of release. She reported that DOL has worked closely with the chair of this

committee, the House, the court system, and the defense bar to arrive at a consensus. HB 324 is very similar to the companion bill, SB 252, but there have been changes since the committee heard the Senate bill. She said she would put the major changes on the record.

3:35:06 PM
Section 1 pertains to the crime of failure to appear. Page 2, lines 4-5, provides a mental state for the crime of failure to appear whereas the Senate version didn't specify a mental state for failing to appear. HB 324 requires the state to prove that the person knew that he or she had to appear at a specific time and place and that the person acted with criminal negligence in failing to do so.

Section 3 pertains to release procedures. The original version required the court to prepare a report on previous applications for bail review when it was considering a subsequent application. The court thought that was burdensome and DOL agreed to remove that section.

Section 4 pertains to release before trial. Page 7, line 8, talks about when the court is making a finding about the amount of bail or the conditions that are going to be imposed. In certain circumstances there's a rebuttable presumption that there are no conditions of release that would assure a person's appearance. Page 7, lines 13-15 narrows the types of circumstances to which the rebuttable presumption can apply. The previous version would have applied to anyone who has a prior felony conviction and is before the court and charged with a new felony. The new paragraph (B) is limited to individuals who are charged with a crime against a person under AS 11.41 and have been previously convicted of a crime against a person, which is a significantly smaller universe of people.

Section 5 pertains to third-party custodians. The previous version said that the court had to personally address the proposed third-party custodian. That has been changed to make it clear that the court may also use a telephone or other approved technology. The previous version also said that anyone who was convicted of a misdemeanor or felony within the past five years could not be appointed as a third-party custodian. This was particularly burdensome for rural courts because it would critically limit the pool. That was changed so that only individuals who have been convicted of a crime against a person within the past three years would be prohibited from serving as a third-party custodian.

3:39:09 PM
Section 10 pertains to release after conviction pending sentencing and appeal. The previous version said that a person previously convicted of a felony who has just been convicted of a class B or class C felony and is awaiting sentencing or appeal, could not be released pending sentencing or appeal. That has been changed to now apply only to a person who has been convicted of class B felony. Previously the bill provided that people convicted of class A and unclassified felonies were not subject to release at the moment that the jury returned a verdict. This just extends it to class B felonies.

MS. MCLEAN said those are the major changes since the committee last saw the bill.

CHAIR FRENCH directed attention to a conceptual amendment that is largely based on provisions in HB 283. It pertains primarily to Section 4 of HB 324, but changes to Sections 3 and 5 may be necessary. He asked Mr. Svobodny to comment on the general idea.

3:41:12 PM
RICK SVOBODNY, Deputy Attorney General, Criminal Division, Department of Law (DOL), said he knows that the committee is looking primarily at the addition of paragraph (13) from Section 4 of [HB 283]. Although DOL thinks it's a good idea to have a condition of sentencing or a suspended imposition of sentence that would prohibit someone from consuming alcohol, the provision is written in a manner that causes some legal concern. Basically it says that the court can order the defendant to refrain from consuming alcohol for a period of time including the term of the sentence and as a condition of probation. The judge already has the ability to prohibit somebody from consuming alcohol as a condition of probation, but that decision is based on a finding that alcohol provides a nexus to the crime, not by clear and convincing evidence as subparagraphs (A) and (B) would require. The legal concern is that including the word probation takes away the power of the court to do probation.

3:43:06 PM
SENATOR EGAN joined the committee.

MR. SVOBODNY suggested the committee drop the words "as a condition of probation" from page 3, lines 16-17.

CHAIR FRENCH said he'd keep that under advisement. He asked if the matter gets more or less complicated if you consider Section 3 on page 2, which relates to Title 4. [HB 283 Sec. 3. amends AS 04.16.160(a).]

3:44:23 PM
MR. SVOBODNY said he didn't have a conceptual problem with including Section 3, but he didn't want to make a decision on the fly.

CHAIR FRENCH said he'd hold it in abeyance.

