STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
SENATE JUDICIARY STANDING COMMITTEE
February 22, 1977
JOINT PUBLIC HEARING
From tape b32r07-02-JJUD-770222

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

BARRY JEFFREY STERN, Staff Counsel
Criminal Law Revision Subcommission
Alaska State Legislature
Juneau, Alaska

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Office of the Attorney General
Department of Law
Juneau, Alaska

^Draft Criminal Code Revision Review

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CHAIR GARDINER noted that the members of the joint meeting of the House Judiciary Standing Committee and the Senate Judiciary

Standing Committee were discussing the homicide provisions of the draft criminal code revision at the end of yesterday's meeting.

BARRY JEFFREY STERN, Staff Counsel, Criminal Law Revision Subcommission, Alaska State Legislature, noted that he had also covered the highlighted changes from Alaska's current statutes to the draft criminal code revision.

REPRESENTATIVE RUDD asked for the meaning of "a person commits criminal homicide if ... without justification or excuse."

UNIDENTIFIED SPEAKER said that is fairly traditional language in homicide statutes. Justification would constitute something like self-defense and excuse would constitute something like insanity.

MR. STERN said murder can be committed three ways under the revised code. The first is intentionally causing the death of another person, he stated. "In addition we included the knowing conduct here, which is knowing that the conduct is substantially certain to cause death or serious physical injury to another person and causes the death of another person." He stated that if either can be proved, the person committed murder. The language takes the place of "sound memory, discretion, purposefully, deliberate, premeditated malice" in current law, he said.

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MR. STERN said murder can also be committed when someone "recklessly causes the death of another person under circumstances manifesting an extreme indifference to the value of human life." He gave the example of a person shooting at a passenger train or of someone driving at a high speed near a school yard and running down a child. That would be considered worse than reckless, he stated, it would be with extreme indifference to the value of human life. The third way a murder can be committed is as a felony murder, and this provision is different from the language in existing law. The new language eliminates the requirement that the murder be intentional, he explained. This provision provides that when someone attempts to commit arson in the first degree, kidnapping in the first degree, forcible sexual assault, burglary in the first degree, escape in the first or second degree, or robbery in any degree, and someone (other than the participant) is killed during the commission of that crime or in immediate flight from that crime,

it will be murder. This was debated substantially, he said. He gave the example of a teller having a gun during a robbery and shooting at one of the robbers. If the teller misses and kills a bystander, should the felon be responsible for that death? The Subcommission decided that, yes, the felon should be liable for any death that occurs. He noted one exception, which is when one of the accomplices is killed. For example, if the bank guard shoots one of the accomplices, the other felon should not be liable for felony murder, he stated.

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MR. STERN responded to a question by Representative Dankworth by saying that in recent years the felony murder rule has been substantially limited in most jurisdictions. It has been criticized as placing liability on a felon for circumstances that are totally unexpected, he explained. The one limitation that the Subcommission kept was very small: when an accomplice is killed the other robber will not be liable for murder. He stated that it was just a value judgment.

REPRESENTATIVE DANKWORTH surmised that if anyone other than a police officer shoots [the accomplice], the other will be liable for murder.

MR. STERN said that is not correct. If the co-felon dies, the other felon will not be responsible. Felony murder has to involve the death of someone other than one of the participants, he stated. Some states have limited the felony murder rule that a killing has to be caused by one of the accomplices—the felon has to pull the trigger that caused the death of the teller [or other person]. The Subcommission did not agree with that point of view, he said, although there was debate. So, under the revised code, the death does not have to be caused by the accomplice—it could be caused by the bank guard accidently shooting the teller, for example.

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MR. STERN said the Subcommission also broadened the category of underlying felonies. Under existing law, for example, escape is not included as a felony sufficient to trigger this rule—it is now included, he said.

REPRESENTATIVE MILES asked the difference between first and second degree burglary.

MR. STERN said first degree is a burglary involving a dwelling where a person is likely to be. Second degree would be burglary of a warehouse, for example.

REPRESENTATIVE MILES asked why the [felony murder rule would not apply] if someone was killed while a person was burglarizing a warehouse.

