

HOUSE FINANCE COMMITTEE
February 25, 2013
2:03 p.m.

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CALL TO ORDER

Co-Chair Stoltze called the House Finance Committee meeting to order at 2:03 p.m.

MEMBERS PRESENT

Representative David Guttenberg
Representative Alan Austerman, Co-Chair
Representative Bill Stoltze, Co-Chair
Representative Mark Neuman, Vice-Chair
Representative Mia Costello
Representative Bryce Edgmon
Representative Les Gara
Representative Lindsey Holmes
Representative Cathy Munoz
Representative Steve Thompson

MEMBERS ABSENT

Representative David Guttenberg
Representative Scott Kawasaki, Alternate
Representative Tammie Wilson

ALSO PRESENT

Representative Mark Neuman, Sponsor; Lieutenant Rodney Dial, Deputy Commander for a Detachment (Southeast), Alaska State Troopers; Quinlan Steiner, Director, Public Defender Agency, Department of Administration.

PRESENT VIA TELECONFERENCE

Joseph Masters, Commissioner, Department of Public Safety; James Fayette, Attorney, Anchorage; Richard Svobodny, Deputy Attorney General, Criminal Division, Department of Law.

SUMMARY

HB 24 SELF DEFENSE

HB 24 was HEARD and HELD in committee for further consideration.

#hb24

HOUSE BILL NO. 24

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

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REPRESENTATIVE MARK NEUMAN, SPONSOR, informed the committee that the provision related to self-defense of someone else was not included in HB 24 but was contained in an existing statute, AS 11.81.340. He provided the information to the committee (copy on file).

JOSEPH MASTERS, COMMISSIONER, DEPARTMENT OF PUBLIC SAFETY (via teleconference), commented on the legislation. He remarked that the Alaska Association of the Chiefs of Police had sent a communication informing the committee of its position on the legislation. He offered that the association's opinion did not represent the position of the entire membership. The provisions in HB 24 were controversial within the law enforcement community. He felt that adequate safeguards existed in current law to disallow false claims of self-defense. The Department of Public Safety (DPS) was examining how changes in the law would impact the potential for increased use of unjustifiable deadly force or burden law enforcement officer's investigations of self-defense. He thought that any impact would be minimal. He indicated that similar arguments were expressed in the early 2000's regarding conceal carry permit changes. He relayed that according to a recent study the rate of gun violence in the state declined over a 30 year period despite significant changes in handgun laws. He guessed that passage of the bill would not affect the downward trend in violent crime.

Co-Chair Stoltze asked for the department's position on the legislation. Commissioner Masters replied that the department was in support of HB 24 with some reservation.

Representative Munoz asked for Commissioner Master's personal position on the bill. Commissioner Masters responded that he was personally in favor of the bill.

LIEUTENANT RODNEY DIAL, DEPUTY COMMANDER FOR A DETACHMENT (SOUTHEAST), ALASKA STATE TROOPERS, DEPARTMENT OF PUBLIC SAFETY, voiced that the Alaska State Troopers were in support of the legislation.

Co-Chair Stoltze asked how charges against someone claiming self-defense originated. Lieutenant Dial answered that DPS investigated use of force situations. The department in conjunction with the Department of Law (DOL) and the District Attorney's office arrived at either a charging decision or a decision not to charge. The department determined that passage of the legislation would not change the process.

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Representative Gara asked for clarification about the department's position on the bill. Commissioner Masters replied that the department supported the bill and that he personally was strongly in favor the legislation.

Representative Edgmon cited Page 2, line 3, of the bill, "(5) in any other place where the person has a right to be." He inquired about "where a person has a right to be." He asked for clarification. He wondered whether there were places a person should not have a gun and how the law would work in those instances. Lieutenant Dial answered that there were locations that individuals were "not supposed" to have firearms. He noted that domestic violence shelters and courthouses were examples.

Co-Chair Stoltze warned that subjectivity existed in the terms, "shouldn't be" or "not supposed to be" He requested terms that defined precise legal prohibitions, i.e., "prohibited from".

Lieutenant Dial continued that DOL and the District Attorney's office decided whether the person who acted with deadly force was legally in the right place. He offered that trespassing was an example of a place a person did not have a right to be.

Representative Edgmon believed that the phrase was subjective. He wondered why the bill would not affect the department's current procedures.

Lieutenant Dial reported that two murders took place in the last six months. He reiterated that the department's responsibility was to fully investigate the incidents and report the facts to the districts attorney's office in order to determine charging decisions, regardless of current law. He supposed that some elements of the legislation could affect the process for the Department of Law.

