ALASKA LEGISLATURE COMMITTEE FILES, 2003-2004 8672
11163 SENATE JUDICIARY

(5) may disclose to a victim or to the victim's insurance company information, including copies of reports, as necessary for civil litigation or insurance claims pursued by or against the victim."

AMENDMENT #3 passed

OFFERED IN THE SENATE

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

Page 11, following line 29:

Insert the following:

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

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

Page 12, lines 23 and 24:

Following "applies:": Delete all material and insert the following:

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

AMENDMENT TO CSSB 170 (JUD) Work Draft 3/8/2004 # 4 passed

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

Insert in its place:

(s) In a prosecution under (a) of this section, a person may introduce evidence of having consumed alcohol before operating or driving the motor vehicle, aircraft or watercraft, to rebut or explain the results of a chemical test, but it is not a defense that the chemical test did not measure the blood alcohol at the time of the operating or driving.

Add a new section and renumber other sections accordingly:

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

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

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

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

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

AMENDMENT # 7 Adopted 3/31/04

OFFERED IN THE SENATE **BY Senator Hollis French**

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

Page 12, Lines 22-24

Following "finding": Delete all material, as shown below

(i) If the court finds that the witness has a valid claim of privilege, it shall advise the prosecution of that finding [AND INFORM THE PROSECUTION OF THE CATEGORY OF OFFENSE TO WHICH THE PRIVILEGE APPLIES: AN UNCLASSIFIED FELONY, A CLASS A FELONY, A CLASS B FELONY, A CLASS C FELONY, OR A MISDEMEANOR].

Pages 11 and 12

Rescind passage of amendment #3, adopted 3/24

Adopted 3/31/09

AMENDMENT #8 (Robbers Amnd #2)

OFFERED IN THE SENATE

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

Page 18

Delete all material and insert:

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

(c) A state or municipal law enforcement agency

(1) shall disclose information regarding a case that is needed by the person or agency charged with making a preliminary investigation for the information of the court under this chapter;

(2) may disclose to the public information regarding a criminal offense in which a minor is a suspect, victim, or witness if the minor is not identified by the disclosure;

(3) may disclose to school officials information regarding a case as may be necessary to protect the safety of school students and staff or to enable the school to provide appropriate counseling and supportive services to meet the needs of a minor about whom information is disclosed;

(4) **and, under department regulations, a state or municipal agency or authorized employee** may disclose to the public information regarding a case as may be necessary to protect the safety of the public; and

(5) may disclose to a victim or to the victim's insurance company information, including copies of reports, as necessary for civil litigation or insurance claims pursued by or against the victim."

23-GS1024\H
Luckhaupt
3/8/04

CS FOR SENATE BILL NO. 170(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

"An Act relating to murder in the second degree, the justification of defense of self or others, immunity from prosecution, sentencing, probation, discretionary parole, and the right to representation in certain criminal proceedings; relating to violation of a custodian's duty; relating to sexual abuse of a minor; relating to release of agency records, upon request, concerning an adjudication of a sexual offense; relating to local options regarding alcoholic beverages, the offense of furnishing or delivery of alcoholic beverages to a person under 21 years of age, and forfeiture of property used in, and money or other items of value used in financial transactions derived from, violation of certain laws relating to alcoholic beverages; relating to assault by means of a dangerous instrument; relating to operating or driving a motor vehicle, aircraft, or watercraft while under the influence of an alcoholic beverage, inhalant, or controlled substance, to the refusal to submit to a chemical test, and to the presumptions concerning the

chemical analysis of breath or blood; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** AS 04.11.010(c) is amended to read:

(c) **Unless a municipality or established village has adopted a more restrictive local option under AS 04.11.491(g), in** [IN] a criminal prosecution for possession of alcoholic beverages for sale in violation of (a) of this section, the fact that a person

(1) possessed more than 12 liters of distilled spirits, 24 liters or more of wine, or 12 gallons or more of malt beverages in an area where the sale of alcoholic beverages is restricted or prohibited under AS 04.11.491 creates a presumption that the person possessed the alcoholic beverages for sale;

(2) sends, transports, or brings more than 12 liters of distilled spirits, 24 liters or more of wine, or 12 gallons or more of malt beverages to an area where the sale of alcoholic beverages is restricted or prohibited under AS 04.11.491 creates a presumption that the person sent, transported, or brought the alcoholic beverages for sale in the area.

*** Sec. 2.** AS 04.11.010 is amended by adding a new subsection to read:

(d) In this section,

(1) "bring" has the meaning given in AS 04.11.499;

(2) "send" has the meaning given in AS 04.11.499;

(3) "transport" has the meaning given in AS 04.11.499.

*** Sec. 3.** AS 04.11.150(g) is amended to read:

(g) If a shipment is to an area that has restricted the sale of alcoholic beverages under AS 04.11.491(a)(1), (2), or (3) or (b)(1) or (2), a package store licensee, agent, or employee may not ship to a purchaser more than 10 and one-half liters of distilled spirits, 24 liters or more of wine, or 12 gallons or more of malt beverages in a calendar month**, or a lower amount of distilled spirits, wine, or malt beverages if the municipality or established village has adopted the lower amount by local option under AS 04.11.491(g).**

*** Sec. 4.** AS 04.11.491 is amended by adding a new subsection to read:

(g) If a municipality or established village has adopted a local option under (a)(1), (2), (3), or (4), or (b)(1), (2), or (3) of this section, the municipality or established village, as part of the local option question or questions placed before the voters, may

(1) adopt an amount of alcoholic beverages that may be imported that is less than the amounts set out in AS 04.11.150(g);

(2) adopt an amount of alcoholic beverages that would give rise to a presumption that the person possessed the alcoholic beverages for sale; the amounts adopted under this paragraph may be lower than those set out in AS 04.11.010(c).

* **Sec. 5.** AS 04.11.508(b) is amended to read:

(b) If the perimeter of an established village determined under (a) of this section includes any area that is

~~4.19.080~~ 4.21.080(9)

(1) within a municipality

(A) that has adopted a local option, the local option adopted by the municipality applies in the overlapping area;

(B) the local option adopted by the established village does not apply in the overlapping area;

(2) within the perimeter of another established village and, if the other established village has

(A) also adopted a local option under AS 04.11.491, the local option of the established village that is less restrictive applies in the overlapping area;

(B) not adopted a local option under AS 04.11.491, the local option does not apply in the overlapping area [OR WITHIN THE PERIMETER OF ANOTHER ESTABLISHED VILLAGE, THE PERIMETER DESCRIBED UNDER (a) OF THIS SECTION IS LIMITED TO AN AREA THAT INCLUDES ONLY THE ESTABLISHED VILLAGE].

* **Sec. 6.** AS 04.11.508(c) is amended to read:

(c) If the board determines that the perimeter of an established village as provided under (a) and (b) of this section does not accurately reflect the perimeter of the established village, the board may establish the perimeter of the established village

and the areas of overlapping perimeter described under (b) of this section for purposes of applying a local option selected under this chapter.

* **Sec. 7.** AS 04.16.051(d) is amended to read:

(d) A person acting with criminal negligence who violates this section is guilty of a class C felony if

(1) within the five years preceding the violation, the person has been previously convicted under

(A) this section; or

(B) a law or ordinance of this or another jurisdiction with elements substantially similar to this section; [OR]

(2) the person who receives the alcoholic beverage negligently causes serious physical injury to or the death of another person while under the influence of the alcoholic beverage received in violation of this section; in this paragraph,

(A) "negligently" means acting with civil negligence; and

(B) "serious physical injury" has the meaning given in AS 11.81.900**; or**

(3) the violation occurs within the boundaries of a municipality or the perimeter of an established village that has adopted a local option under AS 04.11.491.

* **Sec. 8.** AS 04.16.220(a) is amended to read:

(a) The following are subject to forfeiture:

(1) alcoholic beverages manufactured, sold, offered for sale or possessed for sale, bartered or exchanged for goods and services in this state in violation of AS 04.11.010; alcoholic beverages possessed, stocked, warehoused, or otherwise stored in violation of AS 04.21.060; alcoholic beverages sold, or offered for sale in violation of a local option adopted under AS 04.11.491; alcoholic beverages transported into the state and sold to persons not licensed under this chapter in violation of AS 04.16.170(b);

(2) materials and equipment used in the manufacture, sale, offering for sale, possession for sale, barter or exchange of alcoholic beverages for goods and services in this state in violation of AS 04.11.010; materials and equipment used in the

stocking, warehousing, or storage of alcoholic beverages in violation of AS 04.21.060; materials and equipment used in the sale or offering for sale of an alcoholic beverage in an area in violation of a local option adopted under AS 04.11.491;

(3) aircraft, vehicles, or vessels used to transport, or facilitate the transportation of

(A) alcoholic beverages manufactured, sold, offered for sale or possessed for sale, bartered or exchanged for goods and services in this state in violation of AS 04.11.010;

(B) property stocked, warehoused, or otherwise stored in violation of AS 04.21.060;

(C) alcoholic beverages imported into a municipality or established village in violation of AS 04.11.499;

(4) alcoholic beverages found on licensed premises that do not bear federal excise stamps if excise stamps are required under federal law;

(5) alcoholic beverages, materials or equipment used in violation of AS 04.16.175;

(6) money, securities, negotiable instruments, or other things of value used in financial transactions derived from activity prohibited under AS 04.11.010 or in violation of a local option adopted under AS 04.11.491.

*** Sec. 9.** AS 04.16.220(e) is amended to read:

(e) The owner of property subject to forfeiture under (a) **or (i)** of this section is entitled to relief from the forfeiture in the nature of remission of the forfeiture if, in an action under (d) of this section, the owner shows that the owner

(1) was not a party to the violation;

(2) [AND] had no actual knowledge **or reasonable cause to believe** that the property was used or was to be used in violation of the law**; and**

(3) had no actual knowledge or reasonable cause to believe that the person committing the violation had

(A) a criminal record for violating this title; or

(B) committed other violations of this title.

*** Sec. 10.** AS 04.16.220(f) is amended to read:

(f) A person other than the owner holding, or the assignee of, a lien, mortgage, conditional sales contract on, or the right to possession to property subject to forfeiture under (a) **or (i)** of this section is entitled to relief from the forfeiture in the nature of remission of the forfeiture if, in an action under (d) of this section, the person shows that the person

(1) was not a party to the violation subjecting the property to forfeiture;

(2) [AND] had no actual knowledge **or reasonable cause to believe** that the property was [USED OR WAS] to be used in violation of the law; **and**

(3) had no actual knowledge or reasonable cause to believe that the person committing the violation had

(A) a criminal record for violating this title; or

(B) committed other violations of this title.

*** Sec. 11.** AS 04.16.220 is amended by adding new subsections to read:

(i) Upon conviction for a violation of AS 04.11.010 or 04.11.499, if an aircraft, vehicle, or watercraft is subject to forfeiture under (a) of this section, the court shall, subject to remission to innocent parties under this section,

(1) order the forfeiture of an aircraft to the state;

(2) order the forfeiture of a vehicle or watercraft if

(A) the defendant has a prior felony conviction for a violation of AS 11.41 or a similar law in another jurisdiction;

(B) the defendant is on felony probation or parole;

(C) the defendant has a prior conviction for violating AS 04.11.010 or 04.11.499; or

(D) the quantity of alcohol transported in violation of this title was twice the presumptive amounts in AS 04.11.010(c).

(j) Notwithstanding (i) of this section, a court is not required to order the forfeiture of a vehicle or watercraft if the court determines that

(1) the vehicle or watercraft is the sole means of transportation for a family residing in a village;

(2) the court may impose conditions that will prevent the defendant's

use of the vehicle or watercraft; and

(3) either

(A) a member of the family would be entitled to remission under this section if the family member were an owner of or held a security interest in the vehicle or watercraft; or

(B) if a member of the family would not be entitled to remission, the family member was unable as a practical matter to stop the violation making the vehicle or watercraft subject to forfeiture.

(k) When forfeiting property under (a), (d), or (i) of this section, a court may award to a municipal law enforcement agency that participated in the arrest or conviction of the defendant, the seizure of property, or the identification of property for seizure, (1) the property if the property is worth $5,000 or less and is not money or some other thing that is divisible, or (2) up to 75 percent of the property or the value of the property if the property is worth more than $5,000 or is money or some other thing that is divisible. In determining the percentage a municipal law enforcement agency may receive under this subsection, the court shall consider the municipal law enforcement agency's total involvement in the case relative to the involvement of the state.

(l) In this section, "village" means a community of fewer than 1,000 persons located off the interconnected state road system.

*** Sec. 12.** AS 09.50.020(a) is amended to read:

(a) A person who is guilty of contempt is punishable by **a** fine of not more than $300 or by imprisonment for not more than six months. However, when the contempt is one mentioned in AS 09.50.010(3) - (12), or in an action before a magistrate, the person is punishable by a fine of not more than $100 unless it appears that a right or remedy of a party to an action or proceeding was defeated or prejudiced by the contempt, in which case the penalty shall be as prescribed for contempts described in AS 09.50.010(1) **and** [,] (2) [, AND (13)].

*** Sec. 13.** AS 11.41.110(a) is amended to read:

(a) A person commits the crime of murder in the second degree if

(1) with intent to cause serious physical injury to another person or

knowing that the conduct is substantially certain to cause death or serious physical injury to another person, the person causes the death of any person;

(2) the person knowingly engages in conduct that results in the death of another person under circumstances manifesting an extreme indifference to the value of human life;

(3) under circumstances not amounting to murder in the first degree under AS 11.41.100(a)(3), while acting either alone or with one or more persons, the person commits or attempts to commit arson in the first degree, kidnapping, sexual assault in the first degree, sexual assault in the second degree, sexual abuse of a minor in the first degree, sexual abuse of a minor in the second degree, burglary in the first degree, escape in the first or second degree, robbery in any degree, or misconduct involving a controlled substance under AS 11.71.010(a), 11.71.020(a), 11.71.030(a)(1) or (2), or 11.71.040(a)(1) or (2) and, in the course of or in furtherance of that crime or in immediate flight from that crime, any person causes the death of a person [OTHER THAN ONE OF THE PARTICIPANTS];

(4) acting with a criminal street gang, the person commits or attempts to commit a crime that is a felony and, in the course of or in furtherance of that crime or in immediate flight from that crime, any person causes the death of a person [OTHER THAN ONE OF THE PARTICIPANTS]; or

(5) the person with criminal negligence causes the death of a child under the age of 16, and the person has been previously convicted of a crime involving a child under the age of 16 that was

(A) a felony violation of AS 11.41;

(B) in violation of a law or ordinance in another jurisdiction with elements similar to a felony under AS 11.41; or

(C) an attempt, a solicitation, or a conspiracy to commit a crime listed in (A) or (B) of this paragraph.

*** Sec. 14.** AS 11.41.220(a) is amended to read:

(a) A person commits the crime of assault in the third degree if that person

(1) recklessly

(A) places another person in fear of imminent serious physical

injury by means of a dangerous instrument;

(B) causes physical injury to another person by means of a dangerous instrument; or

(C) while being 18 years of age or older

(i) causes physical injury to a child under 10 years of age and the injury reasonably requires medical treatment;

(ii) causes physical injury to a child under 10 years of age on more than one occasion;

(2) with intent to place another person in fear of death or serious physical injury to the person or the person's family member makes repeated threats to cause death or serious physical injury to another person; [OR]

(3) while being 18 years of age or older, knowingly causes physical injury to a child under 16 years of age but at least 10 years of age and the injury reasonably requires medical treatment; **or**

(4) with criminal negligence causes serious physical injury to another person by means of a dangerous instrument.

* **Sec. 15.** AS 11.41.438(a) is amended to read:

(a) An offender commits the crime of sexual abuse of a minor in the third degree if

(1) being under 16 years of age, the offender engages in sexual penetration with a person who is under 13 years of age and at least three years younger than the offender;

(2) being 16 years of age or older, the offender engages in sexual contact with a person who is 13, 14, or 15 years of age and at least three years younger than the offender; or

(3) [(2)] being 18 years of age or older, the offender engages in sexual penetration with a person who is 16 or 17 years of age and at least three years younger than the offender, and the offender occupies a position of authority in relation to the victim.

* **Sec. 16.** AS 11.41.440(a) is amended to read:

(a) An offender commits the crime of sexual abuse of a minor in the fourth

degree if

(1) being under 16 years of age, the offender engages in [SEXUAL PENETRATION OR] sexual contact with a person who is under 13 years of age and at least three years younger than the offender; or

(2) being 18 years of age or older, the offender engages in sexual contact with a person who is 16 or 17 years of age and at least three years younger than the offender, and the offender occupies a position of authority in relation to the victim.

*** Sec. 17.** AS 11.56 is amended by adding a new section to read:

Amend #5 2/31/04

Sec. 11.56.758. Violation of custodian's duty. (a) A person commits the crime of violation of custodian's duty if the person knowingly fails, when acting as a custodian appointed by the court for a released person under AS 12.30, to report immediately as directed by the court that the person released has violated a condition of release.

(b) Violation of custodian's duty is

(1) a class A misdemeanor if the released person is charged with a felony;

(2) a class B misdemeanor if the released person is charged with a misdemeanor.

*** Sec. 18.** AS 11.81.330(a) is amended to read:

(a) A person may use 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, unless

(1) the force involved was the product of mutual combat not authorized by law;

(2) the person claiming the defense of justification provoked the other's conduct with intent to cause physical injury to the other; [OR]

(3) the person claiming the defense of justification was the initial aggressor; **or**

(4) the person claiming the defense of justification was, at the time the force was used,

(A) acting alone or with others to further the criminal

objectives of one or more other persons; or

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

*** Sec. 19.** AS 11.81 is amended by adding a new section to read:

Sec. ~~11.81.~~345. Defense of self and others. A court ~~may instruct~~ the jury about the justification described ~~in AS 11.81.330~~ - 11.81.340 if the court, sitting without a jury, finds ~~that there~~ is some plausible evidence ~~to warrant~~ a reasonable jury to find ~~the~~ elements of the justification.

Amend #6 3/31/04

*** Sec. 20.** AS 12.50.101(a) is amended to read:

(a) If a witness refuses, on the basis of the privilege against self-incrimination, to testify or provide other information in a criminal proceeding before or ancillary to a court or grand jury of this state, and a judge issues an order under (b) of this section, the witness may not refuse to comply with the order on the basis of the privilege against self-incrimination. If the witness fully complies with the order, **the witness may not be prosecuted for an offense about which the witness is compelled to testify** [NO TESTIMONY OR OTHER INFORMATION COMPELLED UNDER THE ORDER, OR INFORMATION DIRECTLY OR INDIRECTLY DERIVED FROM THAT TESTIMONY OR OTHER INFORMATION, MAY BE USED AGAINST THE WITNESS IN A CRIMINAL CASE], except in a prosecution based on perjury, giving a false statement [,] or otherwise knowingly providing false information, or hindering prosecution.

*** Sec. 21.** AS 12.50.101(e) is amended to read:

(e) **In** [AS USED IN] this section,

(1) "other information" means books, papers, documents, records, recordings, or other similar material**;**

(2) "proffer" means a written or oral statement by the attorney for the witness, stating the attorney's good faith belief of the substance of the witness's testimony or other information.

*** Sec. 22.** AS 12.50.101 is amended by adding new subsections to read:

(f) If a witness refuses, or there is reason to believe the witness will refuse, to

testify or provide other information based on the privilege against self-incrimination, and if the attorney general or the attorney general's designee has not applied for an order under (b) of this section, the court shall inform the witness of the right to be represented by an attorney, and that an attorney will be appointed for the witness if the witness qualifies for counsel under AS 18.85. The court shall recess the proceeding to allow the witness to consult with the attorney for the witness.

(g) If the attorney general or the attorney general's designee declines to seek an order under (b) of this section after the witness has had an opportunity to consult with an attorney, and the witness continues to refuse to testify or provide other information, the court shall hold a hearing to determine the validity of the claim of privilege by the witness. The hearing shall be in camera.

(h) At the hearing under (g) of this section, the attorney for the witness, in the form of a proffer, shall describe the testimony or other information that the witness claims is privileged. The proffer must include a description of how the testimony or other information could connect the witness with a crime. The proffer is privileged and inadmissible for any other purpose. If the proffer establishes a factual basis that there is a real or substantial danger that the testimony or other information to be compelled would support a conviction or would furnish a link in the chain of evidence leading to conviction for a crime, the court may find that the witness has a valid claim of privilege.