MR. STERN said the purpose of the felony murder rule is to.... There are three ways a murder can be committed: intentionally, recklessly, or under the felony murder statute, he said. If in committing the burglary of the warehouse, the felon intentionally killed a person, he or she would be guilty of murder.

REPRESENTATIVE MILES asked how one proves the recklessness with extreme indifference....

REPRESENTATIVE BROWN said if a person threw open the door of a place where there was likely to be 25 human beings and fired a shotgun without looking, not pointing at anyone in particular and no general motive to kill any one of them, that would certainly be conduct that would fit.

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UNIDENTIFIED SPEAKER said it is a factual question for the jury. Another example would be dropping a boulder off of a building into a crowd.

REPRESENTATIVE BROWN stated that a good example of the felony murder rule relates to the kidnapping and death of the child of Charles Lindberg. At that time, kidnapping was only a misdemeanor, "or something like that," and the offenders were charged under the felony murder rule because there was no clear evidence of how the child died.

MR. STERN said the purpose of this statute is to hold the felon liable for any death that results regardless of whether it was culpable. The death could be totally accidental, he explained.

REPRESENTATIVE BROWN said it was his understanding that the felony murder rule pertains to actions that the offenders are taking to commit the offense.

MR. STERN said that the main point is that Alaska has repudiated the "Gray ruling."

REPRESENTATIVE DANKWORTH asked about someone breaking into a cold storage plant and forcing the guard into one of the freezers with the belief that the guard will likely get out, but the guard freezes to death. "Would that be reckless? Is that murder?"

UNIDENTIFIED SPEAKER said yes.

REPRESENTATIVE DANKWORTH asked how that is consistent since there is no intent to kill. It would be reckless but not necessarily with extreme indifference to the value of human life, he added.

UNIDENTIFIED SPEAKER said a reasonable person in that circumstance would know that the conduct will potentially cause death, and it is arguable to a jury. Any reasonable jury would see the conduct as having extreme indifference to human life, he stated.

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REPRESENTATIVE DANKWORTH said, "You had a lot of trouble, I guess, just saying that ... when you go out and commit a felony be aware, because if you kill somebody in the commission of a felony or they get killed, you are guilty of murder."

MR. STERN said he believes that this is the way that most felony murder statutes are phrased. He said he has not seen another formulation. The felony murder rule, even in Alaska, is limited to a very few felonies—those involving a potential for violence, he added. The purpose is to deter a person from committing one of those felonies.

REPRESENTATIVE DANKWORTH asked what the jury's prerogative will be. "If they don't find 1, can they find 2?"

UNIDENTIFIED SPEAKER said, "You could charge alternatively [indisc.]."

MR. STERN said, "Manslaughter is defined as intentionally, knowingly, or recklessly causing the death of a person under circumstances not falling under the murder situation. So, manslaughter is a catch all."

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MR. STERN said the code is based on four terms—the four culpable mental states that have been discussed. There will be a better example when discussing assault, he noted. Murder could be done recklessly under circumstances manifesting extreme indifference to the value of human life. If only recklessness is proved, the person will be guilty of a lesser included manslaughter. If it was not done recklessly (being aware of the risk), but with criminal negligence (not being aware of the risk), the person will be guilty of criminally negligent homicide.

REPRESENTATIVE DANKWORTH asked if the burden of proof was on the state—to prove what the person was thinking. [Indisc.]

UNIDENTIFIED SPEAKER said it is not important that the defendant had any regard or disregard for human life, it is only important that when viewed objectively, the circumstances manifested an extreme indifference.

MR. STERN said it is an objective standard—"a reasonable man test."

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MR. STERN said Section B is the codification of "heat of passion," which has been recognized in existing law but not codified. Killing someone [while experiencing] emotional disturbance or some type of traumatic event, is not murder; it is treated as manslaughter. In a prosecution under (a)(1), which is intentional killing, it is a defense that the defendant acted in the heat of passion before there had been a reasonable opportunity for the passion to cool. "You can't go home and think about it for a few days and then go back and kill the guy," he said. It is when someone's reflection is not what it would normally be, and the provision specifically provides that the heat of passion must result from a serious provocation by the intended victim.