Vice-Chair Neuman highlighted some of the discussion from the Judiciary Committee. He reported that that if a person was on private property the person did not have a legal right to be there. Conversely, there were places where a person did have a right to be i.e., state land.

Representative Munoz asked whether the provision "any other place where the person has a right to be" weakened or nullified the presumption to avoid the use of deadly force. Lieutenant Dial believed that it did not weaken the presumption.

Representative Gara cited AS 11.81.335 that justified the use of deadly force and noted that it was not contained in the bill.

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Representative Gara cited AS 11.81.335(b). He interpreted the statute to mean that a person must retreat if one could do so in complete safety. He asked whether the legislation changed the statute and allowed the use of deadly force. Lieutenant Dial answered that a person was not required to retreat under the provisions in HB 24.

Representative Gara surmised that HB 24 extended a person's right to use deadly force in a public place when they could retreat without harming a person. Lieutenant Dial deferred the question to DOL. He offered that the bill extended the

same rights to self-defense in public places as permitted in a home.

Vice-Chair Neuman maintained that HB 24 did not mandate the use of deadly force. The bill clarified that the rules of self-defense in the home also applied to where a person "had the legal right to be." The legislation added a clause to existing Alaska law that did not require a duty to retreat in certain instances. Currently under state law a person was required to retreat [in public places]. The bill extended specific "rights to defend yourself" in contrast to having to retreat.

JAMES FAYETTE, ATTORNEY, ANCHORAGE (via teleconference), shared that he worked as a prosecutor for DOL in Anchorage but was testifying on his own behalf. He stressed that his position on the legislation was personal and did not represent the administration. He discussed his resume as an experienced homicide prosecutor for 20 years. He noted that he taught self-defense law. He spoke against the legislation. He testified against the bill in prior years and voiced his continued opposition. He believed the bill was "dangerous and counterproductive." He knew other state prosecutors and homicide detectives who were against the legislation. His opposition was based on two primary reasons:

- The elimination of the duty to retreat in public places benefited dangerous and violent criminals. The self-defense justification was frequently used by violent criminals in court.
- The change was unnecessary. He reported that "there was not a single specific case" in recent years that "the bill would remedy." He stated that, "the bill was a solution in search of a problem."

Mr. Fayette referenced previous testimony from Brian Judy [Senior State Liaison] of the National Rifle Association (NRA) [02/21/13]. He restated the testimony, "House Bill 24 is important self-defense legislation that would provide that a law abiding person has no duty to retreat." He cited Mr. Judy's use of the phrase, "law abiding". He announced that he would support the legislation if it only applied to law abiding citizens, but legislation specific to law abiding citizens was impossible to create. He stressed that the bill would benefit criminals, i.e., domestic abusers, road rage shooters, drug dealers, gang members, who would use the law to claim self-defense. He reported that he

routinely worked on analogous cases. Criminals were not automatically disqualified from self-defense claims in court. The jury decided whether a disqualifier applied. He hypothesized a situation where a shooting took place in a parking lot between two rival gang members that resulted in a fatality. The evidence under AS 11.81.330 [the provisions that disqualified the use of force e.g., initial aggressor, mutual combat, rival group retaliatory activity] was unclear. He offered that often the prosecutor's most powerful argument to disqualify a claim of self-defense was that the necessity to shoot was avoidable if the shooter retreated. Current law required that a person must retreat if one can in complete safety. The prosecutor must disprove self-defense beyond a reasonable doubt to the unanimous satisfaction of a jury or the trial resulted in an acquittal.

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Mr. Fayette voiced that the bill removed the duty to retreat from the existing argument. He considered a road rage scenario with two rival gang members, one claimed to see a gun in the other car and shoots. The duty to retreat meant that the shooter could pull over or slow down and the death was preventable. He reported that under current law a prosecutor could argue that if the assailant retreated the shooting was avoidable. The legislation revoked the provision and nullified the duty to retreat argument.

Mr. Fayette asserted that the bill was unnecessary. He communicated that existing law protected home owners and authorized the right for people to defend themselves without duty to retreat at home. In 2006, the statute was expanded to include business owners in their place of business and guests in a home. He pointed out that no one in the state was unfairly prosecuted in a claim of self-defense. He observed that the legislation was part of a nationwide effort. He thought that a perception of prosecution abuse existed in other states where criminal defendants did not have the right to consider a claim of self-defense by a grand jury.