(i) If the court finds that the witness has a valid claim of privilege, it shall advise the prosecution of that finding and inform the prosecution of the category of offense to which the privilege applies: an unclassified felony, a class A felony, a class B felony, a class C felony, or a misdemeanor.

* **Sec. 23.** AS 12.55.025(c) is amended to read:

(c) Except as provided in (d) [AND (e)] of this section, when a defendant is sentenced to imprisonment, the term of confinement commences on the date of imposition of sentence unless the court specifically provides that the defendant must report to serve the sentence on another date. If the court provides another date to begin the term of confinement, the court shall provide the defendant with written notice of the date, time, and location of the correctional facility to which the defendant

must report. A defendant shall receive credit for time spent in custody pending trial, sentencing, or appeal, if the detention was in connection with the offense for which sentence was imposed. A defendant may not receive credit for more than the actual time spent in custody pending trial, sentencing, or appeal. The time during which a defendant is voluntarily absent from official detention after the defendant has been sentenced may not be credited toward service of the sentence.

* **Sec. 24.** AS 12.55 is amended by adding a new section to read:

Sec. 12.55.127. Consecutive and concurrent terms of imprisonment. (a) If a defendant is required to serve a term of imprisonment under a separate judgment, a term of imprisonment imposed in a later judgment, amended judgment, or probation revocation shall be consecutive.

(b) Except as provided in (c) of this section, if a defendant is being sentenced for two or more crimes in a single judgment, terms of imprisonment may be concurrent or partially concurrent.

(c) If the defendant is being sentenced for

(1) escape, the term of imprisonment shall be consecutive to the term for the underlying crime;

(2) two or more crimes under AS 11.41, a consecutive term of imprisonment shall be imposed for at least

(A) the mandatory minimum term under AS 12.55.125(a) for each additional crime that is murder in the first degree;

(B) the mandatory minimum term for each additional crime that is an unclassified felony governed by AS 12.55.125(b);

(C) the presumptive term specified in AS 12.55.125(c) or the active term of imprisonment, whichever is less, for each additional crime that is

(i) manslaughter; or

(ii) kidnapping that is a class A felony;

(D) two years or the active term of imprisonment, whichever is less, for each additional crime that is criminally negligent homicide;

(E) one-fourth of the presumptive term under AS 12.55.125(c)

or (i) for each additional crime that is sexual assault in the first degree under AS 11.41.410 or sexual abuse of a minor in the first degree under AS 11.41.434, or an attempt, solicitation or conspiracy to commit those offenses; and

(F) some additional term of imprisonment for each additional crime, or each additional attempt or solicitation to commit the offense, under AS 11.41.200 - 11.41.250, 11.41.420 - 11.41.432, 11.41.436 - 11.41.458, or 11.41.500 - 11.41.520.

(d) In this section,

(1) "active term of imprisonment" means the total term of imprisonment imposed for a crime, minus suspended imprisonment;

(2) "additional crime" means a crime that is not the primary crime;

(3) "primary crime" means the crime

(A) for which the sentencing court imposes the longest active term of imprisonment; or

(B) that is designated by the sentencing court as the primary crime when no single crime has the longest active term of imprisonment.

*** Sec. 25.** AS 18.85.100 is amended by adding a new subsection to read:

(f) Notwithstanding (a) of this section, an indigent person is entitled to the representation and necessary services and facilities of representation as provided in (a) of this section when the person is a witness who refuses or there is reason to believe will refuse to testify or provide other information based on the privilege against self-incrimination.

*** Sec. 26.** AS 28.35.030(n) is amended to read:

(n) A person is guilty of a class C felony if the person is convicted under (a) of this section and **either** has been previously convicted two or more times since January 1, 1996, and within the 10 years preceding the date of the present offense**, or punishment under this subsection or under AS 28.35.032(p) was previously imposed on the person**. For purposes of determining minimum sentences based on previous convictions, the provisions of (r)(4) of this section apply. Upon conviction, the court

(1) shall impose a fine of not less than $10,000 and a minimum sentence of imprisonment of not less than

(A) 120 days if the person has been previously convicted twice;

(B) 240 days if the person has been previously convicted three times;

(C) 360 days if the person has been previously convicted four or more times;

(2) may not

(A) suspend execution of sentence or grant probation except on condition that the person serve the minimum imprisonment under (1) of this subsection; or

(B) suspend imposition of sentence;

(3) shall permanently revoke the person's driver's license, privilege to drive, or privilege to obtain a license subject to restoration of the license under (o) of this section;

(4) may order that the person, while incarcerated or as a condition of probation or parole, take a drug or combination of drugs, intended to prevent the consumption of an alcoholic beverage; a condition of probation or parole imposed under this paragraph is in addition to any other condition authorized under another provision of law;

(5) shall order forfeiture under AS 28.35.036 of the vehicle, watercraft, or aircraft used in the commission of the offense, subject to remission under AS 28.35.037; and

(6) shall order the department to revoke the registration for any vehicle registered by the department in the name of the person convicted under this subsection; if a person convicted under this subsection is a registered co-owner of a vehicle or is registered as a co-owner under a business name, the department shall reissue the vehicle registration and omit the name of the person convicted under this subsection.

* **Sec. 27.** AS 28.35.030 is amended by adding a new subsection to read:

(s) In a prosecution under (a) of this section, a person may introduce evidence

of having consumed alcohol to rebut or explain the results of a chemical test, but only if the consumption of alcohol occurred after the driving or operating that is the subject of the prosecution.

* **Sec. 28.** AS 28.35.032(p) is amended to read:

(p) A person is guilty of a class C felony if the person is convicted under this section and **either** has been previously convicted two or more times since January 1, 1996, and within the 10 years preceding the date of the present offense**, or punishment under this subsection or under AS 28.35.030(n) was previously imposed on the person**. For purposes of determining minimum sentences based on previous convictions, the provisions of AS 28.35.030(r)(4) apply. Upon conviction,

(1) the court shall impose a fine of not less than $10,000 and a minimum sentence of imprisonment of not less than

(A) 120 days if the person has been previously convicted twice;

(B) 240 days if the person has been previously convicted three times;

(C) 360 days if the person has been previously convicted four or more times;

(2) the court may not

(A) suspend execution of the sentence required by (1) of this subsection or grant probation, except on condition that the person serve the minimum imprisonment under (1) of this subsection; or

(B) suspend imposition of sentence;

(3) the court shall permanently revoke the person's driver's license, privilege to drive, or privilege to obtain a license subject to restoration under (q) of this section;

(4) the court may order that the person, while incarcerated or as a condition of probation or parole, take a drug, or combination of drugs, intended to prevent consumption of an alcoholic beverage; a condition of probation or parole imposed under this paragraph is in addition to any other condition authorized under another provision of law;

(5) the sentence imposed by the court under this subsection shall run

consecutively with any other sentence of imprisonment imposed on the person;

(6) the court shall order forfeiture under AS 28.35.036, of the motor vehicle, aircraft, or watercraft used in the commission of the offense, subject to remission under AS 28.35.037; and

(7) the court shall order the department to revoke the registration for any vehicle registered by the department in the name of the person convicted under this subsection; if a person convicted under this subsection is a registered co-owner of a vehicle, the department shall reissue the vehicle registration and omit the name of the person convicted under this subsection.

*** Sec. 29.** AS 28.35.033(c) is amended to read:

(c) **Except as provided in AS 28.35.030(s), the** [THE] provisions of (a) of this section may not be construed to limit the introduction of any other competent evidence bearing upon the question of whether the person was or was not under the influence of intoxicating liquor.

*** Sec. 30.** AS 33.16.090(b) is amended to read:

(b) Except as provided in (e) of this section, a prisoner is not eligible for discretionary parole during the term of a presumptive sentence; however, a prisoner is eligible for discretionary parole during a term of sentence enhancement imposed under AS 12.55.155(a) or during the term of a consecutive or partially consecutive presumptive sentence imposed under **AS 12.55.127** [AS 12.55.025(e) OR (g)]. A prisoner sentenced to a mandatory 99-year term under AS 12.55.125(a) or a definite term under AS 12.55.125(*l*) is not eligible for discretionary parole during the entire term.

*** Sec. 31.** AS 33.16.090(c) is amended to read:

(c) Except as provided in (e) of this section, a prisoner eligible for discretionary parole during a period of sentence enhancement imposed under AS 12.55.155(a) or during a consecutive or partially consecutive presumptive sentence imposed under **AS 12.55.127** [AS 12.55.025(e) OR (g)] shall serve the unenhanced portion of the sentence or the initial presumptive sentence before being otherwise eligible for discretionary parole under AS 33.16.100(c) or (d). For purposes of this subsection, the sentence for the most serious offense in the case of consecutive or

partially consecutive presumptive sentences shall be considered the initial presumptive sentence. The unenhanced sentence or the initial presumptive sentence is considered served for purposes of discretionary parole on the date the unenhanced or initial presumptive sentence is due to expire less good time earned under AS 33.20.010.

* **Sec. 32.** AS 47.12.310(b) is amended to read:

(b) A state or municipal agency or employee shall disclose

(1) information regarding a case to a federal, state, or municipal law enforcement agency for a specific investigation being conducted by that agency; and

(2) appropriate information regarding a case to

(A) a guardian ad litem appointed by the court;

(B) a person or an agency requested by the department or the minor's legal custodian to provide consultation or services for a minor who is subject to the jurisdiction of the court under this chapter as necessary to enable the provision of the consultation or services;

(C) school officials as may be necessary to protect the safety of the minor who is the subject of the case and the safety of school students and staff or to enable the school to provide appropriate counseling and supportive services to meet the needs of a minor about whom information is disclosed;

(D) a governmental agency as may be necessary to obtain that agency's assistance for the department in its investigation or to obtain physical custody of a minor;

(E) a law enforcement agency of this state or another jurisdiction as may be necessary for the protection, rehabilitation, or supervision of any minor or for actions by that agency to protect the public safety;

(F) a victim or to the victim's insurance company as may be necessary to inform the victim or the insurance company about the arrest of the minor, including the minor's name and the names of the minor's parents, copies of reports, or the disposition or resolution of a case involving a minor;

(G) the state medical examiner under AS 12.65 as may be necessary to perform the duties of the state medical examiner;

(H) foster parents or relatives with whom the child is placed by the department as may be necessary to enable the foster parents or relatives to provide appropriate care for the child who is the subject of the case, to protect the safety of the child who is the subject of the case, and to protect the safety and property of family members and visitors of the foster parents or relatives;

(I) the Department of Law or its agent for use and subsequent release if necessary for collection of an order of restitution on behalf of the recipient;

(J) the Violent Crimes Compensation Board established in AS 18.67.020 for use in awarding compensation under AS 18.67.080; [AND]

(K) a state, municipal, or federal agency of this state or another jurisdiction that has the authority to license adult or children's facilities and services; **and**

(L) upon request, a member of the public regarding an adjudication of a sexual offense under AS 11.41.410 - 11.41.460 as may be necessary to protect the safety of a child or vulnerable adult; in this subparagraph, "vulnerable adult" has the meaning given in AS 47.24.900.

*** Sec. 33.** (a) AS 09.50.010(13) is repealed.

(b) AS 12.55.025(e), 12.55.025(g), and 12.55.025(h) are repealed.

*** Sec. 34.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. (a) The changes made in secs. 7 - 11, 13 - 16, 18, 19, 23, 24, 30, 31, and 33(b) of this Act apply to offenses committed on or after the respective effective date of those sections.

(b) Sections 26 and 28 of this Act apply to offenses occurring on or after the effective date of those sections, except that previous punishment, referred to in AS 28.35.030(n), as amended by sec. 26 of this Act, and in AS 28.35.032(p), as amended by sec. 28 of this Act, includes punishment imposed before, on, or after the effective date of secs. 26 and 28 of this Act.

(c) Section 17 of this Act applies to custodians who fail to report on or after the effective date of sec. 17 of this Act, for persons released for offenses committed before, on, or

after the effective date of sec. 17 of this Act.

(d) The changes made in secs. 20, 22, 25, 27, and 29 of this Act apply to criminal proceedings for offenses committed before, on, or after the effective date of those sections.

(e) Section 32 of this Act applies to an offense occurring before, on, or after the effective date of this Act.

* **Sec. 35.** This Act takes effect July 1, 2004.

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: SB170-LAW-CDCO-3-9-2
Bill Version: CSSB170(JUD)-LAW-CD
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Law
Title "An Act relating to murder in the second degree, the defense of acting in the heat of passion..."
BRU Criminal
Component All
Sponsor Rules Committee
Requester Governor
Component No.

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2004) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

The bill proposes a number of changes in the law regarding criminal defenses and procedures.

1. Makes the death of any person in the course of the enumerated crimes such as robbery murder in the second degree.
2. It makes self- defense unavailable to violence resulting from gang activity or illegal drug transaction and it reverses certain self-defense decisions.
3. It adopt a procedure for the courts to determine whether a valid privilege against self-incrimination exists, and if found makes requirements of the court to inform prosecution of the seriousness of the crime to which privilege applies.
4. The bill adopts guidelines and direction to courts in imposing concurrent and consecutive terms of imprisonment when a defendant is convicted of more than one crime.

Prepared by: Robert Meiners, Admin. Services Manager
Phone
Division Administrative Services
Date/Time 3/9/04 4:45 PM

Approved by: Robert Meiners for Gregg D. Renkes, Attorney General
Date 3/9/2004
Agency Department of Law

(Revised 9/2003 OMB)

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

BILL NO. SB170

ANALYSIS CONTINUATION

5. It also makes failure to report a violation of a condition of release by a third party custodian a misdemeanor.
6. It expands the crime of sexual abuse of a minor in the third degree to include offenders under 16 years of age engaging in sexual penetration with a person under 13 years of age and at least three years younger than the offender and makes it a class C felony. It also authroizes the release to the public, upon request, of agency records concerning adjudication of a sexual offense to protect the safety of a child or vulnerable adult.
7. Finally, this bill also relates to local options regarding alcoholic beverages; the boundaries of local option areas; furnishing alcoholic beverages to a person under 21 years old; and forfeiture of money and other valuable items derived from violation of laws relating to alcoholic beverages.

Passage of this legislation will have no foreseeable fiscal impact on the Department of Law.

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: CSSB170-DOC-IDO-03-10-(
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Corrections

Title: Criminal Procedures, Sentencing & Related Issues.
RDU: Administration & Operations
Component: Institution Director's Office

Sponsor: Rules Committee
Requester: Governor
Component No.: 1381

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	3.4	54.6	98.9	174.2	195.0	225.7
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	3.4	54.6	98.9	174.2	195.0	225.7
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)						
1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	3.4	54.6	98.9	174.2	195.0	225.7
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1037 GF/Mental Health	0.0	0.0	0.0	0.0	0.0	0.0
Other (Specify Type–Do not abbreviate)	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	3.4	54.6	98.9	174.2	195.0	225.7

Estimate of any current year (FY2004) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS						
Full-time	0	0	0	0	0	0
Part-time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

ANALYSIS: *(Attach a separate page if necessary)*

Time served is estimated based on the time that would have been served under this bill for defendants sentenced during the time period 1/1/2001 through 12/31/2001. Time served under current law is not included on Fiscal Note estimates. Months are based on an average of 30 days per month and the FY04 cost of care of $113.69. Sentences timeframe is estimated as beginning 7/1/2004.

See attached:

Prepared by: Jerry D. Burnett, Director
Phone (907) 465-3339
Division: Administrative Services
Date/Time 3/10/04 7:30 AM

Approved by: Portia C.K. Parker, Deputy Commissioner
Date 3/10/2004
Agency: Department of Corrections

(Revised 9/2003 OMB)

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

BILL NO. CSSB170-DOC-IDO-03-10-(

ANALYSIS CONTINUATION

For years past FY 2010, there could be a cumulative effect of long-term and short-term sentence increases that would result in higher costs on an annual basis. We have not attempted to estimate these future year costs past FY 2010. Given the recidivism rates for many offenders, it is not clear that these longer sentences will actually have the effect of increasing costs to the Department of Corrections. Our costs are the same on a daily basis whether offenders are serving an extra period of incarceration or are reincarcerated for a new offense. To the extent that increased sentences reduce recidivism for this group of offenders, the legislation may result in lower costs in future years.

STATE OF ALASKA

DEPARTMENT OF LAW
CRIMINAL DIVISION

FRANK H. MURKOWSKI, GOVERNOR

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February 10, 2004

Hon. Ralph Seekins, Chair
Senate Judiciary Committee
State Capitol, Room 125
Juneau, AK 99801-1182

Re: Proposed Committee Substitute SB 170

Dear Senator Seekins:

Here are the highlights of the proposed Senate Judiciary Committee Substitute for SB 170. I am also enclosing a chart comparing the original version of the bill with the proposed committee substitute and also the final House Judiciary version. Also attached are a two-page sectional summary and a four-page description of the bill with examples showing how the proposed changes would improve criminal law in the state.

Highlights of Governor's 2004 Crime Bill (CSSB 170)

MAKES CRIMINALS THINK TWICE BEFORE COMMITTING DANGEROUS OFFENSES

1. Expands felony-murder law so offenders committing dangerous crimes can be charged with second-degree murder if their accomplice is killed

2. Adopts consecutive sentencing procedures so that some consecutive term is imposed for each victim or each conviction of a serious crime

3. Disallows self-defense if the state proves the defendant was furthering the criminal objectives of a gang or was buying or selling illegal drugs

4. Disallows self-defense if the only evidence of it is implausible

5. Adopts a uniform procedure for deciding whether to grant immunity to witnesses, thus making it harder for gang members, accomplices and friends of defendants to refuse to testify by hiding behind state immunity laws

6. Makes it a misdemeanor crime for a court-appointed custodian to fail to report that the defendant released to his custody has violated court imposed conditions

BOOTLEGGING: HELPS COMMUNITIES THAT CHOOSE TO REDUCE ALCOHOL

7. Allows communities to adopt lower limits of alcohol possession and importation as part of the local option system; increases the penalty for bootleggers in urban areas who send booze to local option areas

8. Increase penalty to a class C felony for furnishing alcohol to minors in local option areas, and for sending large amounts of alcohol to local option areas

9. Strengthens the forfeiture law for bootlegging offenses

PROTECTS CHILDREN FROM JUVENILE SEX OFFENDERS

10. Increases penalty for sexual abuse of young children by teenagers

11. Allows greater disclosure of information about juvenile sex offenders

IMPROVES DRUNK DRIVING LAWS

12. Once a person has committed felony drunk driving, all further drunk driving offenses would be treated as felonies

13. Increase penalty to a class C felony for certain vehicular offenses that cause serious physical injury

14. Prohibits the "big gulp" defense in drunk driving cases

I hope this information is helpful.

Sincerely,

GREGG D. RENKES
ATTORNEY GENERAL

By: David Marquez
Assistant Attorney General

DWM:hb

Enclosure

CS for SENTATE BILL 170

Sectional Summary

Sections 1 - 4 allow communities to adopt, as part of a local option, lower amounts of alcohol that may be possessed or imported into the community than may currently be possessed or imported, and still presumed to be for personal use rather than for sale. Certain communities have already adopted lower limits by ordinance. If it is part of a local option, however, state law enforcement authorities can help communities enforce these limits.

Section 5 raises the penalty for furnishing alcohol to a person under 21 years of age from a class A misdemeanor to a class C felony, if the offense occurs in a village or municipality that has adopted a local option.

Sections 6 - 7 allow for the forfeiture of money used in bootlegging offenses, and provides for sharing of the proceeds of forfeitures from bootlegging offenses with local law enforcement.

Section 8 expands the felony-murder rule so that an offender who commits a dangerous crime can be charged with second-degree murder if an accomplice is killed. The current felony-murder rule allows an offender to be charged with second-degree murder if a person, such as a bystander, is killed during the commission of the crime, even if the offender did not directly cause the death. The purpose of the felony-murder rule is to discourage serious crimes. It will be more effective if it also applies to the death of a participant in the crime.

Section 9 increases the penalty from a class A misdemeanor to a class C felony for certain vehicular offenses that cause serious physical injury. This will apply to persons who drive partly impaired (but not enough to be DUI) and cause serious injuries to another person.

Sections 10 - 11 increase the penalty for sexual abuse of very young children by teenagers from a class A misdemeanor to a class C felony.

Section 12 adopts a new crime - that of violating a person's duty as a third party custodian. It applies to a person who agrees to be a third party custodian, but does not report to authorities if the person in custody violates release conditions. It is either a class A or class B misdemeanor, depending on the crime with which the person released is charged.