UNIDENTIFIED SPEAKER said this language eliminates two arguments that occasionally arise at homicide prosecution trials where the defense asks for an instruction on manslaughter on the theory of serious provocation. It refines serious provocation to eliminate insulting words, gestures, and other things, he stated. A defendant is going to argue that under the circumstances of a given case, the [provocation] was sufficient, and now that will not be possible, he opined. Secondly, it eliminates the possibility of a serious provocation instruction where there has been a cooling off period. "Judges are inclined

to give instructions, I can tell you," and a compromised verdict is always going to be possible, he noted. There is a lot of value to codifying this kind of defense, which comes up in almost every murder prosecution, he added.

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UNIDENTIFIED SPEAKER asked about a rapist provoked by a low-cut dress who kills his victim, "and he was certainly in the heat of passion."

MR. STERN said there has been a case like that. The heat of passion term is a common law term, and the Subcommission determined that the term will be understood by judges and juries. It is not limited to sexual passion. "I don't see it as including that at all. It might come from a result of sexual ... but it doesn't imply that he was sexual aroused and he killed."

CHAIR GARDINER said it may be the other way around. The woman might kill her rapist in the heat of passion.

MR. STERN said that is a very good example.

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MR. STERN said there was a case in Oregon where a man was raping a woman and she resisted. He claimed that was a serious provocation to kill her. "It was thrown out, of course," he added. He turned to Section C, which is a limitation on felony murder, but not a strong one. He gave an example of two people robbing a bank, and one of the felons is armed with a deadly weapon. The other is not armed and had been assured that there would be no weapons and no one would be hurt. If the armed felon kills someone, Section C creates an affirmative defense to felony murder for the other robber. The defendant has the burden to prove all the factors, he added. All other codes that were consulted also had such a provision. The person would still be responsible for the robbery, he clarified.

UNIDENTIFIED SPEAKER said it might be worth noting that the commentary and the proceedings of this hearing will become part of the law and will be available to researchers.

MR. STERN said staff went through every Oregon case that has come out since Oregon's revised code was passed in 1973 to try and find problem areas and to see how it was working. Mr. Stern

found that in a few cases the [hearings on the] commentary were referred to, and sometimes even the commission hearings were studied. "So what we are establishing is a record in interpretation of this code when it passes," he stated. He added that the previous lack of records has hurt the state, immensely, in the administration of criminal justice. No one really knows why something [in current statute] was passed.

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MR. STERN turned to Section D, which only applies in one circumstance. If a person decides to kill someone by breaking into a dwelling in the heat of passion, he or she will not be liable for felony murder (for a death occurring during a burglary). It is a complicated section, and he offered to make a memorandum available that was written for the Subcommission.

UNIDENTIFIED SPEAKER said that he believes it is a necessary provision, and it eliminates any constitutional questions surrounding the issue that Mr. Stern touched on.

REPRESENTATIVE RUDD asked how long the heat of passion can last.

MR. STERN said he has not researched it but assumes it could last a few hours or a day. "The closer [the killing] is to the actual provocation, the more credible the story's going to be."

REPRESENTATIVE BROWN said it is up to the jury to determine.

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MR. STERN said courts have held that such a situation is not appropriate for a felony murder, and "we're just putting it in the statute so we won't have to have an appeal on it someday." He turned to Section E, aiding a suicide. This provides that it is a defense to a charge of murder if the defendant's conduct constituted aiding, without the use of duress or deception, another person to commit suicide, he explained. Forcing someone to commit suicide is murder, he clarified. He said that an example of deception might be someone forming a suicide pact when he or she had intended for only the other person to die.

REPRESENTATIVE BROWN stated that, "You can't look up in your draft—you can't look up manslaughter and find out what constitutes manslaughter. You've got to go ahead and find out what essentially is a homicide that doesn't amount to murder, which means then you read 11.41.120 and imagine what the

negative of everything of these two pages is, and that's where you find the thing ... with regard to causing the suicide or procuring the suicide of another." He asked why Mr. Stern used the double negative to define manslaughter.

MR. STERN said he started out doing it the other way of listing the situations. The Subcommission said it would be easier and more consistent to describe [manslaughter] this way.

REPRESENTATIVE BROWN asked if Mr. Stern agrees with the Subcommission.

