

ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE

March 16, 2012

1:33 p.m.

MEMBERS PRESENT

Senator Hollis French, Chair
Senator Bill Wielechowski, Vice Chair
Senator Joe Paskvan
Senator Lesil McGuire
Senator John Coghill

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

HOUSE BILL NO. 80

"An Act relating to self defense in any place where a person has a right to be."

- HEARD & HELD

SENATE BILL NO. 200

"An Act establishing certain procedures related to the identification of suspects by eyewitnesses to criminal offenses."

- SCHEDULED BUT NOT HEARD

SENATE BILL NO. 110

"An Act relating to human trafficking; and relating to sentencing and conditions of probation in criminal cases involving sex offenses."

- SCHEDULED BUT NOT HEARD

SENATE BILL NO. 186

"An Act relating to persons found guilty but mentally ill; relating to sentencing procedures for factors that may increase the presumptive range or affect mandatory parole eligibility; relating to the granting of probation; relating to procedures for finding aggravating factors at sentencing; amending Rule 32.1, Alaska Rules of Criminal Procedure; and providing for an effective date."

- SCHEDULED BUT NOT HEARD

SENATE BILL NO. 210

"An Act relating to crimes against children; establishing a new aggravating factor at sentencing in certain crimes against children; relating to criminal nonsupport; adding to the list of crimes against children that bar the Department of Public Safety from issuing to a person a license to drive a school bus; adding an exception to a provision that requires the Department of Health and Social Services to make timely, reasonable efforts to provide family support services to prevent out-of-home placement of a child; and providing for an effective date."

- SCHEDULED BUT NOT HEARD

SENATE BILL NO. 212

"An Act relating to crimes of human trafficking; establishing the Human Trafficking Task Force to evaluate services available to victims of human trafficking; and relating to the recommendations and report of the task force."

- SCHEDULED BUT NOT HEARD

SENATE BILL NO. 218

"An Act relating to conspiracy to commit human trafficking in the first degree or sex trafficking in the first degree; relating to the crime of furnishing indecent material to minors, the crime of online enticement of a minor, the crime of prostitution, and the crime of sex trafficking; relating to forfeiture of property used in prostitution offenses; relating to sex offender registration; relating to testimony by video conference; adding Rule 38.3, Alaska Rules of Criminal Procedure; and providing for an effective date."

- SCHEDULED BUT NOT HEARD

PREVIOUS COMMITTEE ACTION

BILL: HB 80

SHORT TITLE: SELF DEFENSE

SPONSOR(S): REPRESENTATIVE(S) NEUMAN, FEIGE, LYNN, COSTELLO

01/18/11	(H)	PREFILE RELEASED 1/14/11
01/18/11	(H)	READ THE FIRST TIME - REFERRALS
01/18/11	(H)	JUD, FIN
02/09/11	(H)	JUD AT 1:00 PM CAPITOL 120

02/09/11 (H) Heard & Held
 02/09/11 (H) MINUTE(JUD)
 02/11/11 (H) JUD AT 1:00 PM CAPITOL 120
 02/11/11 (H) Moved Out of Committee
 02/11/11 (H) MINUTE(JUD)
 02/14/11 (H) JUD RPT 4DP 1DNP 1NR
 02/14/11 (H) DP: KELLER, THOMPSON, LYNN, GATTO
 02/14/11 (H) DNP: HOLMES
 02/14/11 (H) NR: GRUENBERG
 03/08/11 (H) FIN AT 9:00 AM HOUSE FINANCE 519
 03/08/11 (H) Heard & Held
 03/08/11 (H) MINUTE(FIN)
 03/30/11 (H) FIN AT 5:00 PM HOUSE FINANCE 519
 03/30/11 (H) -- MEETING CANCELED --
 04/04/11 (H) FIN AT 6:00 PM HOUSE FINANCE 519
 04/04/11 (H) Moved Out of Committee
 04/04/11 (H) MINUTE(FIN)
 04/05/11 (H) FIN RPT 5DP 3NR
 04/05/11 (H) DP: FAIRCLOUGH, T.WILSON, COSTELLO,
 STOLTZE, THOMAS
 04/05/11 (H) NR: GUTTENBERG, JOULE, DOOGAN
 04/09/11 (H) TRANSMITTED TO (S)
 04/09/11 (H) VERSION: HB 80
 04/11/11 (S) READ THE FIRST TIME - REFERRALS
 04/11/11 (S) JUD, FIN
 03/07/12 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)
 03/07/12 (S) Heard & Held
 03/07/12 (S) MINUTE(JUD)
 03/16/12 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)

WITNESS REGISTER

GARY ELLIS, representing himself
 Wasilla, AK

POSITION STATEMENT: Testified in strong support of HB 80.