Section 13 disallows self-defense if the state proves that the defendant was furthering his own criminal objectives or those of a gang, or was buying or selling illegal drugs.

Section 14 would require the court to give an instruction to the jury on self-defense only if there is plausible evidence to support self-defense. Current law requires the court to instruct the jury on self-defense even if the evidence supporting it is "weak or implausible". This

change adopts the federal approach, which requires evidence on which a rational jury could find self-defense before the instruction is given.

Sections 15 - 17 and 20 adopt a fair and uniform procedure to determine if a witness has a valid Fifth Amendment privilege against self-incrimination. An attorney is appointed for the witness, and the court makes the determination in a closed proceeding outside the presence of the prosecution. If the court determines that the witness has a valid privilege, the court will inform the prosecution of the level of seriousness of the crime.

Sections 18 - 19 and 25 - 26 give direction to courts in sentencing a defendant for more than one crime. Current law appears to require consecutive sentences, but was not interpreted that way because of bad drafting. This clarifies that for most crimes a court may impose sentences that are concurrent or partially concurrent. However, for homicides, kidnapping, and serious sex offenses, this section specifies the minimum amount of consecutive time that must be imposed. For example, for two counts of first-degree murder, the court must require the mandatory minimum term of the second offense to be served consecutively. For manslaughter and kidnapping, at least the period of the presumptive term of the second offense must be served consecutively.

Sections 21 and 23 provide that once a person has been convicted of felony drunk driving or felony refusal to submit to a chemical test, any subsequent drunk driving or refusal offense will also be a felony.

Sections 22 and 24 disallow the "big gulp" defense in drunk driving cases. It reverses a recent court decision, *Conrad v. State,* 60 P.3d 701 (Alaska App. 2002), that allows a driver to claim that he drank alcohol just before driving, and was able to drive before the alcohol affected his perceptions. This is a major step back in the state's efforts to reduce drunk driving, and requires expert testimony about alcohol assimilation rates and other issues confusing to jurors. The legislature, in prohibiting driving with .08 blood alcohol, as determined by a chemical test taken within four hours of driving, intended to avoid this battle of chemical experts.

Section 27 allows for greater disclosure to the public of information about juvenile sex offenders, if necessary to protect children or vulnerable adults.

Section 28 provides conforming repealers.

Sections 29 and 30 include applicability and effective date provisions.

CSSB 170(JUD)

MAKES CRIMINALS THINK TWICE BEFORE COMMITTING DANGEROUS OFFENSES

1. Expands felony-murder rule so offenders committing dangerous crimes can be charged with second-degree murder if their accomplice is killed (sec. 8)

   - The "felony-murder rule" says that if a person dies during commission of a serious felony, the offender is guilty of second-degree murder, even if he did not cause the death. However, there is an exception in Alaska law: if the person killed is one of the perpetrators, the other perpetrators cannot be charged with his death. The felony-murder rule is designed to discourage serious crimes, and it can be made more effective if it applies equally to the death of a participant in the crime as to the death of a bystander.

   - Example: A small gang commits an armed robbery. The robbery victim (for example, a homeowner or a security guard) shoots and kills one of the robbers. Under current law, if a bystander had been killed, the robbers would be guilty of second-degree murder, but because one of the gang members dies, his accomplices cannot be charged with murder.

2. Adopts consecutive sentencing procedures so that some consecutive term is imposed for each victim or each conviction of a serious crime (secs. 18, 19, 25, 26 and 28)

   - Gives direction to courts when sentencing for more than one offense. Current statutes were intended to require consecutive sentences, but were not interpreted that way because of bad drafting.

   - Under this bill, courts still retain significant sentencing discretion, and for most crimes may impose sentences that are concurrent. However, for homicide, kidnapping, and serious sex offenses, the bill specifies the minimum amount of consecutive time that must be imposed.

   - Example from *State v. Glaser*: Two counts of second degree murder and one count of first degree assault (three separate victims). Under the bill, after the court determines an appropriate sentence for the first count of murder, the court must impose at least the 10-year mandatory minimum term for the second count of murder, and the sentence is consecutive. For the count of assault, the court must impose some period of consecutive time, but the amount is left to the judge's discretion. Actual sentence imposed in *Glaser*: 13 years. Under this bill, the sentence would be a minimum of 20 years.

3. Disallows self-defense if the state proves the defendant was furthering the criminal objectives of a gang or was buying or selling illegal drugs (sec. 13)

   - DOES NOT CHANGE THE BURDEN OF PROOF. THE STATE MUST STILL DISPROVE SELF-DEFENSE BEYOND A REASONABLE DOUBT.

   - This bill merely identifies additional circumstances when self-defense is not justified, similar to the current law that says self-defense is not justified if you started the fight or provoked the other person.

   - One of the reasons there is so much serious street violence, especially in Anchorage, is that individuals or groups of criminals fight over territory or over drug deals gone bad or over any number of disputes. These groups are sometimes organized gangs, but often they are loosely-associated or simply "wannabes" who try to curry favor with an organized gang or gang leader because they "want to be" part of the group. These people often roam the city, looking for an opportunity to shoot a rival or perceived rival. It is common that gang members or innocent bystanders are shot or killed, and everyone involved claims they acted in self-defense. Because the prosecution often can't prove who started shooting, the state usually can't prosecute the person who did the killing. **This bill says that if you are trying to further your own criminal objectives or those of someone else, you can't use force and claim self-defense.**

   - In illegal drug deals, it's common for all parties to be armed, and for violence to break out. Everyone claims self-defense, and the prosecution often can't prove who started shooting. **This bill says that anyone engaged in an illegal drug transaction cannot claim self-defense. This is not only a deterrent to violence, but also a deterrent to drug dealing.**

4. Disallows self-defense if the only evidence of it is implausible (sec. 14)

   - Alaska law requires the trial judge to give an instruction that allows the jury to find self-defense, even if the evidence supporting it is "weak or implausible." *Folger v. State*, 648 P.2d 111 (Alaska App. 1982).

   - Federal law, by contrast, requires the defendant to produce enough evidence in support of self-defense that a rational jury could find that the defendant acted in self-defense. *United States v. Jackson*, 726 F.2d 1466 (9th Cir. 1984).

   - The bill will help avoid verdicts not supported by evidence, by changing the law to allow the judge to instruct the jury only if there is plausible evidence of self-defense.

5. Adopts a uniform procedure for deciding whether to grant immunity to witnesses, thus making it harder for gang members, accomplices, and friends of the defendants to refuse to testify by hiding behind state immunity laws (secs. 15-17 and 20)

   - If it is possible that a person would incriminate himself by giving testimony, Alaska law requires complete immunity from prosecution (called transactional immunity) before that witness can be compelled to testify. The witness must be given immunity for any crimes that he may be required to testify about.

   - Witnesses who are willing to testify will usually consult with the prosecutor to disclose their concerns and work out an immunity agreement, if necessary. However, fellow gang members, friends and relatives of defendants usually do not want to testify and often claim self-incrimination, but then refuse to disclose their concerns. Because the prosecutors have no information about what crimes they would be immunizing, they cannot responsibly grant immunity, and therefore critical testimony is not available.

   - This provision sets up a fair and uniform procedure for determining whether a person has a valid self-incrimination claim. For example, it gives the witness a public defender to represent them. It also gives prosecutors minimal information upon which to base a rational decision, i.e., whether the possible offense committed by the witness is a serious offense.

6. Makes it a misdemeanor crime for a court-appointed custodian to fail to report that the defendant released to his custody has violated court imposed conditions (sec. 12)

BOOTLEGGING: HELPS COMMUNITIES THAT CHOOSE TO REDUCE ALCOHOL

7. Allows communities to adopt lower limits of alcohol possession and importation as part of the local option system (secs. 3 and 4)

8. Increases penalty to a class C felony for furnishing alcohol to minors in local option areas (sec. 5), and for sending large amounts of alcohol to local option areas (secs. 1 and 2)

9. Strengthens the forfeiture law for bootlegging offenses (secs. 6 and 7)

   - Allows for forfeiture of money used in bootlegging offenses and provides for sharing of proceeds of forfeitures with local law enforcement

PROTECTS CHILDREN FROM JUVENILE SEX OFFENDERS

10. Increases penalty for sexual abuse of young children by teenagers (secs. 10 and 11)

- Increases the protection for children from sexual abuse of older teenagers. Adjudication for an offense that would be a felony may be used as an aggravating factor if the offender commits another offense as an adult.

11. Allows greater disclosure of information about juvenile sex offenders (sec. 27)

- Help parents and other adults protect children by making information available to them about juvenile sex offenders. This information is not currently available to the public.

IMPROVES DRUNK DRIVING LAWS

12. Once a person has committed felony drunk driving, all further drunk driving offenses would be treated as felonies (secs. 21 and 23)

- Because prior drunk driving offenses must be within a ten-year period to subject the driver to felony penalties, sometimes, later drunk driving offenses are treated as misdemeanors even if the person was already convicted of felony drunk driving. These drivers present a big risk to the public; by making every subsequent drunk driving a felony, we can encourage repeat drunk drivers to stay off the road if they have been drinking.

13. Increases penalty to a class C felony for certain vehicular offenses that cause serious physical injury (sec. 9)

- Persons who drive partly impaired (but not enough to be DUI), and cause serious physical injury, are only guilty of misdemeanor assault. Causing long-term and debilitating injuries by driving while impaired justifies felony penalties.

14. Prohibits the "big gulp" defense in drunk driving cases (secs. 22 and 24)

- Reverses a recent court decision, *Conrad v. State,* 60 P.3d 701 (Alaska App. 2002), that allows a driver to claim that he drank alcohol just before driving, and was able to drive before the alcohol affected his perceptions. This is a major step back in the state's efforts to reduce drunk driving, and requires expert testimony about alcohol assimilation rates and other issues confusing to jurors. The legislature, in prohibiting driving with .08 blood alcohol, as determined by a chemical test taken within four hours of driving, intended to avoid this battle of chemical experts.

Comparison of HB 244/SB 170, CSHB 244 (Jud) and Proposed Committee Substitute for 2004

	HB 244 and SB 170 as introduced	CSHB 244 (Jud)	Proposed Committee Substitute for 2004
Heat of Passion	Makes Heat-of-passion (essentially a form of temporary insanity), an affirmative defense that the defendant must prove by a preponderance of evidence, just like insanity.	No similar provision	No similar provision
Self-defense; Defense of others	Makes self-defense an affirmative defense, that the defendant must prove by a preponderance of evidence, with certain exception, such as a person on their own property.	No similar provision	No similar provision. **DOES NOT CHANGE THE BURDEN OF PROOF.**
	Prohibits use of deadly force if a person brings a deadly weapon to an encounter with reckless disregard that the encounter would result in combat.	No similar provision	Prohibits self-defense if the force was used to further the criminal objectives of other persons (i.e., gang activity), or in an illegal drug transaction. Court may instruct a jury on self-defense if the court finds there is **plausible** evidence to warrant a reasonable jury to find self-defense.
Felony-Murder	No similar provision	No similar provision	Expands felony-murder rule so offenders committing dangerous crimes can be charged with second-degree murder if their accomplice is killed.
Rights of arrested person	Clarified that a person may not interrupt an interview with the police if the arrested person has consented to the interview after being advised of his rights.	Same	No similar provision
Prior convictions admissible when elements of crime	The bill allows evidence of prior convictions to be admitted during the state's case-in-chielf, if the state is required to prove the prior convictions (e.g. felony drunk driving) as an element of the offense. Allows the defendant to challenge the validity of these prior convictions only by proving to the court, sitting without the jury, that the defendant was denied the right to counsel or to a jury trial in the prior prosecutions.	No similar provision	No similar provision
Immunity for witnesses	Conforms statutory law to *State v. Gonzales*, 853 P.2d 526 (Alaska 1993), that requires complete immunity if a person is compelled to testify after claiming a valid privilege against self-incrimination.	Same	Same
	Establishes orderly procedure for the court to consider if the witness has a valid claim of the privilege against self-incrimination. An attorney would be appointed to represent the witness, and the prosecutor would be present. The court would specify the crime to which the privilege applies.	No similar provision	Establishes a procedure similar to HB 244 for the court to consider if the witness has a valid privilege. **However, the prosecutor would not be present in the hearing.** The court may inform the prosecution only about the seriousness of the crime, but not the specific crime the witness may have committed.

Comparison of HB 244/SB 170, CSHB 244 (Jud) and Proposed Committee Substitute for 2004

	HB 244 and SB 170 as introduced	CSHB 244 (Jud)	Proposed Committee Substitute for 2004
Consecutive sentences	Adopts guidelines for sentencing defendants for more than one crime. In 1982, the legislature enacted AS 12.55.025 (e) and (g), which requires consecutive sentences for each count of homicide, assault, and sexual assault. Because of imprecise drafting, the courts have interpreted these statutes as a legislative preference for consecutive sentences, which is frequently ignored.	Same	Same
	For homicide, kidnapping, first-degree sexual assault, and first-degree sexual abuse (penetration), the bill adopts minimum requirements for consecutive sentences in cases with multiple convictions.	Same	Same
	For less serious crimes against a person, such as a misdemeanor assaults, the court must impose some period of consecutive time for each crime.	Same	Same
	For other less serious crimes, the bill allows the complete judicial discretion to impose sentences that are concurrent or partially concurrent.	Same	Same
Sexual abuse and Sexual assault sentence mitigator	Added a statutory mitigating factor for sentencing in sexual assault and sexual abuse cases - that the defendant mitigated the effect of the crime on the victim by entering a plea of guilty or no contest within 30 days of arraignment in superior court.	No similar provision	No similar provision
Discovery in criminal cases: Notice of Defenses	Requires the defense to give notice of certain defenses (e.g. alibi, entrapment) 30 days before trial (current rules require 10 days notice). It also requires the defense to give notice of these defenses if they are likely to raise them, and requires the court to disallow the defense if notice is not given within 7 days of trial.	Same	No similar provision
Discovery in criminal cases: Sanctions	Clarifies that sanctions for discovery violations, such as failure to give notice of defenses discussed above, are in addition to other sanctions provided in the Criminal Rules.	Same	No similar provision

Comparison of HB 244/SB 170, CSHB 244 (Jud) and Proposed Committee Substitute for 2004

	HB 244 and SB 170 as introduced	CSHB 244 (Jud)	Proposed Committee Substitute for 2004
Discovery in criminal cases: Expert witnesses	Requires the disclosure of expert witnesses at least 45 days before trial. Adopts an orderly procedure for disclosure of written reports of experts. The bill also provides sanctions for failure to comply with the rule. The court must exclude the testimony if disclosure is not made within 7 days of trial.	Same	No similar provision
Impeachment evidence	Admits evidence of a statement to be used as impeachment, if the statement was voluntary and not coerced, but suppressed because *Miranda v. Arizona* was violated. This would prevent a person from testifying falsely with impunity after a statement is suppressed.	Same	No similar provision
Impeachment evidence	Allows evidence illegally obtained (for example, taken as a result of a search that was later found to be flawed), to be used to impeach testimony, if the court finds that the evidence was not obtained in substantial violation of rights.	Same	No similar provision
Impeachment with prior conviction	Increases the time after a conviction that the conviction can be used for impeachment.	Same	No similar provision
Domestic violence reports	Allows a statement made within 24 hours of an alleged domestic violence offense to be admitted, as an exception to the hearsay rule.	Same	No similar provision
Bootlegging	No similar provision	No similar provision	Allows communities to adopt lower limits of alcohol possession and importation as part of the local option system. Increases the penalty for bootleggers in urban areas who send alcohol to local option areas. Increases penalty to a class C felony for furnishing alcohol to minors in local options areas, and for sending large amounts of alcohol to local option areas. Strengthens the forfeiture law for bootlegging.
Drunk Driving	No similar provision	No similar provision	If a person has committed felony drunk driving, all later drunk driving offenses would be treated as felonies. Increases penalty to a class C felony for certain vehicular offenses that cause serious physical injury. Prohibits the "big gulp" defense in drunk driving cases.
Protects Children from Juvenile Sex Offenders	No similar provision	No similar provision	Increases penalty for sexual abuse of young children by teenagers. Allows greater disclosure of information about juvenile sex offenders.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

FRANK H. MURKOWSKI, GOVERNOR

1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-5903
PHONE: (907)269-5100
FAX: (907)276-3697

March 9, 2004

The Honorable Ralph Seekins, Senator
State Capitol
Juneau, Ak 99801-1182

Re: SB 170, Governor's 2004 Crime Bill

Dear Senator Seekins:

I am writing to voice my support of the Governor's 2004 Crime Bill, which I understand, will be considered as a committee substitute for SB 170. Although I support all the provisions in the Governor's new bill, there are some that are of particular interest to me because they are important in protecting children from abuse.

For over 20 years I have been working in Alaska as a prosecutor of adult sex offenders, as a prosecutor of juvenile offenders, and as a line attorney and supervisor of prosecutors of child protection (CINA) cases, many of which involve sexual abuse of children, as well as other types of abuse and neglect. I have also served on two Governor's Child Protection Task Forces and the Balloon Project Steering Committee. I continue to serve on the Juvenile Justice Working Group, the CINA and Juvenile Delinquency Court Rules Committee, the CINA Court Improvement Project and the Management Team of Alaska CARES (Anchorage's Child Advocacy Center). And I currently serve as chair of the Federal Children's Justice Act Task Force. Finally, I received the 2003 Commissioner's Award from the U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, for my "outstanding leadership and service in the prevention of child abuse and neglect." This was followed by a citation in my honor issued by the Alaska Legislature and sponsored by the Honorable Fred Dyson.

Because of my lengthy and broad experience in several aspects of the fight against child abuse and neglect articulated above, I would like to add my support and comments to four particular provisions of the Governor's crime bill that deal directly with this effort.

First, the provisions giving direction to courts in imposing sentences for defendants convicted of more than one crime will help protect children from abusers. Current laws for sentencing offenders convicted of multiple offenses are confusing and unevenly applied. As I know you are aware, child abusers often victimize more than one child, and more than one time, and therefore these new sentencing provisions are of great interest to me.

Next, because I am well aware that sexual offenders are not always adults, I support the provisions that would increase the seriousness of abuse of young children by teenagers. A 14-year-old that sexually abuses a five- year- old by penetration should be adjudicated of a felony, not a misdemeanor. Even though the incarceration/treatment of these young offenders would not drastically change, increasing the class of the offense would send the correct message to these offenders about the seriousness of the offense. Currently, to a juvenile, it appears more serious to steal someone's laptop (a felony) than to engage in full sexual penetration with a kindergartner (a misdemeanor).

Thirdly, I support the provision that would allow greater information to be released about juvenile sex offenders. A parent should be able to find out if a potential babysitter for their children has been adjudicated in the juvenile justice system for a sex offense. As a mother of two young children, I know I would be horrified if I unwittingly hired a babysitter that perpetrated on one or both of my children. My children could be scarred for life.

Finally, the provisions giving local communities authority to adopt stronger controls over alcohol in local option areas, and related provisions to curb bootlegging, will contribute to a better environment for children in rural areas. Alcohol is almost always involved in incidents of child sexual abuse, physical abuse and neglect. If perpetrators who are prone to abusing children when they have consumed too much alcohol were not allowed access to it, I guarantee the rate of child abuse and neglect would plummet.

Thank you for hearing this legislation. I believe it will greatly assist our efforts to make Alaska a safer place to be a child.

Sincerely,

GREGG D. RENKES
ATTORNEY GENERAL

By: Lisa B. Nelson
Assistant Attorney General

LBN:dal

Alaska Association of Chiefs of Police

Via: US Mail

February 24, 2004

Mr. Dean Guaneli
Chief Assistant Attorney General
PO Box 110300
Juneau, Alaska 99801

RE: Governor's 2004 Crime Bill

Dear Dean,

The Alaska Association of Chiefs of Police would like to offer our support for the Governors 2004 Crime Bill. I believe this bill offers many potential solutions to problems we as Law Enforcement Officers and you as Prosecutors face day on a daily basis.

As an Alaskan Law Enforcement Officer for over 30 years I have watch our criminal justice system come from areas that were weak to a much stronger practice today. However there is still much to do to assure the safety of the people we serve as well as reducing the occurrence of serious and dangerous offenses. This bill assist's those communities that choose to reduce the use of alcohol; it improves our drunken driving laws and helps in the protection of children from juvenile offenders. These are important areas that need to be address and I believe the Governor has made a major step in the right direction.