MR. STERN answered that it is consistent with existing statute and is a better way to define it. "If all you've proved is reckless, and you don't prove the circumstances manifesting in an extreme indifference to the value of human life, it is manslaughter. It's a good lesser-included," he explained. Most judges and attorneys are familiar with the way the provision is formulated now. "Where ever we can be consistent with existing law, we try to be," he added.

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REPRESENTATIVE BROWN said it seems to be drafted to anticipate only the situation of a lesser-included offense. There is a great incentive for a prosecutor to charge a person with murder, which could result in a "hideous" injustice, rather than manslaughter, simply because it will be difficult for the judge to give jury instructions, he opined. If a person is charged only with manslaughter, the jury instructions will be, "Hey jury, manslaughter is all the kinds of homicides that aren't murder defined by this two-page statute and criminally negligent homicide." It would be easier to tell the jury that manslaughter is A, B, C, or D, he added.

MR. STERN reiterated that the draft started out that way.

CHAIR GARDINER said the Subcommission probably spent as much time on this one issue as any other three pages in the code. There are two Supreme Court cases where the legislature is requested to clean the language up.

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MR. STERN said most of the murder provision deals with felony murder. He turned to Section F, which defines the terms that are used in the heat-of-passion provision, and then criminally

negligent homicide, which is a situation where a person is not aware of the risk, but the risk is there, and there is a gross deviation from the standard of care that a reasonable person would exercise in that situation. There is a separate crime of criminally negligent homicide in the code, but it is punished as manslaughter, "and that's what got the judge in trouble with the case that we discussed yesterday where he didn't instruct on culpability."

REPRESENTATIVE BROWN asked if the prosecutor almost always attempts to charge manslaughter on the reckless culpability level and end up with a trial that has jury instructions that will tell the jury this if they did not find that level of culpability [indisc.]. He gave an example of reckless driving while intoxicated.

MR. HICKEY opined that, [with the revision], there will be offenses charged as criminally negligent homicide that are not now charged with homicide.

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[Indiscernible discussion]

REPRESENTATIVE BROWN asked for an example.

MR. HICKEY gave the example of a large, poorly loaded truck with heavy lumber and the driver participated in the loading and knew it was loose and the load shifted and killed someone. In response to Representative Brown, he said that those facts would not give rise to a negligent homicide charge under current statute. It does not meet the standard of negligence as interpreted by the Supreme Court in terms of defining the phrase "culpable negligence."

[Indiscernible discussion]

MR. STERN said, based on his reading on how the Supreme Court has looked at the culpable negligent standard that is used today in the negligent homicide statute, a person could make the argument that the conduct would be covered, even today, but it sure is unclear. He said this discussion will come up later. He stated that it will now be clearer that that type of conduct is chargeable.

CHAIR GARDINER noted that when the Supreme Court makes a decision they often look at other state rulings, and since other

states have had revised codes, the decision would use these definitions of culpability even though Alaska was not using them at the time.

MR. STERN said the important thing to emphasize is that such a process requires an appeal and takes a lot of time. The new code is setting it out so the Supreme Court will not have to do the research.

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CHAIR GARDINER said his point is that the court is looking at codes similar to the revised code to interpret Alaska's existing law.

MR. STERN noted that for a Supreme Court case he mentioned yesterday, the Court looked at Oregon's revised code and said it liked how Oregon dealt with culpability, for example.

REPRESENTATIVE MILES noted that the proposed code sets out a term not to exceed 99 years, and current law says 20 years to life. There is now no minimum, he offered.

CHAIR GARDINER said the Subcommission has not made a final recommendation on sentencing. A proposal that the Subcommission worked on last year took all sentences "and went zero to whatever the max was." Murder was set apart from the three classes of felonies as a policy decision. "If there are people that you have to put away because they're such a threat to society, certainly these are a few of the people, but, also, there are all different variations of murder cases, and that is why you end up with such a wide range." He noted that there is less recidivism with murder offenders; however, there are people who are professional killers.

REPRESENTATIVE MILES asked if murder is the only offense in the criminal code that does not fall under the class A, B, or C felony.

