STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
SENATE JUDICIARY STANDING COMMITTEE
February 21, 1977
JOINT PUBLIC HEARING
From tape b32r06-01-JJUD-770221

Senate

Senator George Hohman, Chair
Senator Robert Ziegler, Sr., Vice Chair
Senator Patrick Rodey
Senator Mike Colletta
Senator Clem Tillion

House

Representative Terry Gardiner, Chair
Representative Bill Miles, Vice Chair
Representative Fred Brown
Representative Lisa Rudd
Representative Larry Carpenter
Representative Ed Dankworth
Representative Richard Eliason

COMMITTEE CALENDAR

Criminal Code Revision Review

WITNESS REGISTER

JOHN HAVELOCK, Project Executive Director
Criminal Law Revision Subcommission
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Provided an overview of the process of drafting the criminal code revision.

BARRY JEFFREY STERN, Staff Counsel
Criminal Law Revision Subcommission
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Provided an overview of the draft criminal code revision.

DANIEL HICKEY, Chief Prosecutor
Office of the Attorney General

Department of Law
Juneau, Alaska
POSITION STATEMENT: Answered questions regarding the draft criminal code revision.

^Draft Criminal Code Revision Review

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CHAIR GARDINER called the joint meeting of the House Judiciary Standing Committee and the Senate Judiciary Standing Committee to order, and he noted that the committee will be working on the draft criminal law revision for three weeks, four days each. He said Barry Stern has been the code reviser, working on the revision day to day doing all of the drafting. Dan Hickey was a member of the Subcommission representing the Attorney General's office.

JOHN HAVELOCK, Project Executive Director, Criminal Law Revision Subcommission, Alaska State Legislature, said the Criminal Law Revision Subcommission (Subcommission) is under the Alaska Law Revision Commission that was established by resolution in 1975. The Subcommission staff have been developing and offering drafts [of new criminal statutes] to the Subcommission, which is made up of representatives of the public and of the criminal justice community. The Subcommission reviews each draft provision at least three times.

BARRY JEFFREY STERN, Staff Counsel, Criminal Law Revision Subcommission, Alaska State Legislature, said the Subcommission is creating three draft revisions [this session]. The first tentative draft, which the committee members have in front of them, includes Chapter 41 and Articles 1-4, which are offenses against the person, including criminal homicide, assault, kidnapping, and sexual offenses. He said that Part 2 was just sent to the printer and covers the remaining crime against the person (robbery); Chapter 11, which includes the general principles of criminal liability or the state of mind that the defendant must act with when committing a crime; parties to a crime; general principles of justification, which deals with the use of force in self-defense; Chapter 31 with attempt and solicitation; bribery; and perjury. Part 3 will be comprised of offenses against property, Articles 1-4, which include theft, burglary, arson, and forgery.

MR. STERN said the Subcommission will be meeting soon and will go over business and commercial offenses, prostitution,

gambling, and offenses against the family. He expects it to be complete by July, "and then we'll have to tackle the remaining material," he explained.

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MR. STERN turned to the first tentative draft [Mr. Stern also called it Book 1] and how it is set up. The statute establishing the Subcommission is described on pages i to iii, he said. The Subcommission members are listed next. Page 3 has a preface explaining why Alaska needs a revised criminal code, and that is followed by an introduction, which explains how to use the book. He noted that it should contain everything needed to go over homicide, assault, kidnapping, and sexual offenses, and it contains the proposed statutes followed by staff commentary. The intent is to show how existing law is changed, he explained. Page 92 lists definitions that apply throughout the code, and it is followed by derivations, which are the sources of the new statutes. He said about 95 percent of the statutes came directly from laws in other jurisdictions, primarily Oregon, New York, Missouri, and Arizona. "If this code passes, this will be invaluable to the attorneys and judges in interpreting the statutes, because cases will be decided under similar statutes," he stated.