We support this bill and offer any assistance we can provide. Please contact me if you have any questions or concerns.

Sincerely,

Thomas Lee Clemons
Chief of Police

(907) 224-3338 P.O. Box 167 Seward, AK 99664

ALASKA NETWORK ON
DOMESTIC VIOLENCE AND SEXUAL ASSAULT

130 Seward, Rm 209
Juneau, Alaska 99801

(907) 586-3650 ph
(907) 463-4493 fx

SB170/HB244
March 2004

Please accept this memo as a letter of support for the Governor's crime bill.

The Network particularly appreciates the administration's stance on holding perpetrators accountable for each crime they've committed by requiring consecutive sentencing for multiple counts of particularly heinous crimes, including sexual assault. The longer sex offenders can be removed from the community the safer we all are. Consecutive sentences also provide some sense of approximate justice to each victim involved, that at least the perpetrator is being required to pay something, for the crime committed against her/him.

The Network supports increasing the penalty from a class A misdemeanor to a class C felony for the crime of sexual abuse when an older minor penetrates a very young minor. Recognizing that minors who commit sexual abuse crimes are sometimes victims themselves, it is still important that the crime carry a penalty severe enough that if the minor chooses to perpetrate a sexual assault as an adult, the previous conduct can be examined.

The Network also supports releasing documents concerning adjudication of a sexual offense to protect the safety of a child or vulnerable adult. Balancing the needs of families to protect children and vulnerable adults and the juvenile offender's right to confidentiality is something we believe can be achieved through the regulation process when the department begins to implement procedures to allow for the release of information.

pur·fle (pûr'fəl) *vt.* **-fled, -fling, -fles.** [ME *purfilen* < OFr. *porfiler* < VLat. **profilare* : Lat. *pro-*, forth + Lat. *filum*, thread.] To finish or decorate the border or edge of. —*n. also* **purfling** (-fling). An ornamental edging or border.

pur·ga·tion (pûr-gā'shən) *n.* An act of purging or purifying.

pur·ga·tive (pûr'gə-tĭv) *adj.* Tending to cleanse or purge, esp. tending to cause evacuation of the bowels. —*n.* A purgative agent : CATHARTIC.

pur·ga·to·ri·al (pûr'gə-tôr'ē-əl, -tōr'-) *adj.* **1.** Serving to purify of sin : EXPIATORY. **2.** Of, relating to, or like purgatory.

pur·ga·to·ry (pûr'gə-tôr'ē, -tōr'ē) *n., pl.* **-ries.** [ME *purgatorie* < Med. Lat. *purgatorium* < Lat. *purgare*, to cleanse < *purus*, clean.] **1.** *Rom. Cath. Ch.* A state in which the souls of those who have died in grace must expiate their sins before attaining heaven. **2.** A place or condition of suffering, expiation, or remorse. —*adj.* Purgative.

purge (pûrj) *v.* **purged, purg·ing, purg·es.** [ME *purgen* < OFr. *purger* < Lat. *purgare*, to cleanse < *purus*, clean.] —*vt.* **1. a.** To free from impurities : PURIFY. **b.** To remove (impurities and other elements) by or as if by cleansing. **2.** To rid of guilt, sin, or defilement. **3.** *Law.* To clear (a person) of a charge or imputation. **4.** To rid (a group, as a nation or political party) of persons believed to be undesirable. **5.** *Med.* **a.** To cause evacuation of (the bowels). **b.** To induce evacuation of the bowels in (a patient). —*vi.* **1.** To become clean or pure. **2.** To undergo or cause an emptying of the bowels. —*n.* **1.** An act or process of purging. **2.** Something that purges, esp. a medicinal purgative. —**purg'er** *n.*

pu·ri (po͝or'ē) *n. var. of* POORI.

pu·ri·fi·ca·tor (pyo͝or'ə-fĭ-kā'tər) *n.* **1.** A cloth for cleaning the chalice after the celebration of the Eucharist. **2.** A purifying agent.

pu·ri·fy (pyo͝or'ə-fī') *v.* **-fied, -fy·ing, -fies.** [ME *purifien* < OFr. *purifier* < Lat. *purificare* : *purus*, clean + *facere*, to make.] —*vt.* **1.** To rid of impurities : CLEANSE. **2.** To rid of foreign or unwanted elements. **3.** To free from guilt, sin, or defilement. —*vi.* To become pure or clean. —**pu'ri·fi·ca'tion** *n.* —**pu·rif'i·ca·to'ry** (pyo͝o-rĭf'ĭ-kə-tôr'ē, -tōr'ē) *adj.* —**pu'ri·fi'er** *n.*

Pu·rim (po͝or'ĭm, po͝o-rēm') *n.* [Heb. *pûrîm*, pl. of *pûr*, lot (from the lots Haman cast to decide the day of the massacre), perh. < Akkadian *pūru*, stone.] A Jewish holiday in the month of Adar, celebrating the deliverance of the Jews from massacre by Haman.

pu·rine (pyo͝or'ēn') *n.* [G. *Purin*, a blend of Lat. *purus*, clean and NLat. *uricus*, *uricum*, uric (acid).] **1.** A colorless crystalline compound, $C_5H_4N_4$, used in organic synthesis and metabolism studies. **2.** Any of a group of naturally occurring organic compounds derived from or having molecular structures related to purine, including uric acid, adenine, guanine, and caffeine.

pur·ism (pyo͝or'ĭz'əm) *n.* **1.** Strict observance of or insistence on traditional correctness, esp. of language. **2.** An example of purism.

pur·ist (pyo͝or'ĭst) *n.* An advocate of strict correctness, esp. in language use. —**pu·ris'tic** (pyo͝o-rĭs'tĭk) *adj.* —**pu·ris'ti·cal·ly** *adv.*

Pu·ri·tan (pyo͝or'ĭ-tn) *n.* [< LLat. *puritas*, purity < Lat. *purus*, pure.] **1.** A member of a group of English Protestants who in the 16th and 17th cent. advocated simplification of the creeds and ceremonies of the Church of England and strict religious discipline. **2. puritan.** One who lives in accordance with Protestant precepts, esp. one who views luxury or pleasure as sinful. —*adj.* **1.** Of or relating to the Puritans or Puritanism. **2. puritan.** Characteristic of a puritan : PURITANICAL.

pu·ri·tan·i·cal (pyo͝or'ĭ-tăn'ĭ-kəl) *adj.* **1.** Austerely moral and stern in religious observance. **2. Puritanical.** Of, relating to, or characteristic of the Puritans. —**pu'ri·tan'i·cal·ly** *adv.* —**pu'ri·tan'i·cal·ness** *n.*

Pu·ri·tan·ism (pyo͝or'ĭ-tn-ĭz'əm) *n.* **1.** The doctrines and practices of the Puritans. **2. puritanism.** Scrupulous moral sternness, esp. aversion to social pleasures and indulgences.

pu·ri·ty (pyo͝or'ĭ-tē) *n.* **1.** The quality or state of being pure. **2.** A quantitative assessment of homogeneity or uniformity. **3.** Freedom from guilt or sin : INNOCENCE. **4.** Absence in speech or writing of elements considered inappropriate to good style, as slang or foreign words. **5.** The proportion of a single-frequency spectral component in a mixture of achromatic and spectral colors.

Pur·kin·je cell (pûr-kĭn'jē) *n.* [After Johannes E. *Purkinje* (1787–1869).] Any of numerous nerve cells of the cerebellar cortex distinguished by a large rounded cell body.

Purkinje fiber *n.* Any of the large modified cardiac muscle fibers that compose the cardiac impulse-conducting system of the heart.

purl¹ (pûrl) *vi.* **purled, purl·ing, purls.** [Prob. of Scand. orig.] To flow or ripple with a murmuring sound. —*n.* The sound made by rippling water.

purl² *also* **pearl** (pûrl) *v.* **purled, purl·ing, purls** *also* **pearled, pearl·ing, pearls.** [Orig. unknown.] —*vt.* **1.** To knit with a purl stitch. **2.** To edge or finish something with lace or embroidery. —*vi.* **1.** To do knitting with a purl stitch. **2.** To edge or finish with embroidery or lace. —*n.* **1.** The inversion of a knit stitch : PURL STITCH. **2.** An ornamental edging of embroidery or lace. **3.** Gold or silver wire used in embroidery.

pur·lieu (pûrl'yo͞o, pûr'lo͞o) *n.* [ME *perlew*, alteration of Norman Fr. *puralée*, perambulation < OFr. *poraler*, to traverse : *por-*, forth (< Lat. *pro-*) + *aler*, to go.] **1.** An outlying or neighboring area. **2. purlieus.** Outskirts. **3.** A place that one frequents : HAUNT.

pur·lin *also* **pur·line** (pûr'lĭn) *n.* [ME *purlyn*.] One of ... horizontal timbers supporting the rafters of a roof.

pur·loin (pər-loin', pûr'loin') *vt.* & *vi.* **-loined, -loin·ing, ...** [ME *purloynen*, to remove < Norman Fr. *purloigner* : *pur-*, ... Lat. *pro-*) + *loign*, far < Lat. *longe* < *longus*, long.] To steal ... commit theft. —**pur·loin'er** *n.*

purl stitch *n.* An inverted knitting stitch, often alternated ... the plain stitch to produce a ribbed effect.

pur·ple (pûr'pəl) *n.* [ME *purpel* < OE *purple* < *purpure*, ... cloth < Lat., purple < Gk. *porphura*, a shellfish yielding purple ...] **1.** Any of a group of colors with a hue between that of violet and ... **2.** Cloth of a color between violet and red, once worn as a symbol ... royalty or high office. **3.** Imperial power : high station. **4.** The ... or rank of a cardinal. **5.** The office or rank of a bishop. —*adj.* **1.** ... the color purple. **2.** Regal or imperial : ROYAL. **3.** Ornate and ... rate. —*vt.* & *vi.* **-pled, -pling, -ples.** To make or become ...

pur·ple·heart (pûr'pəl-härt') *n.* **1.** Any of several tropical American trees of the genus *Peltogyne*, valued for their decorative ... **2.** The purple heartwood of the purpleheart.

Purple Heart *n.* A U.S. military decoration awarded to ... personnel wounded in action.

purple loosestrife *n.* A marsh plant, *Lythrum salicaria*, ... long purple flower spikes.

purple martin *n.* A North American bird, *Progne subis*, ... to the swallows, having a glossy blue-black back and, in the ... dark breast.

purple salt *n.* Potassium permanganate.

pur·plish (pûr'plĭsh) *adj.* Somewhat purple.

pur·port (pər-pôrt', -pōrt') *vt.* **-port·ed, -port·ing, -ports.** [ME *purporten* < OFr. *purporter*, to contain < Med. Lat. *proportare*, to extend : Lat. *pro-*, forth + Lat. *portare*, to carry.] **1.** To have or present the appearance, often false, of being or intending : PROFESS <a reporter who *purports* to be objective> **2.** To have the intention of doing : PURPOSE. —*n.* (pûr'pôrt', -pōrt'). **1.** Meaning presented, intended, or implied : IMPORT. **2.** Purpose or intention.

pur·port·ed (pər-pôr'tĭd, -pōr'-) *adj.* Assumed to be such ... POSED. —**pur·port'ed·ly** *adv.*

pur·pose (pûr'pəs) *n.* [ME *purpos* < OFr. < *purposer*, to intend ... Lat. *proponere*, to put forward. —see PROPOSE.] **1.** The object toward which one strives or for which something exists : GOAL. **2.** A ... or intended result or effect. **3.** Determination : resolution. **4.** The matter at hand. —*vt.* **-posed, -pos·ing, -pos·es.** To resolve or intend to accomplish or perform. —**on purpose.** Willfully : deliberately. —**to good purpose.** With favorable results. —**to little (or no) purpose.** With few or no results. —**pur'pose·ly** (-lē) *adv.*

pur·pose·ful (pûr'pəs-fəl) *adj.* **1.** Having a purpose : INTENTIONAL. **2.** Having or showing purpose : DETERMINED. —**pur'pose·ful·ly** *adv.* —**pur'pose·ful·ness** *n.*

pur·pose·less (pûr'pəs-lĭs) *adj.* Without any purpose : POINTLESS. —**pur'pose·less·ly** *adv.* —**pur'pose·less·ness** *n.*

pur·po·sive (pûr'pə-sĭv) *adj.* **1.** Having or serving a purpose. **2.** Purposeful as opposed to random or aimless <*purposive* ...> —**pur'po·sive·ly** *adv.* —**pur'po·sive·ness** *n.*

pur·pu·ra (pûr'pə-rə, -pyə-) *n.* [NLat. < Lat., purple.] A condition marked by purplish discolorations of the skin and mucous membranes caused by hemorrhages into the affected tissues. —**pur·pu·ric** (-pyo͝or'ĭk) *adj.*

purr (pûr) *n.* [Imit.] **1.** The softly vibrant sound made by a cat to express contentment or pleasure. **2.** A sound similar to that made by a contented cat. —*v.* **purred, purr·ing, purrs.** —*vi.* To make or utter a soft, vibrant sound <The motor *purred* along.> —*vt.* To express by a soft vibrant sound.

purse (pûrs) *n.* [ME *purs* < OE < LLat. *bursa*, bag < Gk. ...] **1.** A small pouch or bag for carrying money. **2.** A pocketbook : handbag. **3.** Something that resembles a pouch or bag. **4.** Available wealth or resources : MONEY. **5.** A sum of money collected as a present or offered as a prize. —*vt.* **pursed, purs·ing, purs·es.** To contract (the lips or brow) into folds or wrinkles. —**purse'like** *adj.*

purs·er (pûr'sər) *n.* [ME < *purs*, purse.] The officer in charge of money matters on board a ship.

purse seine (sān) *n.* A fishing seine pursed or drawn into the shape of a bag to enclose the catch.

purse strings *pl.n.* Financial support or resources.

purs·lane (pûrs'lĭn, -lān') *n.* [ME < OFr. *porcelaine*, ... —see PORCELAIN.] A trailing weed, *Portulaca oleracea*, with yellow flowers, reddish stems, and fleshy leaves occas. used ...

pur·su·ance (pər-so͞o'əns) *n.* The carrying out or putting into effect of something : PROSECUTION.

pur·su·ant to (pər-so͞o'ənt) *prep.* [ME *poursuiant* < OFr. ... of *poursuivre*, to pursue < Lat. *prosequi*. —see PROSECUTE.] In accordance with : as a follow-up to.

STATE OF ALASKA

Frank H. Murkowski, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

P.O. BOX 110300
JUNEAU, ALASKA 99811-0300
PHONE: (907)465-3600
FAX: (907)465-2075

February 26, 2004

Senator Ralph Seekins
Chair, Senate Judiciary Committee
Alaska State Legislature
State Capitol, Room 125
Juneau, Alaska 99801

Re: SB 170 – 2004 Governors Crime Package

Dear Senator Seekins:

The Department of Law would appreciate your scheduling a committee hearing of the Governors 2004 Crime Package at your earliest convenience. As we previously discussed, we are planning to use SB 170 as the vehicle and offer a committee substitute, to present these important ideas to the committee for its consideration.

If you have any questions, please feel free to contact me.

Sincerely,

GREGG D. RENKES
ATTORNEY GENERAL

By:
David Marquez
Chief Assistant Attorney General

DWM/lcc

cc: Mike Tibbles, Legislative Director, Office of the Governor
Deborah Behr, Legislation and Regulations Attorney, Department of Law

AMENDMENT

OFFERED IN THE SENATE

TO: SB170

Page 12, lines 2 - 13:

Delete all material and insert the following:

"**Rule 412. Evidence Illegally Obtained.** Evidence illegally obtained shall not be used over proper objection by the defendant in a criminal prosecution for any purpose except:

(1) a statement illegally obtained in violation of the right to warnings under Miranda v. Arizona, 384 U.S. 436 (1966), **if the prosecution shows that the statement was otherwise voluntary and not coerced,** may be used

(A) to impeach the person who made the statement; or

(B) in a prosecution for perjury if the statement is relevant to the issue of guilt or innocence [AND IF THE PROSECUTION SHOWS THAT THE STATEMENT WAS OTHERWISE VOLUNTARY AND NOT COERCED]; and

(2) other evidence illegally obtained**, if the prosecution shows that the evidence was not obtained in substantial violation of rights,** may be admitted

(A) to impeach a witness; or

(B) in a prosecution for perjury if it is relevant to the issue of guilt or innocence [AND THE PROSECUTION SHOWS THAT THE EVIDENCE WAS NOT OBTAINED IN SUBSTANTIAL VIOLATION OF RIGHTS].

AMENDMENT

OFFERED IN THE SENATE

TO: SB 170

Page 9, line 21:

Following "**trial,**" insert the following:

"**to the extent allowed by the Alaska and United States Constitutions and except where it would work manifest injustice**"

AMENDMENT

OFFERED IN THE SENATE

TO: SB 170

Page 5, lines 19 and 20:

Delete the following:

"The court shall permit the prosecutor to be present at the hearing under this section."

Page 5, lines 21 - 31 and Page 6, line 1:

Delete all material and insert the following

"(h) At the hearing under (g) of this section, the witness or the attorney for the witness in the form of a proffer shall describe how the testimony or other information could connect the witness with a crime. If the court finds that there is a real and substantial danger that the testimony or other information to be compelled would furnish a link in the chain of evidence leading to conviction of a crime, the court shall find that the witness has a valid claim of privilege. If the court finds that the witness has a valid claim of privilege, the court shall determine the level of offense to which the privilege applies, unclassified felony, class A, class B, or class C felony, or a misdemeanor, and shall notify the prosecutor, but the court may not disclose the relevant date or other details of the crimes. If the witness is not granted immunity, evidence of the hearing and the court's findings shall be sealed.

tion" and would therefore be subject to the rules and conditions he seeks to have reviewed. [At. 34–35]

[11] The problem with this argument is that Kleven *was not* asserting a claim for constructive discharge in his second lawsuit. The trial court noted this in making its ruling. The issue then is whether an employee who starts a grievance process and subsequently resigns has standing to force the employer to continue with the process and remedy problems presumably for the benefit of those employees who remain. Even under our liberal standing rules, we do not believe Kleven has established a sufficient personal stake in the case to gain standing under an interest-injury analysis. As the trial court noted, because Kleven is no longer employed by YKSD, he is no longer subject to the contested grievance procedures, nor is he threatened by the alleged safety violations.[14] *Compare Rutter v. State*, 668 P.2d 1343, 1346 (Alaska 1983) (holding that commercial fisherman had standing to challenge state's fishing permit policy because his ability to fish would be directly impacted by the number of permits granted); *with Bowers Office Prod. v. University of Alaska*, 755 P.2d 1095, 1098 (Alaska 1988) (holding that bidder did not have standing to challenge university bid review practices where bidder had abandoned claim for damages arising out of these practices and was currently only seeking declaratory relief).

[12, 13] Taxpayer-citizen status is a sufficient basis to challenge allegedly illegal governmental conduct when the issues raised are of significant public concern and when the taxpayer-plaintiff is a suitable advocate of the issues involved in the lawsuit. *See Trustees for Alaska*, 736 P.2d at 329; *State v. Lewis*, 559 P.2d 630, 635 (Alaska 1977), *cert. denied*, 432 U.S. 901, 97 S.Ct. 2943, 53 L.Ed.2d 1073 (1977). In *Trustees for Alaska*, we noted that standing may properly be denied to a taxpayer-plaintiff where "there is a plaintiff more directly affected by the challenged conduct in question who has or is likely to bring suit." *Trustees for Alaska*, 736 P.2d at 329. Because YKSD's remaining employees are certainly in better position to raise the grievances Kleven cites and because we have no reason to believe that current YKSD employees would be indisposed to press legitimate grievances, we agree with the trial court that Kleven has failed to establish citizen-taxpayer standing. Accordingly, we hold that Kleven's second lawsuit was properly dismissed for lack of standing.

[14] We also uphold the trial court's partial attorneys' fee award. *See* Alaska Civil Rule 82. The court awarded YKSD $2,700.00 in cost and fees which represented only about fifty percent of YKSD's total fees for the second lawsuit. We have previously upheld awards representing well over fifty percent of a prevailing party's actual fees and therefore find no abuse of discretion in this case. *See, e.g., Steenmeyer Corp. v. Mortenson–Neal*, 731 P.2d 1221, 1226–27 (Alaska 1987) (holding that a Civil Rule 82 award of 75 percent of actual fees was not "manifestly unreasonable").

