STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
SENATE JUDICIARY STANDING COMMITTEE
March 15, 1977
JOINT PUBLIC HEARING
From tape b32r09-06-JJUD-770315

MEMBERS

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
POSITION STATEMENT: Presented an overview of the draft criminal code revision.

^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. He announced that the only order of business would be

a review of the draft criminal code revision, and he noted that the committee was on page 3 of book 2.

BARRY JEFFREY STERN, Staff Counsel, Criminal Law Revision Subcommission, Alaska State Legislature, Juneau, Alaska, said Page 3 covers Principles of Criminal Liability. It is one of the general sections that applies throughout the code, and it is about culpability. There really is no existing law on this topic, he explained. There are no general rules of culpability that apply, and there is a haphazard approach. Page 13 of the commentary gives a partial list of the different types of criminal intent used in existing law. None of the terms are defined, he added, and there are no rules of construction as to how the terms apply in statute. In the revised code there are four terms: intentional, knowingly, recklessly, and criminal negligence. Consistency makes the new code easier to use, he opined, and it will make it easier to give instruction. Additionally, this is one of the most important areas of the code, he noted. In 1975, the Alaska Supreme Court had a case where a statute did not require that the offender act with a guilty mind because the requirement of culpability was inadvertently left out. The case was "Campbell," he said, and the statute was ruled unconstitutional because it did not have culpability. The court cited the Oregon and New York revised codes as demonstrating "uniform sensitivity." The inconsistency presents substantial problems in the interpretation of Alaska statutes, he stated.

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MR. STERN said that this is one point where he takes issue with the comments of [Judge Moody and Judge Peterson] as to why Alaska needs a new criminal code. "We have to go through each statute and consider each culpable mental state because this haphazard approach applies throughout the entire code," he explained. "We're fixing each statute as we go along." He noted that a person who acts with criminal negligence will usually be less guilty than one who acts intentionally, so the decision has to be made about where to apply criminal negligence for a crime or when recklessness is enough, for example. Based on the four culpable mental states, "you could set up a pretty easy degree structure," he added. Assault, for example, has the four culpable states, and the seriousness of the offense is based on them.

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UNIDENTIFIED SPEAKER asked if the committee has already gone through this topic.

MR. STERN said, yes, the first day of the hearings.

CHAIR GARDINER said the group "pretty much went through" the definitions of the culpable states.

MR. STERN said a person is not guilty of an offense unless there is a voluntary act, which is the most basic principle of criminal law. A person is not guilty of an offense unless acting with a culpable mental state with respect to each element of the offense that necessarily requires a culpable mental state, he added. He explained that there are certain elements of the offense—such as it must occur within the jurisdiction of the state—that have no bearing on criminal liability. Exceptions [to requiring a culpable mental state] include statutes that impose strict liability whereby the person is guilty of the offense regardless of whether he or she had knowledge of doing it. An example is pollution laws: if someone pollutes there may be a decision to find that person guilty whether or not the person knew about it. He gave the example of a person not knowing he or she discharged petroleum from a ship.

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MR. STERN noted that he spoke previously of a legal case called "Campbell," and strict liability is referred to in that case. The legislature has the power to create offenses of strict liability, he said. Another exception [of the requirement of a culpable mental state] concerns violations. He said that a violation is a noncriminal offense that is enforced criminally but without criminal penalties. It would be in the criminal code, however, and he gave the example that [possessing] marijuana is now considered a violation. If there is an offense without criminal penalties there is no requirement to act with a guilty mind.

CHAIR GARDINER said the Subcommission has not classified anything as a violation so far.

MR. STERN said he recalls a recent draft with a violation, but it might turn out that there will be no violations in the code. He said Section 2 says:

> No culpable mental state must be proved with respect to a particular element of the offense if an intent to dispense with a culpable mental state requirement clearly appears.