Mr. Fayette declared that he was not an "anti-gun rights crusader." He was a gun owner, army veteran, and a "fairly conservative person." He was "keenly aware of a person's right to defend themselves." He had prosecuted gang members and murderers in Anchorage for 20 years and could become a

target for violent retribution. He opined that the bill "was a dangerous expansion of the self-defense law for its potential for unintended consequences. The bill makes it easier to kill people and the killers to claim self-defense." He urged for rejection of the bill.

Representative Costello referred to Mr. Fayette's comments about gang members. She asked whether he believed gang members were aware of current laws. Mr. Fayette replied in the negative. He answered that gang members were not aware, but their lawyers were obligated to pay attention. A lawyer will use the law to claim self-defense for their client. He added that no law abiding person wanted to expand the rights of criminals, which is what the bill accomplished.

Representative Gara pointed to potential confusion related to the duty to retreat in current law. He asked for an explanation. Mr. Fayette answered that "self-defense litigation was extremely confusing". The prosecutor "must disprove a negative proposition beyond a reasonable doubt." He explained that a prosecutor must refute a claim of self-defense beyond a reasonable doubt. He pointed to two statutes AS 11.81.330 and AS 11.81.335. He instructed that the basic elements of the self-defense law for the use of non-deadly force were contained in AS 11.81.330. Special rules for the use of deadly force were defined in AS 11.81.335. Together, the statutes shaped multiple propositions into a justification defense of self-defense. If enough evidence existed to support the claim of self-defense, a prosecutor must disprove the self-defense claim to a jury beyond a reasonable doubt. He related his personal experience in the courtroom. He emphasized that in cases of street crime the evidence was indistinct making it difficult to ascertain whether the special rules applied. Most often a prosecutor relied on the duty to retreat to frame the argument against a claim of self-defense.

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Representative Gara pointed to the highly publicized case of Trayvon Martin [Florida, 2012], where the police warned the shooter not to follow Mr. Martin. He asked, in reference to current law, whether HB 24 would change the outcome if a similar situation happened in Alaska. Mr. Fayette stated that the facts of the Martin case were not fully reported. He discussed that in a similar scenario in Alaska, the bill would work in the shooter's defense. The

prosecutor would lose the ability to make a duty to retreat argument, which increased the chance of the shooters acquittal.

Vice-Chair Neuman asked whether all individuals involved in a crime of self-defense should face immediate arrest while law enforcement subsequently investigated the facts. Mr. Fayette replied in the negative. He stressed that the case should be "diligently investigated" by law enforcement and submitted to a grand jury before arrests were made.

QUINLAN STEINER, DIRECTOR, PUBLIC DEFENDER AGENCY, DEPARTMENT OF ADMINISTRATION, remarked that the agency had submitted a zero fiscal note due to the minimal impact on how the cases would be litigated. He commented that the question of self-defense and the duty to retreat "were interconnected questions." He stated that, "the right to use self-defense was mutually exclusive from the duty to retreat." He discussed that "deadly force" was authorized when an imminent threat existed. The duty to retreat applied when an individual was able to retreat in "complete and total safety." The issue in self-defense cases was that the events did not occur simultaneously and the question to determine was whether deadly force was authorized. He opined that the duty to retreat arguments was not lost under HB 24, but the legislation would "reframe" self-defense litigation. Current law did not place the burden on a person (the non-aggressor) to leave the scene; it did not authorize the use of deadly force if the individual did not leave the scene of the incident. The initial aggressor had the duty to retreat. He did not perceive a change in the outcome of self-defense cases as a result of the bill.

Representative Gara related that AS 11.81.330 listed disqualifiers for a claim of self-defense; one being an initial aggressor. He recalled from testimony that determining the initial aggressor was difficult in some cases. If not provable, the initial aggressor could claim he/she acted in self-defense. He asked whether Mr. Steiner had professionally experienced a similar situation. Mr. Steiner answered that depending on whether or not a witness was present determined the difficulty of a self-defense case. He elaborated that initial aggressor aside; a person was still accountable and required to prove that they had the authority to use deadly force from an imminent threat. The situation was the opposite of the duty to retreat argument. If an imminent threat was not present deadly

force was not authorized. He thought that the bill would not impact the difficulty in determining whether or not a person was an initial aggressor. Determining whether or not the person was an initial aggressor was a crucial question but separate from the authority to use deadly force.