WILLIAM PINNEY, representing himself
 Anchorage, AK

POSITION STATEMENT: Testified in strong support of HB 80.

BRIAN JUDY, Senior State Liaison
 National Rifle Association
 Institute for Legislative Action (NRA-ILA)
 Sacramento, CA

POSITION STATEMENT: Testified in strong support of HB 80.

JAMES FAYETTE, representing himself

Anchorage, AK

POSITION STATEMENT: Testified in vigorous opposition to HB 80.

REPRESENTATIVE MARK NEUMAN

Alaska State Legislature

Juneau, AK

POSITION STATEMENT: sponsor of HB 80.

REX SHATTUCK, Staff

Representative Mark Neuman

Alaska State Legislature

Juneau, AK

POSITION STATEMENT: Offered supporting testimony on HB 80 on behalf of the sponsor.

ACTION NARRATIVE

[1:33:49 PM](#)

CHAIR HOLLIS FRENCH called the Senate Judiciary Standing Committee meeting to order at 1:33 p.m. Present at the call to order were Senators Wielechowski, Paskvan, Coghill, and Chair French. Senator McGuire arrives soon thereafter.

HB 80-SELF DEFENSE

[1:34:15 PM](#)

CHAIR FRENCH announced the consideration of HB 80, "An Act relating to self defense in any place where a person has a right to be." He noted that there was a great deal of interest in the bill and that the committee was committed to honoring the public process.

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GARY ELLIS, representing himself, Wasilla, AK, strongly encouraged the committee to support HB 80. He stated that a person who is in a life and death situation should not have to decide if he/she could potentially face charges for defending him or herself. The bill addresses that problem by essentially doing away with the duty to retreat. He noted that a number of other states have passed similar legislation and haven't had problems.

SENATOR MCGUIRE joined the committee.

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WILLIAM PINNEY, representing himself, Anchorage, AK, strongly encouraged the committee to support HB 80. He said the bill is

an important tool so that average individuals can defend themselves against those who have no respect for other people. Without such legislation, an individual who feels he can't retreat can easily have his life destroyed by a prosecuting attorney. He cited the Rodney Lewis in Iowa as particularly egregious, and concluded that individuals have the responsibility to protect themselves because the U.S. Supreme Court ruled that it is not the responsibility of the police.

CHAIR FRENCH thanked him for bringing the Lewis case to the committee's attention, because he was looking for a specific instance where a bill like HB 80 would have made a difference in the outcome of a criminal case.

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BRIAN JUDY, Senior State Liaison, National Rifle Association - Institute for Legislative Action (NRA-ILA), Sacramento, CA, testifying in support of HB 80, characterized the proposed bill as important self-defense legislation. It provides that a person who is justified in using deadly force in self defense has no duty to retreat if the person is in any place the person has a legal right to be. NRA members believe that a potential victim's life is just as worthy of defense if they are in a place they have a legal right to be as if they were at home, at work, or on their property.

When an individual uses deadly force in self defense, the primary consideration is justification. Alaska statutes provide that the use of deadly force in self defense is justified when a person reasonably believes that he/she or a person he/she is protecting is in danger of being killed, sustaining serious bodily injury, being a victim of sexual assault, being kidnapped, or being robbed. Both the subjective and objective standard must be satisfied. The person must actually believe that deadly force is necessary to protect him or herself against an imminent serious threat, and that belief must be reasonable. Deadly force is specifically not justified if the person is engaged in mutual combat, is provoking another person to violence, is the initial aggressor, or involved in felonious or gang activity. Removing the additional question as to whether a person can retreat with complete safety makes for one less consideration in the split second life or death decision-making process. This does not change the fact that the person must be justified and have a legal right to be in a place where the act of self defense occurs. In conclusion he opined that removing the retreat provision shifts some of the risk calculation to the aggressor.