CHAIR GARDINER said yes, and it is a simple thing for the legislature to change. Sentencing was set aside because of all the work that is being done on presumptive sentencing, he noted.

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REPRESENTATIVE BROWN opined that a minimum sentence does not mean anything because a judge can always suspend a sentence.

[Indiscernible discussion]

CHAIR GARDINER noted that yesterday the committee went through policy issues that the Subcommission addressed and then went back through, section by section. He asked how the committee wanted to proceed.

MR. STERN said that by first addressing the policy issues, the discussion can cover existing law.

CHAIR GARDINER said it seemed like things were covered twice.

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MR. STERN said the Subcommission created four degrees of assault based on the offender's culpable mental state, the seriousness of the injury inflicted, and the dangerousness of the means used to commit the assault. He stated that existing law does not define an assault but it lists 28 ways an assault can be committed. For example, existing law has specific provisions for cutting off the nose, ear, or lip; cutting out or disabling the tongue; and throwing or pouring upon another hot water or a corrosive substance. He gave several other examples and said there is no consistency in language or policy. One statute uses the term dangerous instrument, while the others use dangerous weapon, he said.

MR. STERN noted that there are four degrees of assault and the salient point is whether the result was physical injury or serious physical injury. "Physical injury" is physical pain or impairment of physical condition, and "serious physical injury" means physical injury which creates a substantial risk of death or which causes serious and protracted disfigurement, protracted impairment of health, or protracted loss or impairment of the function of a bodily organ, or physical injury which unlawfully terminates a pregnancy.

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MR. STERN said the fourth degree of assault can be done intentionally, recklessly, or with criminal negligence. A deadly weapon is something specifically designed for and capable of causing death, primarily a firearm, loaded or unloaded. That is one of the problems with existing statute, he said. In order for there to be assault with a dangerous weapon, the prosecution must prove that the firearm was loaded. That has been changed,

he stated. Criminal negligence is the lowest form of culpability, and the offender also has to use a deadly weapon or dangerous instrument to be guilty. Third degree assault deals with serious physical injury, and it can be caused in two ways: criminal negligence with a deadly weapon or a dangerous instrument or recklessly by any means, he explained. This statute will primarily be used to cover a drunk driver hitting but not killing someone. That would be a third degree felony assault, he noted. Under existing law, it could be argued that a person who acts recklessly has not committed an assault, regardless of the injury, he added. He said a number of attorneys has spoken to him regarding this....

REPRESENTATIVE BROWN said, "Well I had a section, didn't I Mr. Hickey, and it didn't fly." It would have taken care of what Mr. Stern is talking about, he added. It was "reckless battery," which was straight out of the model penal code, and it did not fly, he stated.

MR. STERN said this has been argued in a good number of trials whether recklessness is sufficient, "and no one really knows." With the new code it will be set out that recklessly is sufficient for an assault. "In other words, you don't have to intend to do it."

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MR. STERN said second degree assault is when a person intends to cause serious injury while using a dangerous instrument, regardless of result. "If I pick up a baseball bat and swing it at someone, I don't have to cause any injury. It doesn't matter." It is equivalent to existing statute, he stated. He noted that second degree assault also covers the situation where a person causes serious physical injury acting with intent. That is similar to Alaska's aggravated assault statute that passed last year. It has been interpreted to require just a general intent to cause some injury but serious injury results. Second degree also occurs when a person acts recklessly using a deadly weapon.

MR. STERN said first degree assault is a class A felony, and it occurs when a person is using a deadly weapon regardless of result, so it can be shooting a gun at someone and missing. It is identical to the second degree crime except that a deadly weapon is used rather than a dangerous instrument, he explained. If a person acts with intent to cause serious physical injury and does, it is first degree assault. This strengthens the

aggravated assault statute, because under existing law aggravated assault only has a five-year maximum [sentence].

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MR. STERN added that there is a reckless type of first degree assault, and it is similar to the murder statute recently discussed using the phrase, "recklessly under circumstances manifesting an extreme indifference to the value of human life." If a person shot a gun into a crowd without intending to kill and seriously injured someone, that would be first degree assault, he said.

REPRESENTATIVE BROWN noted that Alaska does not have anything other than assault provisions involving intentional culpability.