The judgment in the first lawsuit is REVERSED and the case is REMANDED for further proceedings consistent with this opinion. The judgment in the second lawsuit is AFFIRMED.

14. If Kleven had articulated a claim for constructive discharge in this second lawsuit, he would have had a sufficient interest in these issues. *See Beard*, 796 P.2d at 1349.

STATE of Alaska, Petitioner,

v.

The Honorable Rene J. GONZALEZ, Judge of the Superior Court, Jill Jahnke–Leland, Peter H. Leland, and Jeffrey S. DeGrasse, Respondents.

No. S–5003.

Supreme Court of Alaska.

June 4, 1993.

Following retrial in criminal case, state issued subpoena for witness to appear as

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The Court of Ap
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The Supreme Co
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to give testimony

Affirmed.

1. Witnesses ⇐2

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2. Witnesses ⇐

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3. Criminal Law

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§ 9; AS 12.50.

prosecution witness. Witness moved to quash subpoena by asserting constitutional privilege against compulsory self-incrimination. The Superior Court, Third Judicial District, Anchorage, Rene Gonzalez, J., found that Alaska's witness immunity statute violated Alaska Constitution and quashed the subpoena. State appealed. The Court of Appeals, 825 P.2d 920, affirmed. Petition for hearing was granted. The Supreme Court, Matthews, J., held that statute granting use and derivative use immunity violated the constitutional provision that no person could be compelled to give testimony against himself.

Affirmed.

1. Witnesses ⇐297(4.1)

State constitutional prohibition against compelling person to witness against himself does not prohibit forcing person to testify in criminal case against another person, even though testimony may show witness was guilty of crime. Const. Art. 1, § 9; AS 12.50.101, 12.50.101(a).

2. Witnesses ⇐304(4)

Witness compelled to give testimony that might show he or she was guilty of crime must be granted some type of immunity from prosecution. Const. Art. 1, § 9; AS 12.50.101, 12.50.101(a).

3. Criminal Law ⇐42

"Transactional immunity" from prosecution, of witnesses whose compelled testimony might show their guilt of crime, prohibits prosecution for crime concerning which witness is compelled to testify. Const. Art. 1, § 9; AS 12.50.101, 12.50.101(a).

See publication Words and Phrases for other judicial constructions and definitions.

4. Criminal Law ⇐42

"Use and derivative use immunity," in connection with compelled testimony that might show witness was guilty of crime, allows prosecution of witnesses for crimes referred to in compelled testimony, but prohibits use of compelled testimony and its fruits in such prosecutions. Const. Art. 1, § 9; AS 12.50.101, 12.50.101(a).

5. Criminal Law ⇐1139

Scope of state constitutional provision, that no person would be compelled to be witness against himself in criminal proceeding, is question of constitutional law to be decided by Supreme Court de novo. Const. Art. 1, § 9; AS 12.50.101, 12.50.101(a).

6. Constitutional Law ⇐12, 13, 18

In applying state constitutional provision barring person from being compelled to testify against himself in criminal case, Supreme Court's inquiry is not controlled by any one source of authority, such as United States Supreme Court or appeal to intent of framers of State Constitution; such authority is considered when helpful in discerning intent and spirit of local constitutional language and whether right invoked is necessary for kind of civilized life and ordered liberty which is at core of constitutional heritage. Const. Art. 1, § 9; AS 12.50.101, 12.50.101(a).

7. Criminal Law ⇐393(1)

Under state constitutional provision prohibiting self-incrimination individual may not be compelled to give testimony unless state has taken measures to remove hazards of incrimination, and individual faces hazard of incrimination whenever answers elicited could support conviction or might furnish link in chain of evidence leading to conviction. Const. Art. 1, § 9; AS 12.50.101.

8. Criminal Law ⇐42, 393(1)

Statute granting use and derivative use immunity to witnesses compelled to give testimony that might incriminate them violated state constitutional prohibition against forcing a person to be witness against himself in criminal proceeding; due to human frailties it would be impossible to ensure that testimony would not be used in some manner against defendant in subsequent trial and even if evidence was not used directly, nonevidentiary use could be made of testimony in terms of focusing investigation, deciding to initiate prosecution against witness, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally de-

veloping trial strategy. Const. Art. 1, § 9; AS 12.50.101, 12.50.101(a).

Eric A. Johnson, Asst. Atty. Gen., Anchorage, Charles E. Cole, Atty. Gen., Juneau, for petitioner.

Margi Mock, Ray Brown, Asst. Public Defenders, John B. Salemi, Public Defender, Anchorage, for respondent Jeffrey S. DeGrasse.

Jeffrey F. Sauer, Juneau, for respondent Jill Jahnke–Leland.

Before MOORE, C.J., and RABINOWITZ, BURKE, MATTHEWS and COMPTON, JJ.

OPINION

MATTHEWS, Justice.

[1, 2] Article I, section 9 of the Alaska Constitution states that "[n]o person shall be compelled in any criminal proceeding to be a witness against himself." This section does not prohibit compelling a person to testify in a criminal case against another person, even though the testimony may show that the witness was guilty of a crime. *Surina v. Buckalew*, 629 P.2d 969 (Alaska 1981); *State v. Serdahely*, 635 P.2d 1182 (Alaska 1981) (per curiam). However, a witness who is compelled to testify must be granted some type of immunity from prosecution.

[3, 4] There are two types of immunity from prosecution in current usage. Transactional immunity, the more protective type, prohibits prosecution of a compelled witness for a crime concerning which the witness is compelled to testify. The narrower form, use and derivative use immunity, allows prosecution of the witness for the crimes referred to in the compelled testimony, but prohibits the use of the compelled testimony and its fruits in such prosecutions. *Surina*, 629 P.2d at 971, n. 2. In *Surina* and *Serdahely*, pursuant to our supervisory powers, we approved of transactional immunity as a matter of practice but expressed no view as to whether use and derivative use immunity might also be constitutionally permissible.

Alaska Statute 12.50.101, enacted after *Surina* and *Serdahely* were decided, authorizes an order compelling testimony based on a grant of use and derivative use immunity. In the present case this statute has been challenged as unconstitutional under article I, section 9 of the Alaska Constitution. The superior court and the court of appeals have concluded that the statute is unconstitutional. We granted the state's petition and now affirm the decision of the court of appeals.

FACTS AND PROCEEDINGS

On the evening of May 8, 1990, Jill Jahnke–Leland, Carl Jahnke–Leland, Peter Leland, and Jeffrey DeGrasse were arrested for the murder of Rick Zaug and the attempted murder of Tom Moore. Earlier that day Zaug and Moore had sailed from Ketchikan to Thorne Arm to go fishing. That evening the two men tied their boat to a public mooring buoy to which another boat was already tied. Soon thereafter a tragic dispute arose over use of the buoy. After angry words were exchanged, Moore and Zaug were fired upon from the shore; Zaug was killed and Moore was seriously injured.

Leland, DeGrasse, and Carl and Jill Jahnke–Leland all gave taped statements to the police. Leland and DeGrasse admitted that each had shot at Zaug and Moore from the shore. Jill Jahnke–Leland stated that after she had words with Zaug and Moore, she headed toward shore and fired a gun shot in the air to scare Zaug and Moore. Jill Jahnke–Leland also stated that soon after she fired that shot into the air, DeGrasse and Leland began firing.

Leland, DeGrasse, and Carl and Jill Jahnke–Leland were each indicted for first-degree murder, attempted first-degree murder, and first-degree assault. Jill Jahnke–Leland was convicted of manslaughter and assault. She appealed to the court of appeals. Her appeal was pending during the proceedings hereinafter de-

scribed and during the presentation and consideration of this case by this court.[1]

In the subsequent trial against Leland and DeGrasse, the state moved to compel Jill Jahnke–Leland to testify under AS 12.50.101.[2] Alaska Statute 12.50.101 allows the state to compel a witness to testify in exchange for immunity from use or derivative use of the compelled testimony in a criminal prosecution. The trial court denied the state's motion, ruling that AS 12.50.101 violates article I, section 9 of the Alaska Constitution, which protects individuals against compelled self-incrimination.[3] Leland and DeGrasse were then tried without Jill Jahnke–Leland's testimony. The trial ended with a hung jury. On retrial, the state renewed its motion to compel Jill Jahnke–Leland to testify. The trial court again denied the motion on constitutional grounds. The state sought review and the court of appeals affirmed the trial court's decision. *State v. Gonzalez*, 825 P.2d 920 (Alaska App.1992). We granted the state's petition for hearing from this decision.

IMMUNITY AND THE PRIVILEGE AGAINST SELF–INCRIMINATION

This case presents two issues: (1) What is the scope of the Alaska Constitution article I, section 9 privilege against self-incrimination? and (2) Does AS 12.50.101 provide immunity which adequately matches the protection of the constitutional privilege? We address each issue in turn.

Scope of the Privilege

[5, 6] The issue of the scope of article I, section 9 is a question of constitutional law which we decide *de novo*. Constitutional interpretation follows the "rule that the intent underlying ... constitutional language should first be gathered from the plain meaning of the language itself." *Baker v. City of Fairbanks*, 471 P.2d 386, 397 (Alaska 1970). As the court of appeals recognized, this inquiry is not controlled by any one source of authority, such as United States Supreme Court precedent or an appeal to the intent of the framers of the Alaska Constitution. Rather, such authority is considered and, when appropriate, followed when helpful in discerning the "intention and spirit of our *local constitutional language* and [whether the right invoked is] necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage." *Id.* at 402 (emphasis added).

[7] In the present case, our inquiry is controlled by Alaska precedent. The state and DeGrasse acknowledge that the scope of article I, section 9 is set forth in *E.L.L. v. State*, 572 P.2d 786 (Alaska 1977):

> The privilege against self-incrimination applies where the answers elicited could

1. Shortly before the publication of this opinion the court of appeals affirmed her conviction and remanded her sentence. *Jahnke-Leland v. State*, Mem.Op. & J. No. 2675 (Alaska App., April 21, 1993). The progress of Jill Jahnke–Leland's appeal is relevant if her conviction becomes final before the state compels her to testify. In that event, Jill Jahnke–Leland would no longer be subject to conviction or punishment on account of her compelled testimony. Without the threat of conviction or punishment, an individual may no longer invoke the protection of the privilege against self-incrimination. *E.L.L. v. State*, 572 P.2d 786, 788 (Alaska 1977) ("a witness may not refuse to testify where there is no real or substantial hazard of incrimination."). Additionally, if Jill Jahnke–Leland was compelled to testify while her appeal was pending, transactional immunity would *not* invalidate her prior conviction; instead, transactional immunity would only bar retrial if her conviction was reversed on appeal. *See State v. Runions*, 100 Wash.2d 52, 665 P.2d 1358, 1360 (1983) (citing *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)).

2. AS 12.50.101 states, in relevant part, that the state may compel testimony upon the condition that:

> no testimony or other information compelled ..., or information directly or indirectly derived from that testimony or other information, may be used against the witness in a criminal case, except in a prosecution based on perjury, giving a false statement, or otherwise knowingly providing false information, or hindering prosecution.

AS 12.50.101(a).

3. Article I, section 9 of the Alaska Constitution reads as follows:

> **Section 9. Jeopardy and Self-Incrimination.** No person shall be put in jeopardy twice for the same offense. No person shall be compelled in any criminal proceeding to be a witness against himself.

> support a conviction or might furnish a link in the chain of evidence leading to a conviction. But, a witness may not refuse to testify where there is no real or substantial hazard of incrimination....

Id. at 788 (citations omitted). Thus, in *Surina v. Buckalew*, 629 P.2d 969, 977 (Alaska 1981), we stated: "where the hazard of incrimination has been removed, the privilege against self-incrimination is no longer required." *Surina*, however, left open the question of what type of immunity would "remove" "the hazard of incrimination." From these authorities we can piece together the scope of the article I, section 9 protection against self-incrimination: (1) an individual may not be compelled to give testimony unless the state has taken measures to remove the hazard of incrimination; and (2) an individual faces a hazard of incrimination whenever "the answers elicited could support a conviction or might furnish a link in the chain of evidence leading to a conviction." [4]

AS 12.50.101 and the Scope of the Privilege

[8] We now reach the question at the center of this case: does a grant of use and derivative use immunity remove the hazard of incrimination? We do not doubt that, in theory, strict application of use and derivative use immunity would remove the hazard of incrimination. *See Kastigar v. United States*, 406 U.S. 441, 468, 92 S.Ct. 1653, 1668, 32 L.Ed.2d 212 (1972) (Marshall, J., dissenting). In a perfect world, one could theoretically trace every piece of evidence to its source and accurately police the derivative use of compelled testimony. In our imperfect world, however, the question arises whether the judicial process can develop safeguards to prevent derivative use of compelled testimony that satisfy article I, section 9. Because we doubt that workaday measures can, *in practice*, protect adequately against use and derivative use, we ultimately hold that AS 12.50.101 impermissibly dilutes the protection of article I, section 9. Our conclusion rests on two bases.

First, we are persuaded that problems of proof and ordinary human frailties combine to pose a potent threat to an individual compelled to testify. The accused faces proof problems because all evidence regarding use of compelled testimony necessarily rests in the hands of the state. Human frailty presents a further obstacle because the accused is reduced to probing the faded memories and incomplete recollections of the state's agents in tracing the path of the compelled testimony from the point where it is given to the point where it is used. Justice William Brennan expressed these twin concerns in his dissent in *Piccirillo v. New York*, 400 U.S. 548, 552, 91 S.Ct. 520, 522, 27 L.Ed.2d 596 (1971) (Brennan, J., dissenting). According to Justice Brennan:

4. This scope largely parallels the scope the Supreme Court has set for the Fifth Amendment. *Kastigar v. United States*, 406 U.S. 441, 453, 92 S.Ct. 1653, 1661, 32 L.Ed.2d 212 (1972). None of the parties have suggested, nor do we consider, Justice William O. Douglas' position that the privilege "put[s] it beyond the power of [government] to *compel* anyone to confess his crimes." *Id.* at 467, 92 S.Ct. at 1668 (emphasis added) (Douglas, J., dissenting); *see Ullmann v. United States*, 350 U.S. 422, 446, 76 S.Ct. 497, 511, 100 L.Ed. 511 (1956) (Douglas, J., dissenting).

At times, DeGrasse claims to broaden the scope of article I, section 9 by stating that a grant of immunity must "place[ ] [the witness] in the same position as if he remained silent." The Supreme Court has rejected this formulation of the self-incrimination guarantee, instead favoring an interpretation similar to the one stated above. *See United States v. Apfelbaum*, 445 U.S. 115, 100 S.Ct. 948, 63 L.Ed.2d 250 (1980). This formulation also begs a very important question: put in the same position with respect to *what interest?* Clearly certain interests, such as keeping the compelled testimony from coming to public light, could not be achieved without implementing extraordinary means. The standard "the same position as if he remained silent" must have a specific reference point. In the present case, that reference point is incrimination. Thus, a meaningful reading of the "same position" argument is that the person compelled to testify must be put in the same position with regard to the possibility of incrimination as if he had remained silent. If the person had remained silent, he would have faced no hazard of incrimination *from his own words.* Thus, DeGrasse's seemingly restrictive standard really reduces to this court's prior standard: remove the hazard of incrimination due to the compelled person's own words.

all the relevant evidence will obviously be in the hands of the government—the government whose investigation included compelling the individual involved to incriminate himself.... [T]his argument does not depend upon assumptions of misconduct or collusion among government officers. It assumes only the normal margin of human fallibility. [People] working in the same office or department exchange information without recording carefully how they obtained certain information; it is often impossible to remember in retrospect how or when or from whom information was obtained.

Id. at 568, 91 S.Ct. at 530–531; *see also Kastigar*, 406 U.S. at 469, 92 S.Ct. at 1669 (Marshall, J., dissenting).

For this important reason, we also reject the state's proffered analogy between compelled testimony and coerced confessions. In a case involving a coerced confession, the facts relevant to the "voluntariness" of the confession will be known and available to *both* the state and the accused. In the case of compelled testimony, however, the accused can only speculate as to how widely her compelled statement has been disseminated. Procedures and safeguards can be implemented, such as isolating the prosecution team or certifying the state's evidence before trial, but the accused often will not adequately be able to probe and test the state's adherence to such safeguards. This danger does not subside in the face of even the strictest burden of proof, for, as Justice Thurgood Marshall aptly noted, although the government may have the burden of proof, "the government will have no difficulty in meeting its burden by mere assertion if the witness produces no contrary evidence." *Kastigar*, 406 U.S. at 469, 92 S.Ct. at 1669 (Marshall, J., dissenting).

One of the more notorious recent immunity cases, *United States v. North*, 910 F.2d 843 (D.C.Cir.), *modified*, 920 F.2d 940 (D.C.Cir.1990) (en banc), *cert. denied*, —— U.S. ——, 111 S.Ct. 2235, 114 L.Ed.2d 477 (1991), illustrates another proof problem posed by use and derivative use immunity. *North* involved the criminal conviction of Oliver North for his alleged participation in the Iran/Contra Affair. Prior to his criminal trial, North had been compelled to testify before congressional committees investigating the Iran/Contra Affair. This testimony received extensive coverage in the national media. As required by federal law, North received immunity from use or derivative use of any testimony given before the committees.

On appeal, the District of Columbia Circuit identified two witness-related problems with regard to North's compelled testimony. First, the prosecution could use the compelled testimony to refresh the recollection of a witness testifying at North's criminal trial. *Id.* at 860–61. This use could be policed by relying on the good faith assurances of the prosecution and its witnesses that no such use was made of the compelled testimony. The second problem, however, is more troublesome. In a case such as *North*, where the compelled testimony receives significant publicity, witnesses receive casual exposure to the substance of the compelled testimony through the media or otherwise. *Id.* at 863. In such cases, a court would face the insurmountable task of determining the extent and degree to which "the witnesses' testimony may have been shaped, altered, or affected by the immunized testimony." *Id.* We have not been persuaded that procedures exist to probe the mind of a witness in order to discover such use of compelled testimony.

The second basis for our decision is that the state cannot meaningfully safeguard against nonevidentiary use of compelled testimony.[5] Nonevidentiary use "in-

5. Although both courts and commentators divide on whether a constitutional protection against self-incrimination should prohibit nonevidentiary use of compelled testimony, *see, e.g., United States v. Byrd*, 765 F.2d 1524, 1530–31 (11th Cir.1985) (allowing nonevidentiary use); *United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir.1973) (prohibiting nonevidentiary use); Gary S. Humble, *Nonevidentiary Use of Compelled Testimony: Beyond the Fifth Amendment*, 66 Tex.L.Rev. 351, 371–83 (1987) (urging that nonevidentiary use be allowed); Kristine Strachan, *Self-Incrimination, Immunity, and Watergate*, 56 Tex.L.Rev. 791, 806–10 (1978) (urging

clude[s] assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy." *United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir.1973). Innumerable people could come into contact with the compelled testimony, either through official duties or, in a particularly notorious case, through the media.[6] Once persons come into contact with the compelled testimony they are incurably tainted for nonevidentiary purposes. *See id.* Safeguarding against such dangers will prove well nigh impossible,

> [f]or the paths of information through the investigative bureaucracy may well be long and winding, and even a prosecutor acting in the best of faith cannot be certain that somewhere in the depths of his investigative apparatus, often including hundreds of employees, there was not some prohibited use of the compelled testimony.

Kastigar, 406 U.S. at 469, 92 S.Ct. at 1669 (Marshall, J., dissenting).

Nonevidentiary use of compelled testimony can adversely affect an accused in many ways. When compelled testimony is incriminating, the prosecution can "focus its investigation on the witness to the exclusion of other suspects, thereby working an advantageous reallocation of the government's financial resources and personnel." Strachan, *supra*, at 807. The compelled testimony "may help explain information otherwise known," which could aid the prosecution in the presentation of its case. *Id.* With knowledge of how the crime occurred, the prosecution may refine its trial strategy to "probe certain topics more extensively and fruitfully than otherwise." *Id.* Indeed, a defendant may choose to relinquish her right to testify out of fear that the prosecution has honed its cross-examination with its knowledge of the compelled testimony. *Id.* Regardless of whether Jill Jahnke–Leland testified at her first trial, the prosecution's mere knowledge of her compelled testimony might significantly alter her decision whether to do so in a possible retrial. These are only some of the possible nonevidentiary advantages the prosecution could reap by virtue of its knowledge of compelled testimony.

