

STATE OF ALASKA

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March 15, 2010

Hon. Jay Ramras
Chair, House Judiciary Committee
Alaska State Capitol, Room 118
Juneau, Alaska 99801

Re: House Bill 381

Dear Chairman Ramras:

I am writing to express my serious concern over the current language in House Bill 381. Every experienced prosecutor with whom I have spoken about this bill uniformly agrees that it would promote violence and be a bad idea for our state. We believe that as drafted this bill will **encourage** unnecessary violence in our state. Whatever source one thinks our laws should be drawn from – the ten commandments which say “thou shall not kill,” simple morality, utilitarianism principles of the greater good, or simply the concept that life is sacred – this bill would encourage the needless taking of human life.

AS 11.81.335(b) as currently written sets forth the duty to retreat before resorting to deadly force. It requires that if “with complete personal safety and with complete safety to others being defended, the person can avoid the necessity of using deadly force by leaving the area” then the person must do so. This avoids the **unnecessary** loss of life and encourages our citizens to seek ways other than violence to resolve disputes. The addition of subsections 5 and 6 to this statute eradicates the duty to retreat - in fact should they be enacted, there would no longer be a duty to retreat in Alaska. That is to say if person A could avoid killing person B by walking away, he/she would no longer be required to do so, but instead would be authorized **by law** to kill person B. This does not promote the protection of our citizens or suggest that Alaska as a state places a high value on life itself. While this is highly unlikely to have been the goal of the bill’s sponsors, it is nevertheless the result of what has been proposed. This is best explained by closely examining the language of the proposed changes and additions.

Section 1 of the bill proposes amending AS 11.81.335(b) by adding a subsection (5) that would say there would be no duty to retreat when the person is “in a vehicle” owned, leased, used, or even just occupied with the owner’s consent. Here are but just three examples of how this would encourage violence:

First example:

A person picks up a hitchhiker, or offers a ride to someone, and, for whatever reason, a confrontation arises while in the vehicle such that deadly force could be used, but for the duty to retreat. Under the current law the hitchhiker must leave your vehicle if he knows he can do so safely. Under the proposed amendment, that hitchhiker would be authorized to kill the driver instead -- even if he could have simply walked away. These facts are similar of a recent murder trial in Anchorage, but they are close. The defendant was convicted of and sentenced for second-degree murder. The case is now on appeal. Why would we want to say killing another person is okay when it could be avoided? Why would we want to authorize the taking of a life when one could walk away in complete safety?

Second Example:

Joe Smith drives to a party. At the party he gets into an altercation and is thrown out of the party. He goes to his car and gets inside to leave. Before leaving, Mr. Smith sees the person with whom he got into the altercation. Though Mr. Smith is in his car, behind the wheel and ready to leave, he fears the other guy may come after him. Instead of driving off -- which he could do with complete personal safety, he gets out of his car and grabs a shotgun from the trunk and kills the other man. Again, these are facts similar to a recent murder trial in Anchorage. The defendant was convicted of and sentenced for manslaughter. The case is now on appeal. This is yet another situation in which our current law requires our citizens to walk away if they can do so with safety, but this proposed change in the law would authorize killing another human being instead.

Third Example:

An occupant in car A points a gun at the occupant in car B. If the occupant in car B can drive away with complete safety, then under the current law he must do so. Under the proposed change, the driver in car B would be authorized by this bill to open fire instead of driving away. The law of self-defense in Alaska requires the state to prove beyond a reasonable doubt a defendant's claim of self-defense is not true. It is difficult to prove a negative. If the state cannot prove the negative beyond a reasonable doubt, then at least the state can try to prove that the driver of car B had a duty to retreat and could have done so. This law would eliminate that duty. That is a recipe for inviting gang violence on our streets. These facts are in fact very similar to another case prosecuted by our department. In 2006 there was a shooting at Reka and Bragaw in Anchorage. Two vehicles with young men exchanging gunfire. One young man was killed and the two men in the other vehicle were convicted of murder. One of those cases is on appeal. This loss of life occurred for one of the participants. What about the innocent bystander? For example, there was the election day shooting in Anchorage when a campaign worker for former Gov. Murkowski was hit by a stray bullet at campaign HQ in Anchorage across from the Sears mall. That case involved two vehicles with young men -- not in gangs, but still rivals -- who opened fire on one another. While we did prosecute the shooters in that case, do so would have been impossible under this law.