MR. STERN disagreed. Alaska has no statute that specifically uses the term "recklessly," but if there was an appeal and the state argued that assault can be committed recklessly, Mr. Stern said he believes that the state would win.

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MR. STERN, responding to Representative Brown, said he does not believe that Alaska statutes really address themselves to the situation. For example, the assault and the assault and battery provisions say "unlawfully assaults another." It is up to the Supreme Court to determine what an unlawful assault is, he stated.

MR. STERN said, "I think this makes it very easy." At first glance, there are a lot of concepts presented, but they are like building blocks, he said. "Did he cause serious physical injury? Did he act with a deadly weapon or a dangerous instrument, and what was his culpable mental state?" There is nothing like this in existing law, he noted. He announced that there is one other crime called simple assault:

> A person commits a crime of simple assault when he intentionally touches a person with reckless disregard for the offensive, provocative, injurious, or insulting effect which the act may have on that person.

MR. STERN said that a mere touching under existing law is an assault, but a person has to go into the case law to figure that out. This provision covers unconsented touching, including sexual touching, like slapping someone's buttocks. "I believe

it is covered under existing law; it's just not explicit," he added.

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REPRESENTATIVE DANKWORTH asked why "dangerous weapon" is used instead of just using "dangerous instrument."

MR. STERN said the Subcommission determined that acts with something like a baseball bat are not as serious as ones with a weapon—something specifically designed to cause death.

CHAIR GARDINER said there are two things working at once: the result of the act and the instrument used to commit the act. It makes it complicated, but the Subcommission considered the threat to the public. "That's what we were concerned about was violence, and the more violent you're being the more seriously we ought to treat that." Someone going around with a gun is potentially a lot more dangerous than a person walking around with brass knuckles, he opined. In response to a question, Chair Gardiner said that the problem with walking around with an unloaded gun is people's response to it; it escalates the situation when people start flashing guns and knives around.

REPRESENTATIVE DANKWORTH said it would have saved time to have just called everything a dangerous instrument.

MR. STERN said that when letters start coming in from the attorneys and judges, "then we might find that's the feeling." He added a deadly weapon means any firearm, loaded or unloaded, or anything designed for and capable of causing death or serious physical injury, including but not limited to a knife, ax, club, metal knuckles, explosive, or any weapon from which a shot capable of causing death or serious physical injury may be discharged. The definition is broad, he opined.

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CHAIR GARDINER said the Subcommission discussed whether a paper airplane that injures a person's eye is a dangerous weapon.

MR. STERN said there are two other types of conduct classified as assault. Assault in the fourth degree is when a person, by word or conduct, intentionally places or attempts to place another person in fear of imminent physical injury. In existing law it is referred to as frightening another person. An example

is someone threatening to punch another, he said. The important thing is the intent of the actor.

REPRESENTATIVE BROWN gave an example of someone [half his size] making threatening remarks to him that unreasonably frightens him.

CHAIR GARDINER said it is not based on your fear; it is based on the intent of the [person making the threat].

MR. STERN said the topic is covered in detail in the commentary. It would cover a situation "where you apprehend a danger but do not fear it, or the actor's conduct is such that it would cause fear in a reasonable man, but the intended victim is aware that the actor will not inflict [indisc.]."

REPRESENTATIVE BROWN said that definition means that he witnesses constant assaults when he is on the streets of Juneau, Anchorage, or Fairbanks.

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MR. STERN said this broadens the existing statute, which states that [the offender] must be capable of causing the injury. He added that the conduct becomes assault in the second degree if done with a deadly weapon or dangerous instrument. He turned to reckless endangerment and said it is not covered adequately in existing law unless it occurs [with a firearm]. The crime of reckless endangerment is recklessly engaging in conduct that creates a substantial risk of serious physical injury to another person. He gave the example of shooting off a gun or projectile device that is landing on someone's lawn, but no one is injured.

REPRESENTATIVE DANKWORTH asked if acid or boiling water is an instrument.

MR. STERN said the definition includes anything that, under the circumstances, is capable of causing serious physical injury.

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CHAIR GARDINER discussed the scheduling of the criminal code revision work.

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ADJOURNMENT