SENATOR WIELECHOWSKI read Section 3 and observed that it adds AS 12.55.015(a)(13), which is Section 4.

3:46:54 PM
MR. SVOBODNY said he believes that's right.

CHAIR FRENCH said it adds that a judge can order a person not to consume alcohol as part of a sentence for perhaps another crime.

SENATOR WIELECHOWSKI said it seems eminently reasonable that if a judge orders a person not to consume alcohol, they shouldn't be able to buy it either.

MR. SVOBODNY expressed reluctance to shoot from the hip because this involves working back through several statutes.

3:48:42 PM
CHAIR FRENCH asked what the penalty is for a violation of AS 04.16.160. [An answer was not forthcoming.]

SENATOR COGHILL observed that the court is already doing this to some degree and it sounds like this would be more rather than less restrictive. He said he believes that the sponsor was trying to put in place a mark on a driver's license as an enforcement mechanism. Section 1, which amends AS 04.16.047(a), talks about producing your license in order to purchase alcohol, so these restrictions would probably be more appropriate to the seller of alcohol than to the enforcer of the provision, he said.

CHAIR FRENCH reviewed Section 1 and observed that it's in part aimed at enforcement by the private sector.

MR. SVOBODNY pointed out that AS 04.16.160(b) supports Senator Coghill's statement.

3:51:41 PM
SENATOR WIELECHOWSKI referenced paragraph (13) on page 3 of HB 283 and suggested that including the phrase "order the defendant to refrain from consuming or purchasing alcoholic beverages" may get to the sponsor's intent. That would be a violation of the court order and the sentence or penalty would be ordered by the judge.

CHAIR FRENCH highlighted that this changes AS 04.16.160 and he still didn't know what the penalty is for violating that section.

MR. SVOBODNY said he believes the penalty is in [subsection (b)] and it's that you get the letter "A" on your driver's license.

REPRESENTATIVE HARRY CRAWFORD, sponsor of HB 283, chimed in that the penalty is a red slash on your license and a $1,000 civil fine.

3:53:07 PM
CHAIR FRENCH asked Mr. Svobodny if he agrees that there's a civil enforcement to section .160 and there's also the red slash.

MR. SVOBODNY indicated he wasn't willing to give an answer.

3:53:24 PM
CHAIR FRENCH said he'd hold that thought for the time being. He then asked Mr. Svobodny his view of Section 5 in HB 283.

MR. SVOBODNY said it appears to be a savings clause for the type of concern he raised earlier about probation. The problem is that if you read Section 4 to be anything other than sentencing, the burden of proof is substantially different - it's by clear and convincing evidence. The state doesn't have a problem with it being a condition of the sentence just like the conditions in paragraphs 1-12, but when you move on to areas where judges generally already have that authority it restricts the court's ability to impose alcohol restrictions as a condition of probation. Suspended imposition of sentence is actually a form of probation so that is also a concern. DOL wants the court to have the ability to make restrictions on alcohol a condition of the sentence. For example, if somebody had a $10,000 fine and no jail time, the court could impose that as an additional condition of the sentence.

MR. SVOBODNY summarized that he is concerned about the probationary types of sentences, like a suspended imposition of sentence or probation itself.

CHAIR FRENCH said he still didn't have a clear idea of his view of Section 5.

MR. SVOBODNY said it's a savings clause to allow judges to order the prohibition against consumption of alcohol as a condition of sentence.

CHAIR FRENCH asked if he's saying that he would prefer that the sentence end after the word "sentence" rather than after "probation."

At ease from 3:56 p.m. to 3:58 p.m.

CHAIR FRENCH reconvened the meeting and asked Mr. Svobodny what wisdom and insight he and Ms. McLean had gained in the last few minutes.

MR. SVOBODNY suggested that the language on page 3, line 15 [HB 283] should read, "order the defendant to refrain from consuming alcoholic beverages during the term of the sentence." He would delete the remainder of the paragraph, whereas Ms. McLean would leave that remaining language intact. In subparagraph (A) she would say, "the defendant was convicted of a felony." and drop the rest of the language. In subparagraph (B) she would say, "the defendant was convicted of a misdemeanor." and drop the rest of the language.