Even the state's utmost good faith is not an adequate assurance against nonevidentiary uses because there may be "non-evidentiary uses of which even the prosecutor might not be consciously aware." *State v. Soriano*, 68 Or.App. 642, 684 P.2d 1220, 1234 (1984) (only transactional immunity can protect state constitutional guarantee against nonevidentiary use of compelled testimony). We sympathize with the Eighth Circuit's lament in *McDaniel* that "we cannot escape the conclusion that the [compelled] testimony could not be wholly obliterated from the prosecutor's mind in his preparation and trial of the case." *McDaniel*, 482 F.2d at 312. This incurable inability to adequately prevent or detect nonevidentiary use, standing alone, presents a fatal constitutional flaw in use and derivative use immunity.

We are not alone in construing a state constitutional guarantee to require transactional immunity in exchange for compelled incriminating testimony. Courts in Hawaii, Massachusetts, and Oregon have reached the same result. *See State v. Miyasaki*, 62 Haw. 269, 614 P.2d 915, 922–23 (1980); *Attorney General v. Colleton*, 387 Mass. 790, 444 N.E.2d 915, 921 (1982); *Soriano*, 684 P.2d at 1232.[7] In each case, the court relied, in part or in whole, on dangers presented by the inability to adequately enforce a ban on derivative use. *See Miya-*

that nonevidentiary use be prohibited), the state concedes that the Alaska Constitution prohibits such use. Additionally, we believe that nonevidentiary use could "furnish a link in the chain of evidence leading to a conviction," *E.L.L.*, 572 P.2d at 788, or at least forge and shape that chain, sufficiently to fall within the conduct prohibited by article I, section 9.

6. This situation is further complicated if potential jurors are exposed to the witness' compelled testimony through wide dissemination in the media.

7. *But see, e.g., State v. Strong*, 110 N.J. 583, 542 A.2d 866, 871–72 (1988); *People v. Johnson*, 133 Misc.2d 721, 507 N.Y.S.2d 791, 793 (Sup.1986); *Welsh v. Commonwealth*, 14 Va.App. 300, 416 S.E.2d 451, 455 (1992).

saki, 614 P.2d at 923–24; *Colleton*, 444 N.E.2d at 920–21; *Soriano*, 684 P.2d at 1233–34.

Because of the manifold practical problems in enforcing use and derivative use immunity we cannot conclude that AS 12.-50.101 is constitutional. Mindful of Edward Coke's caution that "it is the worst oppression, that is done by colour of justice," [8] we conclude that use and derivative use immunity is constitutionally infirm.

AFFIRMED.

KEY NUMBER SYSTEM

John WILLIS, Appellant,

v.

WETCO, INCORPORATED, Appellee.

No. S–4905.

Supreme Court of Alaska.

June 4, 1993.

Employer brought action against employee for violation of noncompetition and confidentiality agreements. After preliminary injunction was granted against employee, employee filed counterclaim. The Superior Court, Third Judicial District, Anchorage, Dana Fabe and Peter Michalski, JJ., dismissed case for failure to prosecute. Employee filed motion to reconsider dismissal, which was denied, and employee appealed. The Supreme Court, Rabinowitz, J., held that employee failed to demonstrate good cause for delay in prosecution.

Affirmed.

1. Appeal and Error ⇐962

Supreme Court will review lower court's dismissal of action for delay of prosecution under the abuse of discretion standard. Rules Civ.Proc., Rule 41(e).

2. Pretrial Procedure ⇐594.1

A showing of "good cause" for delay in prosecution is the production of a reasonable excuse for lack of prosecution.

See publication Words and Phrases for other judicial constructions and definitions.

3. Pretrial Procedure ⇐594.1

Trial court did not abuse its discretion in finding that employee failed to demonstrate good cause for delay in prosecuting his counterclaim where employee did not explain what aspect of his damages were continuing to accumulate, or why time was any more ripe for trial now than earlier if alleged damages were still accumulating, and where a review of his counterclaim indicated that there was no support for his excuse.

4. Pretrial Procedure ⇐681

Prior to court's dismissal of case for lack of prosecution, there must be record evidence of court's consideration of lesser sanctions. Rules Civ.Proc., Rule 41(e).

5. Pretrial Procedure ⇐587

Trial court did not abuse its discretion in dismissing employee's counterclaim for failure to prosecute where employee failed to demonstrate good cause for his nearly two-year delay in prosecution. Rules Civ. Proc., Rule 41(e).

6. Pretrial Procedure ⇐681

Trial court is not under duty to explore meaningful alternatives before entering dismissal without prejudice for failure to prosecute where function of rule is to clear court's calendar and to protect parties against undue delay; however, relevant inquiry for court is to determine whether any proceedings have been taken within one-year period, and if no proceedings have been taken for more than one year, to determine whether or not good cause has been shown why action should not be dismissed. Rules Civ.Proc., Rule 41(e); AS 09.10.240.

8. 1 Lord Edward Coke, *The Second Part of the Institutes of the Laws of England* 48 (1797).

MEMORANDUM

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TO:	Senate Judiciary
FROM:	Linda K. Wilson, Deputy Public Defender
RE:	SB 170
DATE:	5/14/03

Introduction

Chairman Seekins, and members of the Committee, Senators Ellis, French, Ogan, and Therriault.

The Public Defender Agency has serious concerns regarding numerous portions of this bill.

This bill proposes some radical changes to the criminal laws, many of which are unwarranted, unfair, and in some instances unconstitutional. This bill covers many different areas within the topic of criminal law and procedure, including defenses, affirmative defenses, rights of prisoners after arrest, discovery, immunity, notice of defenses, admissibility of certain evidence, consecutive sentencing and mitigation in sentencing. I would like to address each area individually.

Specifics

1. Self Defense and Heat of Passion

Sections 1-5 change long-standing Alaska laws on self-defense, defense of others, and heat of passion and require the defense to carry the entire burden of proving to the jury that the defendant acted in self-defense, defense of others, or in the heat of passion. Under current law, if you defend yourself and are later prosecuted, you must produce some evidence of self-defense before a judge will allow a jury to consider the defense, but once produced, the state must prove beyond a reasonable doubt that your use of force was unjustified to gain a conviction. The same holds true for those acting in defense of others, or in the heat of passion.

Defenses can be divided into two basic categories: Justification and Excuse. Although there is some overlap between the categories, looking at defenses in this way helps

explain differences between true "affirmative defenses" which the defense must prove, and other defenses, like self-defense, on which the prosecution has the burden.

An example of an Excuse in the affirmative defense is the defense of necessity. If a person is in danger of freezing to death and breaks into a cabin, he has committed the crime of burglary. But the criminal conduct is excused by necessity. Under current law, the defense has the burden of convincing the judge or jury of the "affirmative defense." This is the way it should be. If a defendant essentially admits to criminal conduct but asks the judge or jury to excuse the transgression, he or she should bear the burden of proving the excuse.

Justifications are given a higher status in criminal law, and the prosecution has traditionally had the burden of proving that a crime took place despite a justification. (Although the prosecution has the ultimate burden, the judge will not allow the jury to consider the justification unless the defense has come forward with some credible evidence to support it.) An example of justification is a police officer using force to arrest someone for a crime. Technically, the police officer's actions are a criminal assault. However, under AS 11.81.370, the police officer is justified in using force to make an arrest or terminate an escape.

Therefore, with justifications, criminal conduct is not merely excused. When a defendant's actions are **justified**, society has made the judgement that conduct that would otherwise be criminal is not a crime. The law placing the ultimate burden of proof on the prosecution when justifications are legitimately raised is longstanding in Alaska (see Toomev v. State, 581 P.2d 1124 (Alaska Supreme Court 1978) and elsewhere (see Paul H. Robinson, Criminal Law Defenses, Sec. 132 at pg. 99-100 (West Publishing Co. 1984)). This law should not be changed.

Many states, and the federal government require that the prosecution has the burden of proving beyond a reasonable doubt that the defendant in a homicide prosecution did not act in self-defense. From a 2002 pocket supplement to an American Law Reports article on the subject entitled *Homicide: Modern Status of Rules As to Burden and Quantum of Proof to Show Self-Defense*, 43 ALR 3d 221, June 2002 Supp. at pp. 13-24, more than 30 states require the government to prove beyond a reasonable doubt that the defendant in a homicide prosecution did not act in self-defense. Those states include Alabama, Arizona, California, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, Texas, Utah, Washington, and West Virginia. Some state may label the defense of self-defense an "affirmative defense," but that can mean, like in Alaska now, that the defendant has the affirmative duty to produce some evidence of self-defense to raise the issue, and then the state must prove beyond a reasonable doubt that the defendant did not act in self-defense. If you look at AS 11.81.900(b)(2) and (18) it explains how the two work in Alaska. "Affirmative defense" is an ambiguous phrase and means different things in different states.

One part of this bill seeks to deny to a victim of domestic violence a right to armed self-defense against the very perpetrator of prior violence. That proposed change in section 4 states that "A person may not use deadly force... if the person brought a deadly weapon to an encounter with reckless disregard that the encounter would result in combat." In other words, the proposed law denies the right of self–defense to the very people who are most likely to have to exercise it. It may be proposed with gangs in mind, but its reach is far more expansive. For example, a woman who carries concealed because she is afraid her abusive ex-boyfriend might seriously hurt or kill her, now would have absolutely no right to self-defense if she regularly carries a weapon and encounters him picking up her child at day care and he lunges at her and she shoots him. She is completely denied her right to self defense under this new provision, because she brought a gun to an encounter with reckless disregard that the encounter with him would result in combat. This is so even if she was not the initial aggressor or did not provoke the incident.

Sections 2 and 4 of the proposed legislation provide exceptions to the burden shifting to the defense for citizens that defend themselves in their own home, but the exeption is meaningless. The transmittal letter states that citizens who defends themselves in their own homes and must use force to protect their families would not be affected by this change, as long as they are in their own home, are not the initial aggressor, and not assaulting a "household member." This exception is meaningless for most people defending themselves in their own home, because the definition of "household member" in AS 18.66.990(5) is so broad, it includes a multitude of people that one can't defend against, even in one's own home. For instance, if a woman is in her home with her children, and a person she dated twice many years before comes to her home and while there physically threatens her, and she grabs a handgun and forcefully defends herself, if she is prosecuted for killing or assaulting him, she has the full burden (preponderance of the evidence) to prove her innocence, because this person is considered a "household member" under the definition. This should not be the case.

Changes in the law on self defense, defense of others and heat of passions are not warranted. In the Governor's transmittal letter it describes how difficult it is for prosecutors to obtain convictions while self defense and 'heat of passion' remain elements that the State of Alaska must disprove. This claim is hard to support. Distress over the results in 16 cases over the last twenty years, as mentioned by prosecutor Novak is not such a compelling figure that it warrants the radical changes proposed. The expressed distress over these sixteen cases out of hundreds does not warrant the drastic erosion of the right to protect oneself.

Further, the argument that this change is needed to combat a rise in drug violence is also misstated. An examination of Alaska's current criminal law shows that possessing a firearm while violating Alaska's controlled substances act is in and of itself a crime. AS 11.61.195 defines this as Misconduct Involving Weapons in the Second Degree, a class B felony. If a person actually uses or attempts to use a firearm while conducting a controlled substances transaction or other violation of the law, AS 11.61.190 defines that conduct as Misconduct Involving Weapons in the First Degree, a class A felony.

That crime is punishable by up to twenty (20) years in prison. As such, when the argument is made that too many drug dealers are carrying weapons and innocent people are dying, the proper response should not be to pass more legislation. The proper response should be to wonder why current laws are not being enforced. It is not that charges can't be prosecuted, but that they are choosing not to charge.

All of this analysis, however, begs the question of how many people are in fact being shot in drive-by shootings or other drug-related violence. The answer, at least according to news reports, is very few. The vast majority of homicides that occur within this state arise over relationships. As such, changing this law will not help put drug dealers who shoot innocent people in jail. Rather, it erodes basic, constitutional and common-law rights of individuals.

This is the second reason why this law should be rejected. From its roots in the Anglo jurisprudence system, individuals have been held to hold basic, inalienable rights. As recognized by the drafters of the United States Constitution, these rights included the right to life, liberty, and the pursuit of happiness. Because the loss of liberty involves such a significant right, courts have held that the Government, in seeking to imprison a defendant, must bear a great burden of proof. As such, for the past several centuries, the government has had to prove that a case did not involve self-defense or heat of passion. Yes, this did make it more difficult for the government to prove, but this was accepted because the rights involved were so great.

The policies behind self-defense and heat of passion are a little different. For heat of passion, a defense only to murder, that if successful, reduces the conduct to manslaughter, the common law recognized that sometimes people were so provoked that they in fact killed the person who did the provoking. The law school textbook example is of the man who comes home to catch his wife in the act of adultery. If the homicide occurred very soon after such a discovery, the law recognizes that the intent of the individual who committed the crime was less than the intent of the individual who deliberately planned a murder, stalked his victim, and then, when an opportunity arose, killed the victim. Thus, the *mens rea* of someone who commits first degree murder is more culpable than one who commits manslaughter, the appropriate crime when someone kills in the heat of passion.

The reasons against making heat of passion an affirmative defense are then two-fold. First, the common law sought to discourage behavior that would provoke ordinary persons into homicidal rage. Adultery and fighting were discouraged in an effort to promote a just and orderly society. Second, because the *mens rea* of murder is more culpable than manslaughter, it is appropriate that the State should have to prove the more culpable *mens rea* in order to gain the greater punishment. By making the defendant prove that this was heat of passion, this bill would erode the protections envisioned by the common law of England and the United States, and the current law in Alaska. It would ignore the wisdom behind that policy, and while it increases the power of the State it does so at the expense of the rights of an individual.

The policy behind the law of self-defense was a little bit different than that of heat of passion. Under common law, individuals were understood to own their own body. Thus, they had the right to do whatever they wished to do as long as they did not unreasonably interfere with the rights of others. This meant, though, that they had the capacity to protect what was theirs, namely, their own persons. Common law recognized this right as being embodied in every major legal system since Old Testament times. Based upon the desire to promote a stable and just society, the right of self defense was extended to encompass third persons, if the third persons would be unable to defend themselves. The common law courts recognized, as courts recognize today, that the sovereign owed no duty to individuals for police protection. Even today, if a person calls 9-1-1 to report a burglar, there is no guarantee that police will respond. By granting individuals the right to self-defense, the common law provided an efficient means of promoting social order. This policy certainly holds true in Alaska where bush communities are the norm, and police protection is not always available. Individuals would be less likely to use violence against others if that violence would be returned upon them.

The policy behind the law then favors individuals having the right to defend themselves. By making individuals prove that any homicide or assault was in fact self defense, this bill would erode that public policy and support a less orderly and just society. It is true, however, that defendants do have to affirmatively raise some evidence of self defense before the jury will be instructed on the matter. Under *Toomey v. State*, 581 p.2d 1124 (Alaska 1978), the Court recognized that the defendant will have to demonstrate some evidence before being entitled to an instruction on self-defense. So not every homicide or assault will be granted jury instructions on self-defense. There does have to be some evidence to support the jury instructions.

The trial courts, then, have not been "too loose in enforcing the Alaska Supreme Court's admonition". Rather, they have been following the instructions of *Toomey*, *supra*, *Folger v. State*, 648 P.2d 111 (Alaska App. 1982), and other decisions holding that once the defendant puts forward some evidence to support the defense of self defense, the trial court is duty bound to give the instruction. This, however, has not resulted in a flood of vicious murderers being acquitted. Rather, it has apparently resulted in some acquittals in cases in which the State of Alaska believes there should have been convictions. This is not a reason to vitiate the sound public policy of the common law in an effort to encourage reasonable people to act reasonably and thus promote a just and orderly society.

This policy, however, went farther and did allow individuals, in certain circumstances, to arm themselves in anticipation of a potential conflict. This right, however, was limited to certain instances. As described in *Brown v. State*, 698 P.2d 671 (Alaska App. 1985), individuals could seek out an adversary in an effort to peacefully settle their differences. A person doing such could, under common law, arm himself in an effort to prevent future attacks. The court in *Brown* noted that neither the defendant's arming himself nor the return to confront his adversary deprived him of the right to self-defense per se. Rather, the test was what did the evidence show the defendant and the adversary did.

This is exactly the purpose of our jury system. As discussed below, these factual nuances are for juries to decide.

Juries decide these questions, though, within well-specified boundaries. It is well-settled law that an aggressor forfeits his right to self-defense. This concept has long roots in common law, and it makes sense when considering the policy previously described. If the law is to promote a just and orderly society, a person who violates the rights of others should not be allowed to avail himself of rights and defenses seeking to promote those rights. There certainly are numerous cases in Alaska where it was decided that a self-defense instruction was not warranted. *See Bangs*, 608 P.2d 1 (1980); *McMahon v. State*, 617 P.2d 909 (Alaska 1980), *cert. de*nied, 454 U.S. 839 (1981); *Stapleton v. State*, 696 P.2d 180 (Alaska App. 1985), *Hilbish v. State*, 891 P.2d 841 (Alaska App. 1995), and *Ha v. State*, 892 P.2d 184 (Alaska App. 1995). There are probably many more unreported or unpublished decisions. The system as it is, then, does work. Making a blanket rule that anyone who arms himself forfeits the right of self-defense destroys common law rights and takes away the decision-making power of the jury. It is an attempt to impose a one-size-fits-all solution to a problem that really is not a problem.

The proponents of this bill argue that these laws are becoming too lax and need to be fixed because too many people are being acquitted on self-defense grounds. The above analysis shows that the law is quite clear regarding self defense and that once a defendant shows some evidence supporting his claim of self defense, the trial court must instruct the jury and let the jury decide. The arguments, then, are not so much against the laws because they even acknowledge the *Bangs* decision. Rather, the difficulty appears to be with jury decisions.

This attitude is extremely problematic. Our system is one in which the power of the sovereign is ostensibly derived from the consent of the governed. This is one of the primary reasons for the right to a jury trial. From *Blackstone's Commentaries on the Law* to present day, opinion is unanimous that juries serve as a vital part of the justice system. Juries serve as a voice of the community. The people give the government its power, and through their representatives they describe the society in which they wish to live. The legislatures seek to create this society through general laws. The community, though, is asked to judge on particular instances when they serve on juries. Thus, the community wants murder against the law, and so the law is passed generally prohibiting murder. But the community, when representatives are seated as a jury, is asked specifically whether under these facts they believe that a murder has been committed. The State of Alaska is arguing that the juries really do not know what they are doing because they are finding too many people not guilty.

Reduced to its simplest terms, the proponents of this bill are saying that the source of its authority, the people, is wrong and that the prosecutors need more power because the people are not smart enough to get it right for themselves. This argument goes against the foundations of our representational legal system and against our commitment to juries as determiners of the facts. While no system is perfect, Alaska juries by and large

understand what happens and they reach correct results. Putting twelve citizens in a box and having them listen to testimony, filtering it through their common sense and experience, and judging it by the law has proven to be remarkably effective at determining what actually happened in a case. Further, it is an important way for communities to voice their approval or disapproval upon certain behavior. Granted, no system is perfect. But we should not be rejecting hundreds of years of experience simply because there are a couple of cases where juries reach decisions that the prosecutors do not like.

The last reason that the legislature should reject these amendments is because they are inefficient. As noted above, part of the public policy supporting the right to self-defense is the idea that the police cannot be everywhere. Further, allowing individuals to defend themselves will have the effect of reducing crime and creating a more just and orderly society without the need for the money or person power a police force needs. These policy arguments have been verified in the work of criminologists John Lott and Gary Kleck, both of whom have found that individuals possessing firearms and exercising their right to self-defense have prevented literally millions of crimes per year. All of this was done at literally no cost to the respective states.

In a time when Alaska is facing huge budget deficits, it makes little sense to diminish the rights of individuals to use self-defense. Already in rural Alaska, it can take literally days and sometimes weeks for appropriate law enforcement to arrive on a scene to determine what happened. Many rural villages are without any law enforcement whatsoever. Even on the road system, there are numerous communities long distances from police protection. By making these defenses affirmative defenses and thus making people prove their innocence, this bill will chill the exercise of self-defense by citizens. This will diminish the just and orderly society we all wish to promote.