CHAIR FRENCH closed public testimony and stated that he invited Mr. Fayette to testify because of his experience in this area.

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JAMES FAYETTE, representing himself, Anchorage, AK, said he was taking personal leave from his job as an assistant district attorney to testify against the bill. He described his education, work experience, and qualifications to speak on the topic. He said he did not presume to represent the department or the administration, but he found no support for the bill among his prosecution colleagues. The bill is a bad and dangerous idea because of its unintended and serious consequences. The problem is that violent criminals will take advantage of the legislation by claiming self defense. He said he would give four examples of cases where this bill would have made a tragic difference in trial outcomes.

CHAIR FRENCH said it's a widespread concern of law-abiding citizens that they will be unnecessarily prosecuted for having used deadly force to defend themselves. The example he used last week was a woman taking groceries to her car who is beset by an aggressor. He said his sense is that DAs can tell the difference between the good guy and the bad guy in this sort of circumstance. She's not going to be prosecuted for using deadly force to defend herself and neither will someone who witnesses the encounter and uses deadly force to stop an armed aggressor.

MR. FAYETTE said he wasn't familiar with the Lewis case, but none of the people who testified during the previous hearing indicated they were responding to a specific case. They just generally and philosophically thought that people should not have a duty to retreat. He opined that the bill is trying to fix a problem that does not exist, because existing law protects a citizen's right to defend him or herself.

MR. FAYETTE added that the 2006 amendment clarified that someone defending his/her children does not have a duty to retreat. He said the perception from Mr. Judy's comments is that someone has to go to court and prove they acted in self defense, but the burden is actually on the prosecutor to prove beyond a reasonable doubt and to the unanimous satisfaction of trial jurors that the person did not act in self defense. That's notoriously difficult to do.

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MR. FAYETTE said the basic rule of self defense is in AS 11.81.330. Subsection (a) says "A person is justified in using nondeadly force upon another when and to the extent the person reasonably believes it is necessary for self-defense against what the person reasonably believes to be the use of unlawful force by the other person," and paragraphs (1)-(3) say that self defense is not justified when the person is engaged in mutual combat, is provoking another person to violence, or is the initial aggressor. In 2004 the Legislature added to the exceptions saying that self defense is not justified if a person is retaliating or in revenge for gang conduct, is a participant in a felony drug transaction, or is engaged in the commission of a felony.

AS 11.81.335 has the special rules for when a person is justified in using deadly force in defense of self. Subsection (a) says a person is justified in using deadly force if the person reasonably believes it is necessary for self defense against death, serious physical injury, sexual assault, or robbery. Subsection (b) says a person may not use deadly force if the person knows that, with complete personal safety and safety as to others being defended, the person can avoid the necessity of using deadly force by leaving the area. It is a fairly high burden and it's the prosecutor that has to prove that the person could not retreat. There are exceptions to the duty to retreat.

There is no duty to retreat if the person is on premises that the person owns or leases, where the person resides, or is a guest or agent of the owner or resident. A police officer acting within the scope of the officer's employment has no duty to retreat. There is no duty to retreat if the person is at his/her workplace or if the person is protecting a child.

HB 80 seeks to add another exception that says a person does not have to retreat if he/she is in a place where he/she has a right to lawfully be. This would basically do away with the duty to retreat except in trespass situations. He opined that this was over broad and problematic. Gang members who shoot at other gang members on a public street are in a place where they have a right to be. In road rage situations when someone pulls a gun, the people are on a highway and are in a place they have a legal right to be.

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SENATOR COGHILL asked if the exceptions in AS 11.81.330 wouldn't rule in this case.

MR. FAYETTE confirmed that the first test for the use of deadly force is that all the conditions in AS 11.81.330 must be satisfied. In other words, a person who is the initial aggressor can't use deadly force because they're boxed out by [AS 11.81.330(a)(3)].

SENATOR COGHILL asked if gang member activity falls into the categories of mutual combat, initial aggressor, or felonious activity.