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MR. STERN noted that after the derivations, he has included the existing statutes, and they are referred to in the commentary. The next page lists the status of other criminal code revisions from other states; 29 states are now functioning under revised codes and 13 states are considering revisions. On page 112 there is an index of the commentary, he stated.

CHAIR GARDINER said that the joint committee will spend a week covering each of the three books this year, including this week, a week in March, and one in April. This summer he hopes to hold public hearings throughout the state. Copies of the books have been distributed to interested parties, he said.

[Discussion ensued on scheduling]

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REPRESENTATIVE BROWN asked about the similarity between Alaska's tentative revision and those of the states from where they were derived.

MR. STERN said the only difference is that New York's revision is from 1967 and those of Arizona and Oregon are more recent. They codes are similar, he added.

UNIDENTIFIED SPEAKER said, "The scholarship on the subject matter is a national scholarship and is applied to whatever state happens to be doing it; they're getting basically the same information and you're getting only minor variations in result."

[The committee discussed what to talk about next. A member suggested an explanation of why the code is being revised, as it would be helpful for the general public.]

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MR. HAVELOCK stated that most people may not understand that until about 150 years ago there were little or no written criminal laws. At that point, there was a movement to codify law, "through the good efforts of a man named Field," and criminal law was put in statute, and that became a common and universal practice in this country. Before that time, he stated, criminal law was all common law—law that was held in the minds of the judges and in the precedence that they established through their cases. A person would learn laws by reading a book that had a group of commentaries on cases or what judges had said about particular crimes. That technique became less and less feasible over time because of increased democratization—people did not feel that it was always appropriate to trust the judges and felt that everyone should have equal access to the law, he stated. Additionally, he said, "society becomes more complex; we became more concerned with rights and responsibilities in particular situations, which needed more particular articulation and better access by the public. So this resulted in a general codification movement."

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MR. HAVELOCK noted that most states codified their laws during the middle of the 19th century, but "in Alaska, no one got around to thinking about the application of law in the frontier until all other states and territories already had established law." The first code of criminal law in Alaska was adopted in 1899 by a congressional act, he said, and it was done in the simplest way, by just taking Oregon's law with some variations from New York. From 1899 until 1977, Alaska's body of law has been added to by individual legislatures that were operating in

highly variable times and very different public climates. The result is a set of laws that have gross inconsistencies. Judges have been interpreting these laws, and some interpretations "may be obvious from the text and some look ridiculous from the text."

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MR. HAVELOCK said:

> In order, now, to know what the law of Alaska is today, you can't find out what that law is by picking up the Title 11 and reading it without referring yourself to the statutes. Some of that growth has been because Alaska is a jurisdiction with a very small number of cases. There are broad areas, which are still waiting around for somebody to file an appeal in order to establish what the law is on that particular subject. Part of the effort of code revision is to anticipate those areas where appeals could come and eliminate unnecessary appeals by saying "this is what the law is on this subject matter."

MR. HAVELOCK noted that there can be three different types of internal inconsistency in a code. One is penalties, and the current code has gross inconsistencies in the penalties that apply to different conduct, he stated. Perjury in a civil case, for example, is considered a worse offence than perjury in a criminal case. Burglary of a warehouse is considered worse than burglary in a home, and that kind of inconsistency is replete through the code, he explained. The penalties do not make any sense; people were not looking at other offenses when they plugged in offenses for new crimes, he stated. Another area of inconsistency can be found within the language. Frequently the legislature would face a particular incident and make a law, and with all of the cases based on the particulars, people lost sight of the broader spectrum of criminal justice. This would create loopholes, he explained. The crime of rape, for example, required proof of sexual penetration, leaving a wide area of highly abusive forceful sexual molestation as misdemeanors instead of felonies.