I would urge the legislature to trust the juries and the people of this State. By and large, they get it right and there really is no need to enact the changes urged in this section of the bill. The changes are not necessary, they reduce individual liberties and increase the power of the government, and they are an assault on the integrity and intelligence of our juries. For all of the stated reasons, I urge you to reject these proposed changes and leave the law of self-defense, heat of passion, and armed individuals as it is. These laws have worked well for several centuries. They will work well for a few more.

2. Prisoner Rights after Arrest

Section 6 of the bill seeks to amend AS 12.25.150(b). This amendment will limit the right of an accused to consult with an attorney. There is no explanation for why this amendment is being offered. Yet the proponents seek to keep the prisoner without counsel as long as possible, and by this legislation make it harder for the prisoner to obtain the benefit of counsel, when one is ready and willing, and already retained to represent the prisoner. The amendment will allow the police or department of corrections to prohibit an attorney who was retained by the friends and family of an accused to speak to that person, unless the accused specifically asks to see that

attorney. The practical effect is that when someone is arrested they are allowed to call an attorney or friends and family, but only if they think to ask to call. It is much easier for a family member or friend to arrange an attorney and get them to the jail than it is for a prisoner. If an accused calls friends or family, they in turn, hire an attorney who tries to see the accused. That attorney will be turned away under this legislation, unless the accused specifically asks to see that attorney.

There is no problem to fix by this legislation. Attorneys are not hanging out at jails seeking to counsel prisoners with no prior arrangement to represent them. Many accused people have mental disabilities or are young, and not very smart. The police can lie to them while they are being questioned. Don't forget that suspects do make false confessions. There has been mention of these recently in the press, like in NYC with the Central Park jogger case. An arrested person should get the benefit of a lawyer that his or her loved ones have secured.

The problem is that the accused is detained and restricted from communicating with the family or friends. It is impossible for that person to know whether his or her friends and family have contacted and retained an attorney, or whether that attorney has arrived, therefore it is impossible to expect the accused to specifically ask to see that attorney. The right to counsel is constitutionally protected by the 5th Amendment to the United States Constitution and Article I, Section 11 of the Alaska Constitution. We should not make it more difficult for a person incarcerated to get the benefit of a lawyer arranged for him or her by family or close friends.

3. The Use and Admissibility of Prior Convictions

Section 7 of the bill seeks to make evidence of a prior conviction admissible in a case where it is an element of the offense, but not contested. Currently in Alaska under *Ostlund v. State*, 51 P3d 938 (Alaska App. 2002) a defendant is entitled to a bifurcated trial so that the jury is not prejudiced by the prior conviction (ie: a prior DUI in a felony DUI case, or a prior shoplifting in a felony shoplifting case) by being informed about it before they deliberate on the current allegation (ie: the current DUI or shoplifting allegation). A bifurcated trial is not two separate trials, but two parts of a single trial done with one jury. This is not necessarily a long or time cunsuming process, and can take less than an hour. This procedure is important though because it preserves both parties' right to a determination of all of the issues, but avoids the potential for unfair prejudice. A majority of other states follow a similar procedure. They have also found that this procedure is the proper way to try these types of cases to protect the defendant from being unfairly prejudiced by evidence of a prior conviction of a similar offense that destroys the presumption of innocence. As Judge Mannheimer stated in *Ostlund*: "When a defendant is tried for felony DWI, and when the defendant's previous offenses have no relevance other than to prove the "prior convictions" element of the offense, a trial judge should bifurcate the trial so that the jury's deliberations on the current DWI are not unfairly prejudiced by evidence of the defendant's prior similar crimes –

evidence that, in other circumstances, would be barred by Evidence Rule 404(b)(1)", the rule against unfair propensity evidence.

This well reasoned, fair procedure that is followed in a majority of states should not be changed. The claimed reason of wanting to explain to a jury why there are 12 of them instead of 6, is not persuasive. It is doubtful whether jurors even notice this distinction and it certainly does not outweigh an accused's right to a fair trial.

Sections 7 and 15 of the bill also propose to change the burden of proof making it the defense's burden of proof to challenge the validity of a prior conviction both in a prosecution where the prior conviction is an element of the crime being prosecuted and also at sentencing where a prior conviction may result in a longer sentence. This change is also not warranted. Currently the state must prove the validity of a prior conviction before it can be considered. The bill proposes that the defense must prove by a preponderance of the evidence that a prior conviction is invalid. Sometimes the prior conviction is from another state. The defendant can only claim that the prior conviction is invalid because of the denial of the right to counsel or jury trial. Not only is this unfair and a violation of due process, the shifting of this burden of proof onto the defense will require more investigation efforts from the defense to find out the underlying facts in the prior case, perhaps from out of state, and then retrieve evidence from that old case to be presented in the current case to meet the burden of proof. This is not an easy task to accomplish by an agency that is outside of law enforcement, and does not have the numerous resources to draw on to assist them across the country.

4. Witness Immunity

Alaska is a state that requires the government to grant transactional immunity, meaning complete immunity from prosecution, to force a witness with a legitimate claim of privilege against self-incrimination to testify. We do so because our state constitution protecting the right against self-incrimination requires it.

Sections 8 - 12 of this bill claim to seek to conform Alaska's immunity statute to the Alaska Constitution for witnesses who testify in a criminal proceeding after establishing a valid claim of privilege against self-incrimination. Amending AS 12.50.101 to enact transactional immunity as required by article I, section 9 of the Alaska Constitution and the Alaska Supreme Court holding in *State v. Gonzalez*, 853 P.2d 526 (Alaska 1993) is commendable. Unfortunately, this intent is not carried out in the proposed legislation because of the additional provisions included in Sections 11 and 12 that allow the prosecutor to participate in the proceeding where the court determines whether the witness has a valid claim of privilege against self-incrimination. Allowing the prosecutor to hear the proffered testimony with only a requirement that it is inadmissible for any other purpose, only provides use and derivative use immunity, not transactional immunity. Use and derivative use immunity is not adequate under the Alaska Constitution and therefore this section of the proposed legislation is unconstitutional.

While the Public Defender Agency supports proposed legislation to conform Alaska's

immunity statute to the requirements of the Alaska Constitution, this proposed legislation fails to do so, and therefore the Agency cannot recommend this portion of the legislation in its entirety. AS 12.50.101 is unconstitutional as currently written because it does not adequately protect the privilege against self-incrimination afforded by article I, section 9 of the Alaska Constitution. The Alaska Supreme Court in *State v. Gonzalez*, 853 P.2d 526 (Alaska 1993) unanimously found the statute unconstitutional and required the state to confer "transactional immunity," not just "use and derivative use immunity" in order for the statute to comply with Alaska's constitution. Simply amending the language in AS 12.50.101(a) as proposed in Section 8 of the new legislation, with a small but important change of the word "an" on line 8, page 4 with the word "any", would bring the statute into compliance. The Public Defender Agency has no objection to making the statute constitutional. The Agency takes no position on Sections 9 and 10 of the proposed legislation changing all references to "attorney general or attorney general designee" with "prosecutor."

The Public Defender Agency, however, strongly opposes the language provided in Section 12. Article I, section 9 of the Alaska Constitution provides that "no person shall be compelled in any criminal proceeding to be a witness against himself." The original drafters of Article I, section 9 intended to confer transactional immunity, which is complete immunity from prosecution for **any** crime about which the witness testifies. The Alaska constitutional right against self-incrimination is closely guarded and construed stringently against the abuse of governmental power. The incurable inability to prevent or even detect the non-evidentiary use of compelled testimony is a fatal constitutional flaw of use and derivative use immunity that would result from enactment of Section 12 of this bill.

The judge alone has to hear the proffer to decide if the privilege exists. If the prosecutor hears it, the privilege is vitiated. If the state is concerned about the judge making a fair ruling on whether or not the witness has a valid claim of privilege, the state always has the ability to petition the court of appeals to review the decision made by the trial court under seal, and the appellate court would review the same information under seal, without the state looking at it. To open the *in camera* proceeding to the prosecutor violates the witness' privilege against self-incrimination, the right not to be compelled to be a witness against oneself.

Allowing the prosecutors to be present during the *in camera* hearing on whether the witness has a valid claim of privilege against self-incrimination, and only providing that any testimonial proffer made under this section is "privileged and inadmissible for any other purpose" only confers use and derivative use immunity to the potential witness. Only providing use and derivative use immunity to the witness after he is compelled to proffer testimony against himself in front of the prosecutor at the *in camera* hearing is inadequate to protect against the privilege against self-incrimination. The inability to adequately enforce a ban on use and derivative use immunity makes this section unconstitutional. The only way this legislation would not violate Article I, section 9 of the Alaska Constitution and the holding in *Gonzalez* would be if the state could not prosecute the witness for anything arising out of his or her proffered testimony, that is

transactional immunity.

5. Consecutive Sentences

Sections 13, 14, and 18 - 20 seek to amend the sentencing statutes to expand the situations in which consecutive sentencing is mandated and to eliminate the court's ability to determine the appropriate amount of consecutive time to be imposed for certain crimes. This change in the sentencing statutes will have a fiscal impact on the criminal justice system, including an increase in prison populations. It will likely result in the inability to resolve cases short of trial, when the case is one in which conviction of more than one count would otherwise have been an appropriate resolution, now would be forced to go to trial because of the exposure to mandatory consecutive sentences.

The proposed legislation is, in the first place, not needed. The concerns that purport to be addressed in the proposed legislation are already being addressed by the current sentencing scheme. Trial courts are aware of the legislative preference for consecutive sentences and give that preference great weight when they impose sentences. For example, in the case of *Jones v. State*, 744 P.2d 410, 411 (Alaska App. 1987) the sentencing judge concluded that consecutive sentences were necessary to reflect the seriousness of the crime. Specifically, the judge emphasized that two people had died and that a third person had been seriously injured. The Court of Appeals agreed with this reasoning. In *State v. Dunlop*, 721 P.2d 604 (Alaska 1986), the Supreme Court specifically held that where an act of violence injures multiple victims, there are as many punishable offenses as there are victims.

In addition to being unnecessary, the proposed legislation would have serious fiscal impacts. The prison population would increase significantly. In addition, other parts of the criminal justice system would see increased costs. For example, because the proposed legislation would discourage settlement in cases in which conviction of more than one count would otherwise be an appropriate resolution, many more cases would go to trial. As a result, the resources of the Public Defender Agency and other criminal justice agencies would be fiscally impacted beyond what they are under the current sentencing scheme.

Finally, this section of the proposed legislation is not in conformity with the legislature's stated declaration regarding the purpose of existing sentencing laws, which is codified in AS 12.55.005. Requiring a sentencing judge to impose large amounts of consecutive jail time when imposing sentences for certain crimes would eliminate the judge's ability to take into account the seriousness of the defendant's present offense in relation to other offenses, the prior criminal history of the defendant and the likelihood of rehabilitation, the need to confine the defendant to prevent further harm to the public, the circumstances of the offense, and the effect of the sentence on deterring the defendant and others. Currently, in situations in which a defendant has established that he cannot be deterred or rehabilitated within the confines of a given sentence, longer sentences are justified. However, in situations in which additional jail time would not

provide additional deterrence or rehabilitative effect, less consecutive time may be imposed. When sentencing a defendant for a number of individual crimes at the same time, the judge is permitted to determine the appropriate overall sentence taking into account each crime, the surrounding circumstances, the defendant's age and background, and any aggravating or mitigating factors. The proposed legislation would force judges into a sentencing scheme that overcrowds the prison system and overburdens the courts, prosecutors, and public defenders, while simultaneously eliminating the trial court's ability to consider a variety of sentencing factors that the legislature has expressly recognized in AS 12.55.005 as fundamental. The effect of previously legislated mandatory sentencing laws can be seen across the country as Los Angeles County, the state of Texas, and New York have been forced into wholesale releases of prisoners without much thought as to appropriateness due to budget constraints. Surely, Alaska should promote reasoned and considered sentences on an individual basis.

Section 14 creates AS 12.55.127(a) effectively replacing AS 12.55.025(e),(g),and (h), which are repealed by Section 20. Proposed AS 12.55.127(a) provides that "If a defendant is required to serve a term of imprisonment under a separate judgment, any term of imprisonment imposed in a later judgment, amended judgment, or probation revocation shall be consecutive." This proposed provision is consistent with existing law insofar as it relates to sentences/dispositions imposed for criminal conduct **committed** after a person "is imprisoned upon a previous judgment..." AS 12.55.025(e); *Jennings v. State*, 713 P.2d 1222 (Alaska App. 1986). Subsection (a)'s language may, however, have an impact upon persons who committed separate criminal acts, charged in separate criminal cases, but **prior** to the imposition of any judgments in the resulting cases. Existing law permits courts to impose concurrent or partially concurrent sentences under those circumstances. *See Wells v. State,* 706 P.2d 711 (Alaska App. 1985)(construing AS 12.55.125(e) to permit concurrent sentencing where judgments are entered in separate cases after the conduct underlying each has ocurred).

Under proposed subsection (a), the mere existence of a "separate judgment" would eliminate this prospect for concurrent sentencing. This would lead to irrational results where clearly similarly situated offenders would not be treated similarly, which defies the stated desire for uniformity and the elimination of unjustified disparity in sentences. For example, a defendant charged with two or more crimes in a single indictment could receive concurrent sentences, while a defendant charged with several related or similar crimes, but in separate indictments or cases could not, unless the defendant made arrangements for sentencing proceedings in the two cases to be consolidated. Yet, for the defendant who did not know or have the foresight to arrange consolidated sentencing proceedings or for whom consolidated proceedings were not possible due to scheduling problems or other procedural difficulties, imposition of consecutive sentences would be mandatory. Mandatory application of consecutive sentences should not turn on such fortuitous or haphazard considerations.

6. Mitigator for Pleading Quickly to Sex Offense

This section of the bill, section 16, adds a mitigator for consideration at sentencing. Normally the Agency would support the addition of a mitigator, but this one is unworkable. It states that the mitigator applies when a defendant is sentenced for a sexual offense and he or she has pled out to the offense within 30 days of being arraigned on the charge. This makes the availability of the mitigator dependant on the prosecution to get full discovery to the defense in a timely manner to enable the defendant to adequately assess the charge and options on how to plead. Therefore it puts the defendant in the difficult and unacceptable position of pleading to a crime without the necessary information to do so, in order to get the benefit of the mitigator.

Perhaps an amendment making the mitigator available based upon an event, or a later time frame, but certainly before trial would be more workable.

7. Notice of Defenses and Experts

Sections 21 - 23 concern notice of defenses and experts and require the defense to give notice sooner than required under current law. It also adopts serious sanctions for failures to timely notify the prosecution. These changes in the rules will require the defense to put forth additional investigative efforts related to experts and defenses to meet these earlier deadlines in order to avoid the significant sanctions proposed.

The proposed amendment to Criminal Rule 16(c)(5) should be amended to allow for a continuance if the prosecutor claims it is prejudiced by the late notice, instead of simply entitling the prosecutor to one with no showing of prejudice required. . Precluding a defendant from raising a defense because his/her attorney failed to file a timely notice has broad reaching repercussions. First, such a ruling most certainly opens the case up for an ineffective assistance of counsel claim that will be filed after any trial where a defendant has been precluded from running an appropriate defense because his/her attorney dropped the ball.

The troubling part of the bill is the language that **requires** the judge to preclude an affirmative defense for lack of notice. No other provision in Criminal Rule 16 **requires** the court to exclude evidence for a violation of the rule. Exclusion is an option in the case of late notice of an expert witness, and one option the court can exercise under Rule 16(b)(1)(B). The Governor's amendments to expert disclosure, under this same rule, include specific language that a continuance is a remedy to late notice. See Section 23, page 11, line 20, but it also requires preclusion of the expert witness in the proposed Rule 16(g)(5)(C) if disclosure is not complete within 7 days of trial or at a time ordered by the court.

8. Expanding Impeachment Testimony

This portion of the bill, found in Sections 24 and 25 amend several of Alaska's Rules of Evidence.

The first concerns Evidence Rule 412 related to the admissibility of evidence illegally obtained by the state. It seeks to make admissible illegally obtained statements and evidence when used to impeach a witness, not just in a perjury prosecution.

This proposed change is not warranted. Evidence Rule 412 as currently written protects constitutional guarantees and removes incentives for governmental intrusion into those protected areas, by precluding use of evidence obtained **illegally**. It does not create a great incentive for the defendant to commit perjury, because the state can still cross-examine the defendant on his claims and the defendant can be prosecuted for perjury with use of the statements in that prosecution. The current rule is a good deterrent and there has been no demonstrated history of misuse.

The second section, section 25, seeks to amend Evidence Rule 609(b) to increase the opportunity to use prior convictions of dishonesty from five years from the date of conviction to within 5 years from unconditional discharge from the conviction when the prosecutor wants to use evidence of the prior conviction to impeach the accused defendant. This will certainly expand the use of prior convictions in cases. If a young adult is convicted of a misdemeanor or low level felony and receives a sentence short of a year, but is put on probation for a significant period of time, he would not be unconditionally discharged from that conviction until he was off probation completely, which could be more than ten years later. Young people may commit crimes of dishonesty and then become upstanding citizens. Using that stale conviction of dishonesty to impeach him when he is much older seems more prejudicial and probative.

9. Unreliable Hearsay Evidence Made Admissible in Domestic Violence Cases

While we recognize that domestic violence cases are tought cases, this section of the bill is unconstitutional and against longstanding rules of evidence. Section 26 of the proposed legislation found on pages 12-13 of the bill seeks to amend Alaska's Rules of Evidence to provide an exception to the hearsay rule, to make statements about an alleged crime of domestic violence made **within 24 hours** of the alleged offense, either by the alleged victim or by another person who allegedly saw or heard the alleged offense, admissible even though the declarant is available as a witness. The underlying state and federal constitutional rights of a defendant to confront witnesses is enforced by the exclusion of hearsay evidence. The constitutional right to confrontation, which entails the right of cross-examination, is a fundamental right essential to a fair trial in a criminal prosecution. Hearsay evidence is second hand evidence that is not capable of cross-examination. Unless the evidence fits one of the constitutionally acceptable exceptions to the hearsay rule, the admissibility and use of out-of-court statements violates the constitutional right to confrontation. Hearsay evidence is generally unreliable second-hand evidence unless it fits one of the closely guarded exceptions. It would be a mistake to broaden the hearsay exceptions to include these out of court statements. Statements made within 24 hours of an alleged crime of domestic violence are not any more reliable simply because it is an alleged crime of domestic violence.

Many domestic violation cases are frought with passion, emotion, and bias, where it is even more essential to provide the accused with the right to test the declarant of the statement's sincerity, memory, ability to perceive and relate, and the factual basis of their statement. It is also essential to a reliable verdict that the jury have the ability to assess the witness' demeanor on the stand so that the witness' veracity is displayed for the jury to judge. Section 26 of this bill should be deleted

Closing

Numerous portions of this bill are problematic. It proposes radical changes in the criminal laws and in particular attempts to make it far easier to convict a person exercising their right to self-defense. It treats the victim of an unlawful assault like a criminal and makes them prove their innocence. The proposed legislation is poorly conceived and runs counter to nearly everyone's conception of the right to self-defense. With the exception of a few sections, most of the sections of this bill are unwarranted, unfair, and in some instances unconstitutional.

Alaska State Legislature

Please enter into the record my testimony to the Senate Judiciary Committee name

Committee on SB 170 Bill/Subject, dated 5/15/03

I have been trying to follow this bill with many other concearned people in the Mat-Su Valley. Changing times and meetings have made it difficult to have all people present. I am totaly against this bill, the more professional testimony I hear the worse this bill sounds. This bill would be another small chunk of our rights taken away. Once all these small mortar chinks are chipped away on these rights, soon the wall of freedom will crumble Please Stop this bill.

Thank You

Jeffery M Duncan

Signed: [signature]

Testifier

SeIA

Representing (Optional)

Box 521024 Big Lake AK. 99652

Address

892-8130

Phone number

STATE OF ALASKA

Frank H. Murkowski, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

P.O. BOX 110300
JUNEAU, ALASKA 99811-0300
PHONE: (907)465-3600
FAX: (907)465-2075

April 3, 2003

Senator Ralph Seekins
Senate Judiciary Committee
Alaska State Legislature
State Capitol
Juneau, AK 99801

Re: "An act relating to the Code of Criminal Procedure; relating to defenses, affirmative defenses, and justifications to certain criminal acts; relating to rights of prisoners after arrest; relating to discovery, immunity from prosecution, notice of defenses, admissibility of certain evidence, and right to representation in criminal proceedings; relating to sentencing, probation, and discretionary parole; amending Rule 16, Alaska Rules of Criminal Procedure, and Rules 404, 412, 609, and 803, Alaska Rules of Evidence; and providing for an effective date"

Dear Senator Seekins:

I am writing this letter to request that you schedule the above act, pending referral, for a hearing at your earliest convenience.