MR. FAYETTE said yes, but it's disputed. The prosecutor has to disprove the propositions and a skilled defense attorney can easily characterize the situation as ambiguous.

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SENATOR WIELECHOWSKI summarized that AK 11.81.330(a)(4)(C) blocks a claim of self defense by gang members.

MR. FAYETTE said that's correct if the jury decides it was retaliation for gang conduct or a drug transaction.

SENATOR WIELECHOWSKI asked if road rage would be considered mutual combat.

MR. FAYETTE replied it would be disputed in court.

CHAIR FRENCH said a bar fight is the classic example of mutual combat, and no one can claim self defense. He questioned whether it was mutual combat when two drivers flip each other off at a stoplight.

MR. FAYETTE responded that whether or not it is mutual combat will be disputed in every case that goes to trial. The burden will be on the prosecutor to prove that it was mutual combat and the jury will be told repeatedly to resolve any ambiguity in the defendant's favor.

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SENATOR MCGUIRE recalled the case of a minister [from Big Lake] who was prosecuted for shooting a man in the back as he was fleeing after breaking into the church. The jury found in the minister's favor, but it brought up a number of issues since the criminal was retreating. She asked him to comment on the outcome, why there was a decision to prosecute, and how HB 80 would enter into that fact pattern.

MR. FAYETTE said he wasn't directly involved in the case, but the important point is that the minister was acquitted after he [shot and killed one man and shot another in the back] as they ran from an unoccupied building.

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MR. FAYETTE described four cases where a bill like HB 80 may have made a difference in the outcome of a criminal case. He displayed a video clip that showed off-duty Army Sergeant Evan Minnear, a military policeman, being shot by Mr. Vongthongdy, a felon who was drunk at the time. Mr. Vongthongdy claimed self defense at trial. The judge ultimately ruled that he was not entitled to a self defense claim, but part of the prosecution's argument was the duty to retreat. Mr. Vongthongdy had the opportunity to walk away from Sergeant Minnear but he did not do so. The incident occurred on the street outside a bar so Mr. Vongthongdy had a legal right to be there. Had HB 80 been law it would have been much more difficult for the prosecution, and Mr. Vongthongdy may have been acquitted.

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MR. FAYETTE next displayed a video clip of a gang-related shooting. Mr. Tautua, a Bloods member, was standing in front of Rumrunners Bar in Anchorage at 1:00 a.m. He was flagging red as Crips members cruised by. In a face-off a Crip punched a Blood, and Mr. Tautua emptied a five-shot revolver at the Crips. One of those shots hit an innocent woman in the collarbone. Mr. Tautua was arrested and argued self defense at trial. The prosecution argued that the self defense claim failed because it was gang conduct, he provoked the incident by flagging, and he had a duty to retreat. If HB 80 had been law, Mr. Tautua would have had a better claim of self defense.

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CHAIR FRENCH highlighted that it's a lawful death if a shot fired in self defense hits and kills an innocent bystander.

MR. FAYETTE agreed that transferred intent counts. If Mr. Tautua had a valid claim of self defense and was not reckless in the care of a third party the self defense claim would transfer. That was litigated in the Tautua case and the jury concluded that he was reckless because he was trying to shoot rivals in the back as they were fleeing.

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MR. FAYETTE described a stabbing/murder case from Ketchikan. Mr. Rossiter was searching through a car that belonged to Mr.

Stachelrodt's parents. When Mr. Stachelrodt tried to pull Mr. Rossiter out of the car, Mr. Rossiter stabbed Mr. Stachelrodt to death. The jury wrestled with the case for two days before convicting him of second degree murder. Mr. Rossiter was not committing a felony, he was not a gang member, and he was not the initial aggressor, but he could have retreated. If HB 80 had been law, there would potentially have been a different outcome at trial.

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MR. FAYETTE described a road-rage/murder case from Fairbanks that was pending retrial. Mr. Bostic was alleged to have instigated a fight following a road-rage incident and he fatally stabbed Mr. Lund. Road-rage cases are illustrative of duty to retreat; you step on the brake and remove yourself from the situation, Mr. Fayette said.