This bill would unintentionally encourage such conduct by making it legal or at least offering a defense – which even if not true – could not be disproved. In each of the four examples the defendants were convicted, but this proposed change would make such prosecutions much harder, if even possible.

The proposed subsection (6) in AS 11.81.330(b) would almost completely eliminate the duty to retreat. That subsection says there is no such duty when a person is “in any place where the person has a right to be.” That means in the Diamond Mall, Sears Mall, McDonalds, or any other public location a person is no longer required to walk away from a confrontation, but instead may kill another citizen even if they could have walked away with complete safety. This does not express a value for human life. This does not encourage finding a resolution for disputes other than violence. The only time there would be a duty to retreat is if the person is some place they have no right to be – they must be trespassing, or committing a burglary in order to have such a duty. With this change you might as well simply eliminate the duty to retreat completely from our statutes.

The bill also proposes adding a new section that whittles away some of the other protections put in place to prevent unnecessary taking of human life. Our current self- defense law is set up with both a subjective and objective test to determine when deadly force is authorized. The subjective test means the person using the force believes he/she needs to do so. The objective tests means the “reasonable person” would have concluded the same thing. The added section proposes to eliminate the objective test in several circumstances: burglary, carjacking, and kidnapping. That is it takes away from the jury the question of whether a reasonable person would view a particular event as unlawful force against a person that required a response of deadly force. At first blush this seems reasonable. However, when you examine what is proposed more closely, it becomes very disturbing. To understand why, you must first understand each of the three crimes it references.

Burglary is found in AS 11.46 and not AS 11.41 because it is a crime against property, not a person. Burglary requires a person to enter a building with the intent to commit a crime – theft, vandalism, and assault are all examples. What must be noted though is that no person needs to be in the building in order for this to be a crime. If a person breaks into a home or business to steal something, this is a burglary. If a student breaks into a school to vandalize it, this is a burglary. If a person breaks into a home to assault another person – even if no one is home, this is still a burglary because burglary only addresses the entry of premises with the intent to commit a crime (called a target crime) whether that (target) crime is committed or not. This is why burglary is classified as a crime against property and not against a person.

Under current law *non*-deadly force may be used to protect property, and deadly force is *only* authorized when terminating an arson or attempted arson on a dwelling or occupied building (See AS 11.81.350(b)), or when terminating a burglary upon an occupied building or dwelling if the person using the force is in possession or control of that premises, or is a guest. See AS 11.81.350(c)).

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The current bill would now authorize deadly force against a person who burgles a dwelling whether anyone was home or not. Thus deadly force may be used even when no human life is at risk.

The proposed bill would also authorize *any* person to use deadly force as compared to only a person who is in possession or control of or is an invited guest in the dwelling. This means the guy driving down the street may kill a person he thinks is breaking into a home. The state must disprove defense of property, so the state must disprove that a victim was committing burglary. While this new section is fraught with the potential for misunderstandings to lead to the unnecessary loss of human life, there is another more serious problem with this section. This new section authorizes deadly force against a person who is currently committing or *had committed* a burglary. This language authorizes vigilantism. It authorizes deadly force against any person whom the person using the force "had reason to believe" *had* -- past tense -- had committed a burglary. This new section says such force *is* reasonable. The only question left is if the person using the force also thought it was "reasonable."

The section on carjacking does the same thing. It authorizes the use of deadly force against someone who *had* -- past tense -- taken a car by force. Even if no human life was at risk in the taking, this law would say it is okay to kill to keep your car from being taken from you or afterwards. That sounds like retaliation and vigilantism, not like a legislature enacting laws to protect our citizens and improve our lives.

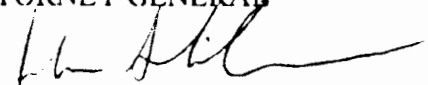
The kidnapping subsection has the same issue with past tense. In each and every section this bill would legalize and authorize vigilantism.

Finally the bill also says no arrest may be made "unless the agency" determines that there is probable cause that the force that used was unlawful. This puts the police in a difficult position especially when confronting gang related violence. It is also unclear to whom "the agency" refers. This could potentially require magistrates and grand juries to start deciding if self-defense has been disproven. This in turn would require the state to act as defense counsel for the defendant to present such a defense only to have to then disprove it. This may sound confusing, and that is because this bill could cause serious problems in the criminal justice system with regard to self-defense law.

Thank you for your consideration of this letter.

Sincerely,

DANIEL S. SULLIVAN
ATTORNEY GENERAL

By: 

John Skidmore
Assistant Attorney General

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cc: House Judiciary Committee Members