If you have any questions, please feel free to contact me.

Sincerely,

GREGG D. RENKES
Attorney General

By: David W. Marquez
David W. Marquez
Assistant Attorney General

DWM:lb
Cc: Mike Tibbles, Legislative Director, Office of the Governor
Deborah Behr, Legislation and Regulations Attorney, Department of Law

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STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

April 3, 2003

The Honorable Gene Therriault
President of the Senate
Alaska State Legislature
State Capitol, Room 107
Juneau, AK 99801-1182

Dear President Therriault:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill making changes to criminal procedures that would allow for more straightforward and fair prosecution of crime in Alaska. Additionally, the bill would improve the criminal law regarding sentences.

The bill proposes the following changes in criminal procedures.

Deterring Those Who Take Deadly Weapons to a Fight. We have to cut down on the violence on our streets. There are too many drug dealers, gang members, and violent people who bring guns to situations where they know they will get into fights; they then claim self-defense when they use the gun. Too many innocent people die, and prosecution is too difficult. We need to put a stop to this. If you bring a gun to a fight, you should be responsible for the consequences. Self-defense should not excuse a killing if the defendant brought a deadly weapon to a confrontation with reason to believe that combat would result. The Alaska Supreme Court long ago declared in *Bangs v. State,* 608 P.2d 1 (Alaska 1980), that a person who brings a deadly weapon to a confrontation, having reason to know that the encounter will likely result in combat, should not be entitled to self-defense protection. But trial judges have become too loose in enforcing the Alaska Supreme Court's admonition. A defendant who brings a gun to an encounter and uses it to finish a fight should not be able to claim self-defense.

Improving the Law of Self-Defense, Deadly Force In Self-Defense, Heat Of Passion, And Other Defenses. A related change is also necessary in the law of self-defense and "heat of passion." The prosecution always bears the burden of proving the essential elements of an offense, but if the defendant is going to raise a defense of which the defendant has exclusive knowledge, the defendant should have the burden to prove the defense by a preponderance of the evidence. This is called an affirmative defense, and the legislature has already created many examples in the Alaska Statutes. For example, duress is an affirmative defense. To establish duress, the defendant must prove that the defendant was coerced to commit a crime by a threat of imminent harm. The burden is correctly on the defendant, because only the defendant knows the effect of the threat.

The bill would change several similar defenses -- heat of passion, self-defense, the use of deadly force in self-defense, and defense of a third person -- to affirmative defenses. Currently, prosecutors must prove a negative. For example, if the defendant claims heat of passion (a defense to intentional murder in the first and second degrees), the state would have to disprove that the victim, who is dead, acted in a way to arouse the passion of the defendant. The bill provides that the defendant, who is often the only eyewitness still alive at trial, would be required to prove that "heat of passion" was aroused because of provocation by the victim. Citizens who defend themselves in their own homes and must use force to protect their families are not affected by this change. If the person acting in self-defense is a peace officer, or is on the person's own premises and is not assaulting a household member, this bill leaves the current law on self-defense intact, and requires that the prosecution disprove self-defense.

Right of Arrested Person. The bill would clarify that a person who is arrested has the right to a telephone call or visit from a friend, relative, or attorney. However, the right belongs to the person arrested, to exercise at his or her discretion.

Limiting Collateral Attacks on Prior Convictions. When an habitual criminal commits a new crime, the punishment is often greater because of the person's prior convictions. But it is now a common tactic in the new criminal case to attack the old convictions on technicalities. This means that before the prosecutor can even begin to prove the new crime, the prosecutor is forced to validate what happened in an old conviction, which is often from another state. This is generally a fruitless inquiry. The law already provides many avenues by which offenders can have their convictions reviewed. Unless a conviction was invalid because the defendant was denied the right to counsel or to a jury trial, the state should be able to rely on those convictions in prosecuting repeat criminals.

Admissibility of Prior Convictions. In the criminal code, the conviction of a prior crime is, in a few cases, an element of another offense. For example, having two prior drunk driving convictions within a certain period of time is an element of felony drunk driving. The bill would clarify that in these circumstances, evidence of prior convictions is admissible in order to prove all the elements of the charged offense. Although generally courts do not admit this evidence, the legislature has the authority to allow it. The bill also would overrule *Ostlund v. State*, 51 P.2d 938 (Alaska App. 2002), which requires a bifurcated trial, by allowing, at any time in the prosecution, evidence of prior convictions in the state's case if the prior conviction is an element of the current crime.

Grants of Immunity. The bill would give prosecutors the information needed to decide whether to grant immunity to a witness. If a witness claims a privilege against self-incrimination and refuses to testify, the only way to obtain that testimony under the Alaska Constitution is to give the person complete immunity for any crime the person may testify about. This makes it critical for the state to know what crimes will be immunized before offering immunity, but that is impossible under current procedures used by the courts. The current practice is for the judge to decide whether the witness is entitled to immunity in a closed hearing in which the prosecution is not allowed to be present. The prosecutor thus does not know what crimes require immunity. A homicide prosecution that currently is awaiting trial is a good example. The defendant, while in jail, allegedly tried to arrange for the killing of the trooper transporting him to court, so the defendant could escape. A cellmate notified the police, but will not testify without immunity. The judge held a hearing without the prosecutor, and ruled that the cellmate had a privilege against self-incrimination, but wouldn't reveal how the cellmate's testimony would incriminate him -- or even whether the cellmate feared prosecution for a felony or a misdemeanor. Unwilling to grant immunity blindfolded, the prosecutor must forego this powerful evidence of consciousness of guilt of the defendant.

The bill would give guidance to the court for evaluating a claim of privilege, and would allow the prosecutor to obtain necessary information and to be present at any hearings on the matter. Judges thus would no longer decide these issues without hearing both sides, and the prosecutor can make an informed decision about immunity.

Consecutive sentences. This bill also would strengthen and clarify the law regarding consecutive sentences for conviction of more than one crime. In 1982, AS 12.55.025(e) and (g), which mandated full consecutive sentences for each count of homicide, assault, and sexual offense, were enacted. But because of imprecise drafting, this clear expression of legislative intent was instead interpreted to be merely a "legislative preference" for consecutive

sentences that courts were free to ignore. *State v. Andrews*, 707 P.2d 900 (Alaska App. 1985), *aff'd.* 723 P.2d 85 (Alaska 1986). Later, in 1988, the legislature mandated consecutive sentences for assaults against children, but the provision that was finally enacted provided no firm guidance to the courts, especially in the most serious sexual assaults. AS 12.55.025(h).

As a result of the interpretations of the courts, trial judges ignore or pay only nominal recognition to the legislature's preference for consecutive sentences. For example, in the recent case of *State v. Glaser*, the defendant was convicted of two counts of second degree murder and one count of first degree assault. The sentence imposed by the superior court treated the drunk driving killing of two people and the serious physical injury of a third person as if only one victim had been affected by the crime, and imposed a sentence only slightly longer than the mandatory minimum sentence for a single count of second degree murder.

This bill would adopt minimum requirements for consecutive sentencing in cases involving multiple counts of homicide, kidnapping, first degree sexual assault, and first degree sexual abuse of a minor (sexual penetration). Although this bill does not go so far as the fully consecutive sentencing reflected in the 1982 legislation, it does provide more specific guidance than exists in current law. In a second degree murder case such as *State v. Glaser*, for example, the bill would require that imprisonment for at least 10 consecutive years be imposed for the second conviction of second degree murder, and some additional consecutive term of imprisonment be imposed for the assault on the third victim.

Better Notice of Expert Witnesses And Defenses. Delay, confusion, and other problems often result from the inefficient exchange of information about defenses and expert witnesses in criminal prosecutions. The discovery rules are supposed to make pretrial procedure orderly and avoid surprises at trial. However, our prosecutors report that at times attorneys who give late notice or no notice rarely suffer adverse consequences from the court, which encourages further disregard of the rules. The bill would adopt procedures for a more orderly exchange of expert witness information, and it also would adopt firm sanctions for violation of the rules. If a party does not provide notice of an expert in the time set out in the rule, the person may not use the expert testimony. The bill also would require that notice of certain defenses be made as required by the rules or the offering of that defense could be forfeited.

Expanding Impeachment of Testimony. The bill also would amend several provisions in the Alaska Rules of Evidence. Under the current rules, a statement obtained from a defendant that was not preceded by the warnings required in *Miranda v. Arizona,* 384 U.S. 436 (1966), is not admissible except in a prosecution for perjury. That is, although the statement may not be used against the person for the underlying offense, it may be used in a subsequent perjury prosecution if the person testifies falsely at trial. The bill would expand this exception to allow the statement to be used for impeachment if the person testifies falsely. Under the current court rule, a defendant in a murder case whose statements to police were suppressed could lie with impunity on the stand, knowing that at most the defendant faced a later prosecution for perjury. The bill's change to the court rule would, however, allow the defendant's statement to be used to contradict the defendant's testimony in the murder trial if the defendant lied.

A similar court rule limits the use of evidence obtained with an invalid search warrant or if the police make a mistake in the technical rules governing search and seizure. Such evidence is not admissible for the underlying prosecution, and can only be used in a subsequent perjury case. This bill would allow this evidence to be used to impeach the defendant or other witness on cross-examination. The exclusionary rule discourages careless law enforcement by excluding illegally obtained evidence. It should not give witnesses a chance to testify falsely at trial.

Current rules also allow a witness's credibility to be impeached by a prior conviction for a crime involving dishonesty or false statement (for example, theft, robbery, burglary, perjury) if the conviction occurred within five years of the testimony. However, in many instances, the five-year period is over before the person is even out of jail, so juries never find out that the person has a conviction for dishonesty. This bill would amend the court rule to allow juries to be told of such convictions if less than five years has elapsed from the person's unconditional discharge from probation or parole.

Giving Juries the Full Picture in Domestic Violence Cases. Domestic abusers often succeed in pressuring their domestic partners into not testifying against the abuser. In order to prosecute such cases, the prosecutor must be able to introduce evidence from other persons to tell the jury the whole story. But if the jury isn't allowed to know what was said immediately after the assault, the jury only gets part of the story. We can change this, and provide more perpetrators with the help they need to stop abusing. Victims of domestic violence are often unavailable to testify at trial -- often for compelling reasons concerning their safety and the safety of their children. Under current court rules, if the victim is not present, the statements of the victim are admissible only if the statements qualify under the narrow rule for "excited utterances."

This bill would expand that rule in domestic violence cases, so that a jury can learn about all statements made within 24 hours of the crime, if there are other indications of reliability. This hearsay exception would apply to statements that an assault occurred, and also if the victim recanted and denied that an assault occurred.

New Mitigating Factor for Defendants Who Show Concern for Victims of Sexual Offenses. Victims of sexual offenses, more so than any other crime, dread testifying in open court and often view giving testimony as being victimized again. They must not only testify in front of a jury of citizens and the defendant who violated them, but it must be done in public and often in cases that gain press attention. This is very traumatic for the victim. Sex offenders who have genuine remorse for their crimes do not want to put the victim through this crucible. For those sex offenders who quickly plead guilty, thus sparing their victims the ordeal of public testimony, this bill would provide a statutory "mitigating factor" that the judge may take into consideration in reducing the person's sentence.

I urge your prompt and favorable consideration of this bill.

Sincerely,

Frank H. Murkowski
Governor

SENATE BILL 170
Sectional Analysis

Section 1. "Heat of passion" applies only to First Degree Murder and Second Degree Murder. If a person kills while in a passion that was the result of serious provocation by the intended victim, that reduces the killing from murder to manslaughter. In one case, a man broke into the home of a drug dealer to recover money, and shot the drug dealer. He claimed that the shooting was done in a "heat of passion" and the Alaska Supreme Court reversed his murder conviction because the trial judge did not believe he was entitled to raise this defense. "Heat of passion" is often a fall-back position for defendants who do not think they will completely escape responsibility under self-defense. In cases where the state is able to disprove self-defense, it may also be required to disprove "heat of passion." This section would change "heat of passion" from a defense, that the state must *disprove* beyond a reasonable doubt, to an affirmative defense, that the defendant must prove by a preponderance of evidence. The defendant is the person who knows the motivation for the killing, and should bear the burden of establishing this justification.

Sections 2 - 4. These change self-defense from a defense, that the state must disprove beyond a reasonable doubt, to an affirmative defense, that the defendant must prove by a preponderance of evidence, with two exceptions. First, self-defense would remain a defense for the state to disprove if the person was on his or her property and did not use force against a household member; Second, it would remain a defense as under current law for force used by a peace officer acting within the scope of his or her duties. In most homicides, the defendant is only person still alive who was present at the killing. As with the defense of duress, the defendant is the person who knows the motivation for the use of force, and should bear the burden of establishing this justification. Section 2 deals with use of non-deadly force in self-defense. Sections 3 and 4 deal with deadly force. Section 4 also provides that a defendant may not claim self-defense for a killing if he brought a deadly weapon to the encounter, and was aware of and disregarded the risk that the encounter would result in combat.

Section 5 makes use of force in defense of a third person an affirmative defense. As with self-defense, the state would still be required to disprove the defense if the incident occurred on the person's property or the force was used by a peace officer.

Section 6 provides that an adult who has volunteered to talk to the police must request to be visited by an attorney, relative or friend. Occasionally attorneys people will demand to visit a person under arrest, even if the person has not made a request for the visit. This interrupts the police investigation, but it is allowed under current law. All other provisions in section 6, regarding the right to immediately make phone calls, are unchanged from current law.

Section 7. When the law provides that an element of a crime depends on a prior conviction or convictions, such as felony drunk driving, the state must prove beyond a reasonable doubt that the past convictions occurred. But the Alaska courts have said that this must occur in two trials, and that the jury must not be told of the past convictions in the first trial. This section reverses that court decision. Section 7 also provides that the defendant may not again litigate the validity of the prior conviction, unless the defendant was not provided counsel or a jury trial. Prior convictions should not again be subject to attack where the defendant has had the opportunity to appeal, and to exercise post-conviction remedies.

Sections 8 -12 and 17. These sections adopt a procedure for making decisions about Fifth Amendment claims and the granting of immunity by the state. Alaska law requires complete, transactional immunity from prosecution for a person who has claimed a privilege; thus, the decision to grant immunity must be made carefully. Currently, the courts hold secret hearings with witnesses who refuse to testify, and then give the state no information that the state needs to decide whether to grant immunity to the witness. Under this bill, the state is allowed the information it needs to make a rational decision about granting immunity from prosecution. Section 8 merely conforms statutory law to a constitutional decision by the Alaska Supreme Court. Sections 9 and 10 are minor clarifying amendments. Section 11 defines a term that explains that the witness can communicate to the court through his or her attorney, rather than speaking directly. Section 12 adopts a procedure where the decision about the privilege is made after an attorney is appointed for the witness, and after input by both the witness and the state. Section 17 clarifies that a witness who claims a Fifth Amendment privilege not to testify is entitled to a public defender if the cannot afford one. This codifies current court practice.

Sections 13 and 14, 18 - 20. Sections 13, 18 - 20 are conforming amendments regarding consecutive sentencing. Section 14 gives direction to courts in sentencing for more than one offense. Current law appears to require consecutive sentences, but was not interpreted that way because of bad drafting. This clarifies that for most crimes a court may impose sentences that are concurrent or partially concurrent. However, for homicides, kidnapping and serious sex offenses, this section specifies the minimum amount of consecutive time that must be imposed. For example, for two counts of first degree murder, the court must require the mandatory minimum term of the second offense to be served consecutively. For manslaughter or kidnapping, at least the period of the presumptive term of the second offense must be served consecutively.

Section 15 is similar to section 7, and provides that in imposing a presumptive sentence (which depends on prior convictions), the defendant may only challenge the validity of a prior conviction if he was denied the right to counsel or the right to a jury trial.

Section 16 would adopt a new mitigating factor for sentencing in a sexual felonies. Because these trials are so difficult for the victim, it would allow the court to consider whether to impose a lesser sentence if the defendant reduced the impact on the victim by entering a plea of guilty or no contest within 30 days of arraignment.

Section 21 changes Rule 16 (c)(5), Alaska Rules of Criminal Procedure, to require a defendant to give notice of certain defenses 30 days in advance of trial. Current law requires a shorter notice, and is routinely ignored by defense attorneys and courts.

Section 22 makes a conforming amendment to Rule 16(e)(1), Alaska Rules of Criminal Procedure, by cross-referencing consequences provided in other law for violation of the discovery rules or an order issued by a court under the discovery rules.

Section 23 addresses pretrial discovery of expert witnesses by both the prosecution and the defense. It requires that no later than 45 days before trial, both parties provide opposing counsel with the name and curriculum vitae of expert witnesses. The defense must disclose only those experts that it may call at trial. The prosecution must disclose experts that it may call at trial or that have worked on the case. Defense attorneys frequently instruct their experts not to write reports, because the report would have to be turned over to the prosecution. The prosecution has no such luxury, and is required to provide an expert's report. This section provides that if the defense expert has not written a report, the prosecution is entitled to depose the expert at the expense of the defense. It requires the court to disallow expert testimony if disclosure isn't complete seven days before trial or another time ordered by the court.

Section 24 amends the Alaska Rules of Evidence to provide that a voluntary statement obtained in violation of the technical *Miranda* requirements, may be used to impeach the person who made the statement, if that person testifies differently. Further, evidence that has been suppressed may also be used to impeach a witness. Current law only allows these statements and evidence to be used at a later perjury trial. This makes them available to impeach a witness at the first trial.

Section 25 extends the time for use of prior convictions for impeachment at trial from five years from conviction, to five years from the date of unconditional discharge.

Section 26 adopts a new exception to the rule against use of hearsay evidence, by allowing the use at trial of statements made within 24 hours of a crime involving domestic violence, if the statement reports or describes the crime.

Sections 27 - 31 include conforming repealers, a notice of a court rule change described above, procedural directions, and an effective date, July 1, 2003.

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: SB 170
(S) Publish Date: 4/4/03

Revision Date/Time (Note if correction):
Dept. Affected: Department of Corrections
Title: Criminal Procedures, Sentencing & Related Issues
BRU: Administration & Operations
Component: Institution Director's Office
Sponsor
Requester
Component No. 1381

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	3.4	54.4	98.6	173.6	194.3	224.9
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	**3.4**	**54.4**	**98.6**	**173.6**	**194.3**	**224.9**
CAPITAL EXPENDITURES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CHANGE IN REVENUES ( )	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	3.4	54.4	98.6	173.6	194.3	224.9
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1037 GF/Mental Health	0.0	0.0	0.0	0.0	0.0	0.0
Other (Specify Type--Do not abbreviate)	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	**3.4**	**54.4**	**98.6**	**173.6**	**194.3**	**224.9**

Estimate of any current year (FY2003) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time	0	0	0	0	0	0
Part-time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

ANALYSIS: *(Attach a separate page if necessary)*

Time served is estimated based on the time that would have been served under this bill for defendants sentenced during the time period 1/1/2001 through 12/31/2001. Time served under current law is not included on Fiscal Note estimates. Months are based on an average of 30 days per month and the FY03 cost of care of $113.31. Sentences timeframe is estimated as beginning 7/1/2003.

See attached:

Prepared by: Jerry D. Burnett, Director — Phone (907) 465-3339
Division: Administrative Services — Date/Time 3/21/03 8:31 AM
Approved by: Portia C.K. Parker, Deputy Commissioner — Date 3/21/2003
Agency: Department of Corrections

(Revised 9/2002 OMB)

STATE OF ALASKA
2003 LEGISLATIVE SESSION

BILL NO. SB 170

ANALYSIS CONTINUATION

For years past FY 2009, there could be a cumulative effect of long-term and short-term sentence increases that would result in higher costs on an annual basis. We have not attempted to estimate these future year costs past FY 2009. Given the recidivism rates for many offenders, it is not clear that these longer sentences will actually have the effect of increasing costs to the Department of Corrections. Our costs are the same on a daily basis whether offenders are serving an extra period of incarceration or are reincarcerated for a new offense. To the extent that increased sentences may reduce recidivism for this group of offenders, the legislation may result in lower costs in future years.