Representative Gara asked whether currently a person had "a duty not to shoot" in public places if one could retreat in complete safety. He wondered if the provision in HB 24 authorized that the person did have the right to use force in public places. Mr. Steiner answered in the negative. He stated that "if you change the law and you have the opportunity to retreat in complete and total safety you do not have the justification to shoot in the first place." He detailed that the "mutually exclusive question was if you can retreat you can't shoot." Elimination of the duty to retreat will not authorize the authority to use force when a person never possessed the authority in the first place. He pointed to the imminent threat question and noted that preceded the duty to retreat and established the authority to use force. He reiterated that the law does not place the burden on a person to retreat.

Representative Holmes asked whether HB 24 would alter the number of self-defense cases and if the legislation would increase the number of successful self-defense claims. Mr. Steiner judged that the legislation would not change the number of cases or impact the outcome of self-defense cases.

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Representative Holmes wondered what the bill would actually accomplish. Mr. Steiner thought that the bill would "reframe how the issues were argued." The justification would focus on the authority to use deadly force from an imminent threat rather than a duty to retreat.

Co-Chair Stoltze asked about his experience related to grand jury indictments of self-defense. He asked whether it was difficult to obtain an indictment for self-defense cases. Mr. Steiner replied that he did not present cases to the grand jury. He discerned that it was not difficult to obtain an indictment with a proper probable cause argument.

Co-Chair Stoltze related personal experience. He asked whether the state would experience fewer or increased cases

if "there was a higher hurdle for the Department of Law" to charge for murder in a self-defense case and how that would impact the public defender agency. He believed that the legislation provided protection against biased prosecutors, for citizens who were diligently exercising the right to defend themselves. Mr. Steiner restated that the legislation would not have an impact on the state.

Representative Costello stated that the legislature had addressed the issue in previous years. She understood the requirements, but wondered whether it was possible for a person under imminent threat to hurriedly determine a place to retreat in a public place. She asked how a jury addressed the duty to retreat. Mr. Steiner answered that the state was required to show that the person could retreat in complete and total safety. The state would investigate the circumstances around the event. The jury would have to weigh the facts.

Representative Costello expressed skepticism that the duty to retreat could be sufficiently established.

Representative Gara discussed current law. He recapped that unless a person was at home, work, or was a police officer, a person presented with a situation to retreat in complete and total safety must retreat. He wondered what happened in a place where a person was legally allowed to be. He asked whether the bill authorized the use of force in a public place when an avenue of retreat was present. Mr. Steiner relayed that the current statute as interpreted by the courts meant that a person could not "shoot" someone if an opportunity to retreat in complete safety presented itself. At that moment you did not have the authority to use force, but you did not have to retreat. He thought that the wording of the statute juxtaposed with the interpretation caused confusion. A person had no obligation to actually retreat just not use deadly force.

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RICHARD SVOBODNY, DEPUTY ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF LAW (via teleconference), indicated that the impact of the bill to the department was minimal. The department would not alter the case review process for the grand jury. He expounded that the self-defense statute was implemented in 1980. Since then the state experienced little change in the number of self-defense cases. A major

change to the statute occurred in 2006, which extended the places where a duty to retreat was not authorized. Subsequently, the homicide rate in Alaska decreased. He qualified that there was not a direct correlation between the two actions. He reported that the use of self-defense did not increase in most of the states that had enacted similar legislation. He noted that Florida's process was substantially different than how Alaska dealt with self-defense cases (he referred to Representative Gara's earlier question about the Trayvon Martin case in Florida. In Alaska, the question was decided by a jury and in Florida the determination was made by the courts; it was not a fair comparison. He communicated that in self-defense cases the state needed to disprove all of the elements including the duty to retreat, beyond a reasonable doubt. He stated that, self-defense cases were the most "difficult defenses" to face for a prosecutor.

Mr. Svobodny addressed Representative Costello's earlier question about how charging decisions were made. He explained that the department thoroughly screened cases and only proceeded with cases when self-defense could be disproven beyond a reasonable doubt. He offered that he had experienced similar self-defense cases as Mr. Fayette had when it was not possible to discern the elements of the self-defense case. He maintained that the cases were screened out and did not proceed to the grand jury. He reminded the committee that a jury ultimately decided whether self-defense was warranted.

Mr. Svobodny voiced that self-defense claims were the only cases where the state must "disprove a negative" meaning that the person did not act in self-defense; and refute the claim beyond a reasonable doubt. He doubted that the law would cause a person to "hesitate to act" to defend one's life. He related that he was explaining the process and not arguing against the bill. He restated that he did not anticipate a financial, procedural, or case load impact for DOL if the legislation was adopted.