MR. FAYETTE concluded that HB 80 dangerously and unnecessarily expands the defense of self defense, which will benefit violent criminals and do nothing to enhance the safety of law-abiding gun owners. Existing law protects life, whereas this proposal devalues it.

SENATOR PASKVAN asked what impact the bill will potentially have on set guns.

MR. FAYETTE said AS 11.81.350(c)(2) allows the use of deadly force to terminate a burglary in an occupied dwelling, but he would argue that there would be no defense for using a set gun under that statute. He added that he was unaware of any set gun case being presented to his office in the last 20 years.

CHAIR FRENCH asked Representative Neuman if he had any concluding comments.

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REPRESENTATIVE MARK NEUMAN, sponsor of HB 80, stated his belief that current statutes do not adequately protect the rights of individual Alaskans to defend themselves. HB 80 does not change that a jury may hear a case but it sends a clear message to prosecutors and the courts that an individual has a right to self defense when he/she is any place where he/she has a right to legally be. He disputed that the bill would increase self defense claims and expressed discomfort with any argument that associates costs with human life.

He offered his belief that the presumption of innocence is disregarded in many cases of self defense, and the burden is on the individual to prove his/her innocence. The minister from Big Lake, for example, spent his life savings to defend his right to defend himself. Referring to the cases cited by the previous testifier, he said each of the cases violated the justification clauses. In the first case the shooter was a felon who was drunk and in possession of a firearm. That's illegal. He argued that the road-rage case was a mutual combat situation, and did not meet the justification clauses. Referring to the gang-related shooting, he opined that if one of the security guards had been armed he would have had the duty to retreat instead of trying to defend the people that Mr. Tautua shot.

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CHAIR FRENCH clarified that the issue is not whether the security guard could personally retreat, but whether everybody involved could safely get away. If not, then deadly force could be used.

REPRESENTATIVE NEUMAN responded that current law says that if a person can safely remove him or herself from the scene he/she has to do that.

CHAIR FRENCH wondered what was wrong with that idea. Don't we want people to withdraw from a situation if it could be done with complete personal safety, he asked.

REPRESENTATIVE NEUMAN said absolutely.

CHAIR FRENCH observed that there didn't appear to be an example in Alaska law of the wrong person being prosecuted under the self defense statute. The [Big Lake] case appropriately went to a jury because one person died and another person was shot in the back.

REPRESENTATIVE NEUMAN responded that he purposefully did not bring individual cases forward.

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SENATOR MCGUIRE asked the sponsor his motivation in introducing the bill, and if it might unwittingly allow more defense opportunities for gang members and make it more difficult for prosecutors.

REPRESENTATIVE NEUMAN said the primary motivators were the Big Lake case and the fact that so many other states brought forward

similar legislation. He offered his belief that the right of self defense under the castle doctrine should extend to any place that a person has a legal right to be, like the Dimond Center or out camping.

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REX SHATTUCK, staff to Representative Mark Neuman, discussed the judicial system and an individual's objective and subjective decision making in the context of HB 80. The judicial system addresses justification and self defense; when a prosecutor takes on one of these cases it has to go to the jury for final decision as to whether it was self defense. For the individual, the message is that there is justification for self defense. An individual who is in imminent danger has a right to defend him or herself in a place where he/she has a right to be.

He concluded that the bill enjoyed broad support in both bodies and that the administration indicated its support as well.

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CHAIR FRENCH announced he would hold HB 80 in committee.

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At ease.

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CHAIR FRENCH reconvened the meeting and reviewed his intentions for the six criminal bills that were scheduled but not heard today.

SB 110, Senator Wielechowski's bill on human trafficking, and the sex trafficking elements of SB 218 will be put into a committee substitute (CS) and moved along.

SB 212 creates a task force dealing with human trafficking and Senator McGuire's requested that it move forward alone.

SB 186 was filed on behalf of the administration. The amendment that Senator Coghill brought forward to raise the felony misdemeanor cutoff for theft and criminal mischief will be added to the bill.

The second half of SB 218, video provisions for video conferencing, will be addressed along with a pornography ruling in a new CS.

SB 210 deals with felony child assault and Senator McGuire requested that it go forward alone.

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There being no further business to come before the committee, Chair French adjourned the meeting at 2:56 p.m.