MS. MCLEAN said if she were doing the rewrite it would read as follows:

> (13) order the defendant to refrain from consuming alcoholic beverages for a period of time, including during the term of any sentence and as a condition of probation, suspended sentence, and suspended imposition of sentence, if
>
> (A) the defendant was convicted of a felony and the court finds that the defendant's conduct constituting the offense was substantially influenced by consumption of alcoholic beverages.
>
> (B) the defendant was convicted of a misdemeanor and the court finds, based on

the defendant's history, there is reason to believe….

She added that although that is what she would suggest, she would defer to Mr. Svobodny who is her boss.

4:00:47 PM
MR. SVOBODNY pointed out that the problem with that suggestion is that judges oftentimes want to impose no alcohol as a condition of probation. Although the person may have been sober when they committed the crime, they may have a long history before the court of alcohol-related offenses. As long as there is a nexus to the person's rehabilitation, the court can do that. Ms. McLean's suggestion is a nexus to the crime.

4:01:41 PM
SENATOR WIELECHOWSKI described his preference for the amendment [using page 3, paragraph (13) of HB 283 as a guideline]:

> (13) order the defendant to refrain from consuming or purchasing alcoholic beverages for a period of time if
>
> (A) the defendant was convicted of a felony and the court finds that the defendant's conduct constituting the offense was substantially influenced by the consumption of alcoholic beverages; or
>
> (B) the defendant was convicted of a misdemeanor and the court finds that, based on the defendant's history…"

MS. MCLEAN said she now understands what Mr. Svobodny was saying, which is that there may be a crime where the person was not drinking but they have a pattern of criminal, often felony, behavior and that behavior generally involves drinking. Under current case law it's possible for the court to impose a no drinking condition even though alcohol wasn't involved this time. The court wants the person to survive probation and recognizes that the person probably won't if they drink. Mr. Svobodny is infinitely quick and he would put the period after the word "felony" and after the word "misdemeanor," she said.

CHAIR FRENCH asked Mr. Svobodny what his preference would be for the amendment.

4:03:45 PM
SENATOR MCGUIRE joined the committee.

MR. SVOBODNY said he starts from the premise that the entire section is about what a judge can do as a sentence - like impose jail time, a fine, or restitution. He would suggest it say, "order the defendant to refrain from consuming or purchasing alcoholic beverages."

SENATOR WIELECHOWSKI said that keeps it simple.

CHAIR FRENCH agreed and asked Senator Wielechowski if he was ready to state the amendment.

SENATOR WIELECHOWSKI confirmed that he was ready.

CHAIR FRENCH asked Mr. Svobodny if he was comfortable with Section 3, Section 4 as discussed, and Section 5. He noted that a title change would be necessary in any event.

Ms. McLean indicated they were comfortable.

MR. SVOBODNY stated for the record that Section 3, Section 4 as amended, and Section 5 are okay with the state.

4:06:16 PM
SENATOR WIELECHOWSKI moved a conceptual amendment to include from CSHB 283: Section 3 and Section 5 as currently written and Section 4 as follows:

> AS 12.55.015(a) would have a new paragraph (13) that says, "order the defendant to refrain from consuming or purchasing alcoholic beverages."

CHAIR FRENCH found no objection, and announced that conceptual Amendment 1 was adopted and that there would be a title change as necessary to conform to the amendment as passed. Finding no further committee discussion, he asked for a motion.

SENATOR WIELECHOWSKI moved to report CS for HB 324, as conceptually amended, from committee with individual recommendations, attached fiscal note, and the recognition that a title change would be necessary.

CHAIR FRENCH announced that without objection, SCS CSHB 324(JUD) moved from the Senate Judiciary Standing Committee.

4:08:23 PM

There being no further business to come before the committee, Chair French adjourned the Senate Judiciary Standing Committee meeting at 4:08 p.m.