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MR. HAVELOCK said that Alaska statute allows for the use of deadly force "to protect your master or mistress," but there is nothing that allows the use of force to protect one's grandmother, for example. He noted that a homicide case got

thrown out the other day because the statute never referred to a state of mind. In the new code, there will be no ambiguity about that. He stated that in criminal offenses, the more conscious the behavior is, the more aggravated it becomes. The current statutes have 20 different phrases that describe the state of mind, and the revised code reduces them to just a few that are explicitly defined and will have general application across the board, he explained. The great majority of states have revised their codes in the 1960s and 1970s, so Alaska has the most antiquated set of laws in the United States.

MR. HAVELOCK spoke of how Alaska code will differ from other states. Regarding the "duty to retreat," some states impose a very substantial burden on the requirement to retreat before being allowed to use deadly force; however, Alaska law reflects the attitudes of Alaskans and there is a very limited duty to retreat. A person is allowed to stand his or her ground in a wide variety of circumstances, he explained. He added that "we had to give a lot of extra thought to how you define escape from a jail when you're thinking of peculiar Alaskan jailing circumstances," and he gave the example of holding people in small villages in a place that is not a jail. But, generally, Alaska's code will be part of the uniform law that is country wide, and Alaska will be able to use decisional law across the states, which cannot now be done. He noted the value of a revised code for law students and law enforcement.

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MR. HAVELOCK stated his belief that the new code will allow for a smoother and more effective administration of justice. He suggested hearing a law enforcement viewpoint.

DANIEL HICKEY, Chief Prosecutor, Office of the Attorney General, Department of Law, said he concurs with Mr. Havelock. Sitting on the Subcommission as a prosecutor, his objectives were to address a number of gaps or problems with Alaska's criminal law that have arisen over the years. The felony murder rule is a good case in point. Additionally, he wanted to stem the proliferation of appeals over what various provisions mean, what is available as a defense, and what kind of defense to expect. He said that the more straightforward, concise, and simplistic a code is the more useful it is. The objective of the Subcommission has been to redraft the present law to bring it as close as possible to conform to what the law is as enunciated through case decisions and to eliminate the problem areas and

inconsistencies. "The work we've done so far has been very valuable work," he stated.

REPRESENTATIVE DANKWORTH asked how much emphasis was put on meeting social changes and social attitudes. It should reflect that, he added.

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MR. HAVELOCK said he does not know that the Subcommission gave it much emphasis. "More often than not, the realities of current social interaction and current law enforcement practices were simply reflected in what was done. It wasn't generally necessary to discuss at any great length the fact that there are statutes on the books that reflect conduct that took place 50 years ago that doesn't take place today."

REPRESENTATIVE DANKWORTH asked for a report on the proceedings of the Subcommission, including how unanimous the votes were and the attendance record of the commissioners.

MR. HAVELOCK said attendance was good. For areas that were highly volatile, like sex crimes, the votes were generally unanimous. Some members felt that it is a mistake to write down rules of general application for all situations, believing that the best way to handle criminal law is through giving the broadest discretion to the judiciary. One of the members asked why there are various degrees of theft, because stealing is stealing. The member wanted one crime of theft and then to allow the judges to determine the penalty. Mr. Havelock surmised that people want to have more predictability in what a judge will do. But some commissioners had the philosophy that the code revision was unnecessary and that "the existing law is there and the judges are in good positions to interpret it."

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CHAIR GARDINER said there were three groups represented on the Subcommission: defense, prosecution, and layperson. Since nobody was happy with who was in the group, it must have been a fair assortment. Often the attorneys were squabbling over one word, he stated. At times, disagreements made the members want to just use current law, "but then you would find out that the attorneys couldn't agree on what the law said." That is the problem with existing law, he opined. When a member disagreed with the majority of the group, the person was asked to do the research and rewrite the provision and submit it for discussion,

and Chair Gardiner found that that was unlikely to happen—it separated the serious complaints from the non-serious ones, he said.

MR. STERN said the review process started with a general discussion to highlight some of the major issues. Then Mr. Stern would come back with a statute including substantial commentary, which would be revised and returned for discussion.