MR. STERN gave the example of engaging in sex with a person under 13 years of age. Under the rules of culpability, it would seem that the person would need to know the age of the child, but there is a specific statute that says that it does not matter if the offender knew.

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MR. STERN turned to the next section, which is an introduction to the use of the terms of culpability. It goes on to say that when one and only one such term appears in the statute defining an offense, it is presumed to apply to every element of the offense unless an intent to limit its application clearly appears. He explained that the three elements of an offense are the conduct, the circumstances, and the result. For example, one type of unlawful imprisonment requires the restraint of a person (the conduct) without consent (the circumstance) and exposing the person to a risk of serious physical injury (result). He expressed that this area of the code is difficult [to understand] when looking at it for the first time, but it is better than the approach in Alaska's existing code.

REPRESENTATIVE MILES asked if it is risky, from a legal standpoint, to say that if only one term appears in the statute defining an offense it is presumed to apply to every element.

MR. STERN said it is simpler to say it once, and it makes the statute shorter. He does not see any problem, but it is important to consider how it applies when looking at a statute.

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REPRESENTATIVE MILES referred to the statute involving sexual penetration with a 13 year old and the offender says he did not know the child was 13.

MR. STERN said that statute has a specific provision where culpability does not matter. "In those circumstances where we want to throw out the requirement that he knows that a circumstance exists, we put it in there, clear as day."

REPRESENTATIVE MILES asked about the commission of an armed robbery where someone is shot but the offender did not know the gun was loaded.

MR. STERN said every revised code has the same rule and it is pretty basic. He said he has looked at every Oregon case, and he has not found any case where the rules of culpability resulted in an appeal, which is very interesting.

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MR. STERN said the defined terms will make jury instructions easier.

CHAIR GARDINER agreed that the Subcommission looked at how the Oregon revised code was working. He said there was one problem that turned up.

MR. STERN said it had to do with kidnapping. Oregon code used the term "terrorize" with regard to the treatment of the victim. Terrorizing implies a ghoulish intent, he said, like wearing a horror mask, so the Alaska code uses "put in fear of."

CHAIR GARDINER spoke of those who worry about the revised code causing litigation, and he pointed out that this was the only problem that came up with the Oregon revised code.

MR. STERN said, in response to an inaudible comment, that a judge in Oregon said there have been appeals over interpretation, "but nothing that we can't handle." In the last three or four years there have been ten states that have revised their codes, and Mr. Stern is not expecting excessive problems.

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EXCESSIVE STATIC AND INAUDIBLE

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MR. STERN turned to the next section, which was discussed yesterday. He said, "Even if we don't require culpability, it's required anyway." [Indisc.] Criminal negligence is not sufficient; it has to be at least recklessness, he said. Criminal negligence is the lowest form of culpability, "and we don't want to impose it unless it's pretty serious, like negligent homicide." The next provision is useful and it provides that if there is an offense that requires one culpable

mental state and it is proven that the offender acted with a higher culpable state, he or she is still guilty of the offense. If there is a criminal negligence statute, for example, and the offender acted with recklessness, "you've got him," he explained, but the opposite does not apply. The next section covers the effect of ignorance or a mistake on liability, and it provides that the knowledge that the conduct is an offense is not an element of the offense—"you can't plead ignorance," he explained.

MR. STERN turned to the next provision. He said that a person is not relieved of criminal liability for conduct because he or she engages in the conduct under a mistaken belief of fact unless the factual mistake negates the culpable mental state required for the commission of the offense. For theft, a person must have the intent to defraud the owner of the property, so if a person mistakenly picks up someone else's coat, it is not theft. The next section provides that a mistake may be a defense if the statute defining the offense provides that a factual mistake constitutes a defense or exemption. He gave the example of when the victim of a statutory rape is under the age of 16 and over the age of 13, a reasonable mistake as to the victim's age would be a defense.