Co-Chair Stoltze asked how long Mr. Svobodny had worked in criminal law prosecutions for the department. Mr. Svobodny answered that he had worked for the criminal division for approximately 33 years and for DOL for a total of 35 years.

Co-Chair Stoltze asked what the department's percentage of criminal indictments was. Mr. Svobodny answered that the

goal was 100 percent. He did not know the percentage. He stated that self-defense arose in homicide and serious assault cases.

Co-Chair Stoltze referenced Mr. Fayette's testimony that the legislation would make it more difficult for prosecutors to obtain indictments in self-defense cases. He asked for clarification. Mr. Svobodny replied that he would question the ability of a prosecutor who was having difficulty obtaining indictments.

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Representative Holmes asked whether the self-defense plea would be used more frequently and with increased success if the bill passed. Mr. Svobodny answered that by the time a self-defense case preceded to a jury many of the elements and disqualifiers were examined and increased success was unlikely.

Representative Holmes believed the committee members shared the same goal of prosecuting criminals. She wondered if the legislation accidentally helped criminals. Mr. Svobodny replied that if the department was properly executing the law no one who legitimately acted in self-defense would be indicted.

Representative Gara discussed previous year's testimony by DOL that the bill would make it more difficult to determine the initial aggressor; therefore, more difficult to prosecute gang violence. He noted that the testimony had come from Anne Carpeneti [Assistant Attorney General, Legal Services Section-Juneau, Criminal Division, Department of Law]. Mr. Svobodny replied that "there was not enough statistical information to answer the question." He thought that most of the gang violence fell into the category of mutual combat, which disqualified a claim of self-defense.

Representative Gara summarized current law. He relayed that unless a person was at home, work, or was a police officer, a person presented with a situation to retreat in complete and total safety must avoid lethal force. The bill added "anywhere a person had the legal right to be." He asked how the legislation would impact the law "when you have a duty with complete personal safety and safety to others to not shoot."

Mr. Svobodny stated that "the answer is that doesn't exist anymore ... the common law will have gone away."

Representative Gara asked why the legislature should change the law if currently a person could retreat in complete and total safety in a public place and avoid the use of lethal force. Mr. Svobodny was unable to answer the question. He thought the question was best answered by the bill's sponsor.

Representative Gara was trying to determine the difference between the current law and the legislation. He wondered how the bill changed a person's ability to use deadly force in self-defense in a public place. He wondered how the law was expanded with passage of the bill. Mr. Svobodny deduced that if the bill passed litigation would ensue to determine where a person had a legal right to be. He believed that the amount of time that the duty to retreat issue would arise in court would be insignificant.

Representative Gara reiterated his desire to understand the difference between the current law and the legislation in a public place.

Mr. Svobodny answered that "if a person can use deadly force and they did not have to use deadly force if they chose to retreat the difference is the person could now stand their ground and shoot if you are using a firearm..." He thought that the bill also removed the ambiguity whether the person had the right to retreat in instances when the person was protecting others.

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Representative Gara reiterated his question. He asked if a person was in a place where he/she was legally allowed "is there a circumstance where under current law because you have the ability to not shoot with complete safety to yourself or others that you would be able to shoot somebody if the bill is passed." Mr. Svobodny answered, "yes."

Representative Gara questioned what the circumstances were. Mr. Svobodny discerned that the concern was with situations when a person had the duty to retreat under current law and a person could choose not retreat under HB 24 provisions. He thought that lawyers were likely to make the distinction in court.

Representative Holmes referenced Mr. Svobodny's testimony asserting that determining where a person had a legal right to be would generate a great deal of litigation. She wondered how that would affect the fiscal note. She pointed to the department's zero fiscal note. She noted that past versions of the bill had a more costly fiscal note.

Representative Costello referenced Representative Gara's testimony that in previous years the department took a position against the bill. She discussed that after reviewing her notes from the prior session that DOL had no previous position on the bill. She wanted to clarify the record.

Co-Chair Stoltze commented that Michael Geraghty, Attorney General, Department of Law, sent a letter to the Senate that countered Mr. Fayette's testimony. He notified the committee that the letter would be distributed to the members. He believed that there was a subjective, pejorative connotation and critique by Mr. Fayette about the department's position on HB 24 and those testifying on the department's behalf.

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ADJOURNMENT

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The meeting was adjourned at 3:35 p.m.