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CHAIR GARDINER noted that in cases where there were serious disagreements, subcommittees would be formed to work them out.

REPRESENTATIVE DANKWORTH said the Subcommission did an excellent job, but as the legislature gets down to adopting the revision into law, he would like to know what has been omitted. There may be things that are now legal by omission, "so let's lay it all out."

MR. STERN noted that there are two pages explaining what was left out under sexual offenses. "It's on the table."

REPRESENTATIVE MILES asked what will happen if the legislation does no pass.

CHAIR GARDINER said that it will all be put together in one bill, "and it's going to fly or it's not going to fly." Most states allow some amount of time before the law to goes into effect, so people have a year or more to get ready for it.

REPRESENTATIVE BROWN stated that he is impressed with the Subcommission and its timeliness. It seems to be ahead of schedule, he commented. Alaska's [current] code has not benefited from any of the major scholarship done in the 19th or 20th century—"our code doesn't derive from the Field code, it goes all the way back to some brilliant work done by some youngsters who were only one generation away from the American Revolution in the 1820s in New York." It was then grafted into Oregon law, and very little of the Field work was taken into account, he explained. Somebody in 1884 decided to use the law of Oregon [for Alaska]. In 1899 the work was put together by an anonymous law clerk, and the commission did not read it, but the Alaska legislature considered it.

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CHAIR GARDINER spoke about the costs of the Subcommission and estimated it to be $200,000. He spoke of the number of staff who worked on the revision and of contracting with the university.

UNIDENTIFIED SPEAKER asked why the legislature contracted with the university.

CHAIR GARDINER said the Subcommission had Mr. Stern, and he had expertise in criminal law. Peter Ring has a police background, and he worked for the FBI and went to Georgetown Law School.

UNIDENTIFIED SPEAKER said he did not realize "we were attempting to develop this law school-type thing at the university."

UNIDENTIFIED SPEAKER said [the university] has a justice center, and the focus is educating non-lawyers. "We're aiming at degree programs for people in the police area, in the corrections area, court administration area, continuing professional development, special courses on crisis intervention, drugs and alcohol, which are done for people working in law-related fields." The center is doing some research projects and this is the largest one by far, he stated.

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REPRESENTATIVE DANKWORTH asked about the draft revision that was sent out to 200 people around the state and if comments were requested. How will those comments be compiled?

CHAIR GARDINER said there was a cover letter asking for comments and testimony. "We're treating this like any other piece of legislation," and any collected information will be forwarded to all committee members, he stated.

REPRESENTATIVE BROWN said there is no bill before the committee. He asked if the committee will work on the draft first and then submit a bill.

CHAIR GARDINER said there will be joint hearings, and like all joint hearings, work will not be done during the hearings. Members will take down questions and comments, and then the House Judiciary Standing Committee will have work sessions. A bill will not be introduced until next year; however, the tentative draft went through Legislative Legal Affairs and is laid out in bill form.

REPRESENTATIVE BROWN asked if Mr. Stern will be available during the work session hearings.

CHAIR GARDINER said he will attend every day.

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REPRESENTATIVE MILES asked for a short briefing on the philosophical changes that permeate the legislation, like sentencing and penalty policies.

MR. STERN said these things will come up as the members get into the material.

CHAIR GARDINER said it is esoteric until one sees how things are applied. Regarding sentencing, the Subcommission has not made a recommendation yet. Regarding classification, other than murder, there are class A, B, and C felonies and two classes of misdemeanors. The way the code is set up, it will be easy to offer changes, he noted.