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MR. STERN turned to the topic of justification. He said that under existing law, a homicide is justifiable by a police officer when arresting a person who has committed a felony, but just a reasonable belief that the person committed a felony is not sufficient. A reasonable mistake when acting in self-defense or when making an arrest is OK, because it is built right into the statute, he said. In other words, a person has a right to act upon appearances when being threatened with physical force. "If you happen to be wrong, it's OK, as long as your mistake was a reasonable one," he explained. He turned to intoxication as a defense, which is basically a restatement of existing statute. He said intoxication is not a defense to a criminal charge unless the intoxication goes to show that the person is not forming the intent that is required. For example, theft requires an intent to defraud, and if a person mistakenly takes a coat when drunk, the person has not acted with intent to defraud.

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[Inaudible question]

MR. STERN said it is not a defense to say that a person is not guilty of an offense because he or she was drunk. Drug use is not always a defense because there may be conduct where a person acts recklessly. If acting recklessly, a person has to be aware of the risks and disregards them, like a drunk driver, he stated. It is a defense when the person has to act with a specific intent, like intending to cause serious physical injury to someone, but it is not a defense when all that is required is recklessness, he explained. He said that without that section, a drunk driver could say that he or she was not aware of the risks to begin with, and recklessness requires an awareness of the risk.

[Inaudible comment]

MR. STERN said that with criminal negligence, the person does not have to be aware of anything.

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[Inaudible comment]

MR. STERN stated, "In that circumstance we're saying it doesn't matter whether he knew or not when the person is under 13."

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[The audio turned to static]

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CHAIR GARDINER announced that the committee is on Page 39 [of Book 2 of the draft criminal code revision].

MR. STERN referred to three circumstances that he had talked about with regard to a person provoking an attack or engaging in mutual combat. "What about the situation where the person wants to get out of the combat but the person keeps beating him up?" In those circumstances where the person withdraws from the combat and asks the other to stop, the person is justified in using force in self-defense, he said. Deadly physical force is used pursuant to line 22, under "circumstances when you reasonably believe it necessary to prevent the use of unlawful physical force while the other person is committing or attempting to commit kidnapping, robbery, or sexual assault," he stated. When the only thing being threatened is physical force,

a person can only use physical force in self-defense; however, if physical force is being used against someone during the commission of the aforementioned crimes, he or she could use deadly physical force. A person who is being raped can use deadly physical force to prevent it, he clarified.

MR. STERN stated that deadly physical force can be used in response to deadly physical force, like a person shooting a gun toward someone or coming at them with a big club. He said that the duty to retreat is a doctrine in common law that says that if a person can avoid using deadly physical force with an obvious safe retreat and the person is not in his or her residence, the person is required to do so. There have been variations of that, he stated. In Alaska there is no specific duty to retreat; however, pre-statehood decisions have held that the use of force has to be necessary under the circumstances, so the duty to retreat would be one thing to be considered. In the revision, there is a duty to retreat prior to using deadly physical force if the person knows that, with complete safety, the deadly force can be avoided. The person has to know, not believe, there is a safe retreat, he explained. There is the doctrine that a person does not have to retreat when in his or her dwelling, and that is included in the code, he said. Additionally, a peace officer making an arrest has no duty to retreat.

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MR. STERN surmised that the above provisions codify what is already Alaska law. He turned to the provision on the "use of physical force in defense of a third person." It provides that any person may use physical force in the defense of another person, and there need not be a relationship between the persons. The Subcommission wanted to encourage people to come to the aid of someone who is a victim of a violent crime, he said. Existing law "kind of discourages it," and he cited a case in New York where a woman was stabbed to death and 19 people just watched.

MR. STERN explained that the use of force in defense of premises is divided into three different circumstances. One involves the damage to premises, and it would cover the situation where a home was vandalized. Under existing law, a person may use deadly physical force to prevent a felony upon one's dwelling, but the Subcommission changed that. He explained that these defenses have to be considered as a package, so a person might not be justified using deadly physical force in the defense of

his or her house, but the person may be justified if he or she is injured by the vandal.