MR. STERN said there will be an entire day discussing culpability. He turned to the commentary on page 21. He said that for each article of commentary, he highlighted some of the major changes, which covers the effect of the code on existing law. The first number refers to the use of culpable mental states in the code. He listed five of 20 terms that are used for mental states in the current code, and said they are not defined. He said he is referring to the mental state with which the actor must have in order to commit a criminal offense. For example, it is not sufficient that a person burned someone's house, the person had to know he or she was burning it. The culpable mental state is crucial in the code, because Alaska has a Supreme Court decision that considered the applicability of states of mind. The case he referred to is called "Campbell," and in that case the court considered a statute that did not require that the defendant act with a guilty state of mind, and the court held that such a statute is unconstitutional, and no conviction, with some exceptions, can be obtained.

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MR. STERN said the exceptions would be strict liability offenses, like pollution laws, for example. He said he believes there are a good number of statutes in current law that are subject to constitutional attacks. The revised code tries to clear that up, he stated, and it uses four terms for mental

states: intentionally, knowingly, recklessly, and criminal negligence. Those terms are defined on page 95, and there will be an entire day devoted to discussing them. Intentionally refers to a result from a conduct, for example, a person intends to cause serious physical injury. It also refers to conduct like intentionally receiving stolen property. That is the highest form of culpability in terms of proof, he explained. "You must show that the defendant acted with a conscious objective to do that—in other words, if he committed murder, it was his conscious objection to kill." He said the second term is "knowingly." He explained:

> Knowingly is the basic term we're using throughout the code. It is referring primarily to conduct—in other words, you knowingly receive property knowing it was stolen. Knowingly, in terms of receiving it—you knew you received it, and it's also used in terms of circumstances, for example, the property was stolen, so you knew it was stolen—that's the applicability of that. And in our definition we say that a person knows something if he is aware that his conduct is of that nature. For example, he knows that he is receiving or that circumstances exist [where] he knows that the property is stolen.

MR. STERN said the third term is recklessly, which refers to "the state of mind with respect to result or to circumstance, and it refers to an actor or defendant who is aware of a risk that either the result will occur or that circumstances exist, and he disregards that risk." He gave the example of recklessly causing serious physical injury where someone was aware that the conduct was dangerous but went ahead with it anyway. The person did not intend to cause serious physical injury but was aware that he or she might cause physical injury, he stated. The term refers to a substantial and unjustifiable risk that the result will occur or that the circumstances exist. The risk must be of such nature and degree that disregarding it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the same situation, he explained. He said the language is similar to Alaska's reckless driving statute.

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MR. STERN stated that if a person was unaware of the risks due to intoxication, it would not matter. The drunk driver will not get off under that definition, he added. The final term is criminal negligence, and it should probably be considered with recklessness. Recklessly is a subjective test. "You have to

show that the defendant was actually aware of a risk—that the results would occur or that circumstances exist." With criminal negligence, it is sufficient for liability that a reasonable person would have been aware, even though the defendant may not have had the awareness, he said. Criminal negligence is used as the culpable mental state in very few statutes, because the actor did not know that his or her conduct was going to cause injury, did not intend to cause injury, and was not even aware that the conduct might cause the injury. "He was just negligent, but it is something more than regular negligence." For tort liability, it is sufficient to show that a reasonable person would have been aware that the conduct was dangerous. Criminal law requires that the person act with more culpability other than mere civil negligence, he noted. "This is spoken to in the draft by requiring that the risk has to be a substantial and unjustifiable risk and it must be of such nature and degree that failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation."

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MR. STERN said the four terms are based on the four levels of culpability that appear in every code that he consulted. There is case law that interprets the term definitions. He reminded the committee that there are many such terms in Alaska's current code, and they are not defined. The Supreme Court has held that if a statute does not provide for one of those terms, it is unconstitutional, he added.

REPRESENTATIVE BROWN said he is curious as to why the matters relating to defenses and justification are placed right in the section that defines the crime rather than following the practice of having a separate title or subtitle relating to general concepts of justification. Maybe it is just a matter of style, he said, but it is easier to look at a short paragraph that defines murder, reckless homicide, manslaughter, and negligent homicide, and then have the general principles of justification, which should apply to all violent crimes. He said that was the pattern followed elsewhere.

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MR. STERN said, "I think we did follow that pattern; we do have separate ... on justification, which will include the defense of self-defense, defense of property, and peace officers using force." The various defenses that Representative Brown is

referring to are peculiar to the homicide provision. For first degree murder where a person acts in the heat of passion, it is a mitigation of the crime, he said. That doctrine is only applicable to the homicides, he stated. "As far as I'm aware," this follows the statutes that were consulted: Oregon and New York. If there is a defense that is peculiar to homicide provisions, it is put in that provision, he explained. If there is a defense that is applicable across the board, like self-defense, it will be in the general provisions.

REPRESENTATIVE BROWN asked where the matters are relating to the defenses that are unique to homicide; they are not under homicide.

MR. STERN said the defenses that are unique to homicide are within the actual homicide provision, and other states had the same. "I am not aware of any other state that had a felony murder defense in a general provision," he added.

REPRESENTATIVE BROWN said it is hard to read. When he glances at the definition of murder, it looks like it goes on for two pages, but when he reads it, he sees that the definition is only in the first part.

REPRESENTATIVE DANKWORTH spoke of the layperson or police officer being able to understand the law, which makes it important "that that defense be in there as you've got it." A lot of people get lost when there are references, he added.

MR. STERN turned to the next topic and said that the distinction between first and second degree murder has been eliminated. In current statute there are both, and first degree murder requires a person to act with sound memory and discretion, and purposefully, deliberately, and with premeditated malice. Those terms are not defined and the courts interpreted those words to mean nothing. For example, if a person forms an intent to kill someone one second before he or she does it, it can be considered premeditated malice, he noted. Additionally, the Subcommission concluded that in some circumstances a person who "does not necessarily intend to kill by thinking it over is not as culpable as a person that, for example, shoots into a train going by." The train shooter did not intend to kill and may not have thought it over, he or she just shot wildly, he surmised. So, the distinction between first and second degree murder based on premeditation has been discarded in most states. There is only one form of murder in the new code.

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MR. STERN said that the third change relates to felony murder. There is a famous Alaska Supreme Court Case involving a felony murder, "which holds a felon liable for all deaths occurring during the commission of a felony." It has been limited to certain violent felonies, like robbery. He gave the example of a bank robber accidentally killing a teller, and the felony murder rule holds the felon liable for first degree murder. The felony murder rule in current code comes from Ohio, which requires that the person is purposely killed during a felony murder, but the purpose of the felony murder rule is to deter people from killing accidentally. "Well our statute says you must do it purposefully, so essentially we do not have a felony murder statute," he said. The Supreme Court called upon the legislature [to rewrite the statute], and the Subcommission has done so.

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MR. STERN noted that the next change eliminates some overly specific statutes that are covered by more general provisions. It is done throughout the code, and he gave the example of a statute about charging someone with murder for obstructing a railroad of bombing an airplane. Such conduct is covered under the murder statute, and a separate statute is not needed, he said. Existing law also has a provision about a drunk doctor administering poison to a patient, which is also covered under the homicide statute.

REPRESENTATIVE BROWN asked about language referring to "procuring for a suicide of another."

MR. STERN said that type of conduct is called "aiding a suicide," and it is considered manslaughter.

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MR. STERN noted that there is a statute under existing law that prohibits dueling, but that is covered under murder or attempted murder and does not need to be a separate provision. Next, "we explicitly recognize the common law doctrine that [indisc.] is murder even though the defendant did not specifically intend to kill." He said that refers to conduct like shooting into a train knowing that there were people in it and someone dies. That is not in existing statutes, he explained, but it is now included in the definition of murder.

REPRESENTATIVE BROWN gave the explanation of "you don't know who you're killing, you just don't care who stays alive or dead."

MR. STERN said the law is not being changed, but the doctrine is being codified, which eliminates researching it. "If we have a doctrine that's recognized today, we might as well put it in the code," he said, and every other state has it.