REPRESENTATIVE BROWN said, "So, you've already implicitly provided for escalation." He added that if someone is using nondeadly physical force to defend property, and then the perpetrator implies a threat of physical force to the person, then the ante has been upped and the person can use deadly physical force.

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MR. STERN agreed. It is important to realize that these all go together.

REPRESENTATIVE BROWN spoke of people placing a loaded spring gun on their private hunting grounds to kill trespassers.

MR. STERN said, "We cover that area of spring guns, and the example is the person has a cabin out in the wilderness and he doesn't want any trespassers in the cabin so he sets a deadly trap, and we specifically said that that's not justifiable." It is discussed in the commentary, he added.

CHAIR GARDINER said there were two cases of spring guns that were [indisc.]. Both of them turned out to be cases where somebody set up a rigged shotgun.

REPRESENTATIVE MILES asked if there is a case where deadly physical force can be considered nondeadly physical force. He gave a scenario of someone robbing his house and he is not allowed to kill the robber.

MR. STERN said, "I think you can."

REPRESENTATIVE MILES asked if in a situation where he is not allowed to use deadly physical force, "can I pull a gun and shoot the guy in the leg, intentionally?"

MR. STERN said deadly physical force is defined as....

REPRESENTATIVE BROWN interjected and said there are two ways in which that would show [indisc.]. One would be the general area of law relating to defense as a justification, and if it was deadly or nondeadly physical force. "The other one would go to the element of the offense that you might be charged with. Could you successfully ... have proven against you all of the

elements of assault with intent to kill if the jury would never believe that your intent was to kill, and if the element fails, then you have an absolute defense without regard to the section on justification."

CHAIR GARDINER said, "It says physical force that, under the circumstances in which used, is capable of causing death or serious physical injury." Shooting someone in the leg would not be justified.

MR. STERN explained that if justification does not work, the person shooting would be charged with a crime.

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REPRESENTATIVE BROWN stated if the prosecution knows it cannot prove one of the major elements of the crime, which is the mental state; assault with intent to kill, then [indisc.].

MR. STERN said deadly physical force to a small person might not be deadly physical force to a big person. If the vandalism is just causing damage to the building, a person can only use nondeadly force; however, if it is arson, deadly force can be used. "If you see someone outside someone's house and they have a can of gasoline and they are about to light the match—you shoot him. You could shoot him if he's lit the match too." Any person can do this, he said, it does not have to be the owner.

MR. STERN turned to the use of force to prevent a criminal trespass. The Subcommission made a value judgment. When the only crime is trespassing on a person's land and the person does not fear physical injury or deadly physical force, only nondeadly force can be used, and it can only be used by the person who owns the land or an expressed or implied agent. That term includes neighbors, he said. He turned next to the use of force during a burglary. After much debate, the Subcommission decided that a person may use deadly physical force when he or she reasonably believes it necessary to terminate what he or she reasonably believes to be a burglar in a dwelling or occupied building. There is no necessity that the person be in fear of injury, he explained. The Subcommission decided that when there is a trespass and people are present, people should be allowed to use deadly physical force. If a person sees someone climbing through a neighbor's window, he or she can shoot the intruder. If it turns out to be the neighbor who forgot his or her keys, the shooting will be justified, he explained. The vote of the Subcommission was "pretty close."

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MR. STERN said some states have written their codes that way and others require fear of physical injury. In response to a question, he said the provision says "to terminate what he reasonably believes to be a burglary in the dwelling." It actually has to be going on, so the burglar has to be over the threshold, he stated. The Subcommission seemed to have the thought that "Alaskans are particularly concerned about their home being sacred."

REPRESENTATIVE BROWN offered the scenario that the "burglar" is really a police officer with a search warrant.

CHAIR GARDINER asked who wants to go to the Alaska logger's luncheon.

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[Irrelevant discussion]

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