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MR. STERN said the introduction emphasizes that criminal homicide only occurs when the defendant acts with a culpable mental state and without a justification or excuse. "You would think after 100 years of working with this existing homicide statute that it would be clear today to everyone that a person must act with a guilty mind, *mens rea*, to be guilty of homicide," he opined. If someone is just negligent and someone dies, the person may be liable civilly but not criminally. Some members of the Subcommission thought the code was too explicit and should not include things that everyone knows. He said that "culpable negligence" is defined to require acting with gross deviation from the standard of care that a reasonable person would exercise, and "negligent homicide" is defined to require acting with criminal negligence. He noted a recent case where the judge decided that negligence was sufficient, so it is being put in the code to remind everyone that criminal negligence is the minimum.

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MR. STERN said that the revision codifies the common law doctrine that killing in the heat of passion mitigates the murder to manslaughter. Those are the policy highlights, he concluded, and the concept of murder was not really changed.

REPRESENTATIVE BROWN said this is relatively conservative codification. He asked the difference in saying something is a defense, is an affirmative defense, or is something a person may not be convicted of.

MR. STERN said there are three types of defenses in the revised code. The first is the defense that a person did not commit one of the elements of the crime. For example, theft requires that a person takes property, so if the prosecution cannot prove that, there is no conviction. The second defense is recognized, but the prosecution is not required to prove the absence of the

defense until the defendant raises it. Most homicides, for example, involve an issue of self-defense. If there is a case and the only evidence is an intentional killing and there is no evidence that there was self-defense, the prosecution has proved its case, he said. The defendant has the burden of injecting the issue; the prosecution is not required to disprove self-defense unless the defendant brings it up, he explained.

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MR. STERN said the prosecution has to disprove, beyond a reasonable doubt, every element of the defense. If the defendant raises a reasonable doubt as to whether he or she took property, the defendant gets off. For self-defense, the prosecution does not have to worry about proving that the killing was not in self-defense if there was no evidence to show that it was. It is a procedural type of a burden, he said, if the defendant does not bring up some evidence of self-defense, the state has proven its case.

MR. MILES said he does not understand.

CHAIR GARDINER reiterated the concept.

REPRESENTATIVE BROWN said there are two sections that say "it is a defense" ... and in another section, it says "it is an affirmative defense."

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CHAIR GARDINER returned to the concept about self-defense.

REPRESENTATIVE BROWN explained that if the defendant never raises the issue of self-defense, it is not there.

MR. MILES asked why a defendant would not raise the issue.

CHAIR GARDINER said, "We just don't want to unnecessarily have the prosecution disprove" what the defense does not want to raise. It is up to the defendant. He noted that this is not changed by the new law.

MR. STERN said the affirmative defense is new to Alaska law. The defendant must raise the defense and the prosecution does not have to disprove the defense unless it is raised. Once the defense is raised, the defendant has to prove the defense by a preponderance of the evidence, so the burden of proof shifts to

the defendant, he explained. For example, the provision on felony murder holds a felon liable for any death occurring during the commission of a violent felony. Numerous commissioners agreed that sometimes it is unfair to hold the felon liable if the murder was done by an accomplice. For example, if a person robs a bank and accidentally shoots a teller, the robber will be responsible for first degree murder. If two people rob a bank and one of them shoots the teller and the other person did not even know the shooter was armed, the law allows that person to get off, but the burden of proof is on the defendant and it is by the preponderance of the evidence. "We'll let you get off, but you have to prove it by a preponderance of the evidence," he stated. The person getting the affirmative defense has to establish all of those facts, he said, like proving that he or she had no gun and did not know the other person was armed.

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MR. STERN said the affirmative defenses in the code are limited; there may be seven or eight. The Subcommission concluded that the affirmative defense was constitutional.

REPRESENTATIVE BROWN summarized what Mr. Stern said.

Adjournment

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