ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE
HOUSE JUDICIARY STANDING COMMITTEE
MARCH 17, 1977
JOINT PUBLIC HEARING
From tape b32r12-07-JJUD-770317

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
Representative Keith Specking

COMMITTEE CALENDAR

Criminal Code Revision Review

WITNESS REGISTER

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.

NOTE: In 1975, a resolution by both houses of the Alaska State Legislature found that Alaska's criminal code was "vastly out of step with constitutional and social developments of recent decades." The Alaska Legislature then established a Criminal Code Revision Commission as a subcommission to the Alaska Code Commission.

Pursuant to AS 24.20.075, the Criminal Code Revision Commission (also called the Criminal Law Revision Subcommission and commonly referred to as the "Commission") was tasked with preparing a draft revision of Alaska's criminal code by December 1977. The Subcommission's tentative draft revision was introduced to the legislature as HB 661. These minutes are part of a series of hearings on this comprehensive revision to Alaska's criminal laws.

This hearing was transcribed in 2014 from reel-to-reel tapes recorded on March 17, 1977. Some of the audio was difficult to understand, and committee members never identified themselves during the hearings. An attempt was made to determine the speakers' names, but some speakers may be incorrectly identified. In transcribing these minutes, parts of some discussions are absent because they were inaudible.

The time notations distributed throughout these minutes represent elapsed time from the beginning of the narrative, not real time. That is, these hearing minutes begin at (0:00:00) or at zero hour, zero minutes, and zero seconds.

ACTION NARRATIVE

^Criminal Code Revision Review

Criminal Code Revision Review

0:02:24
CHAIR GARDINER announced that the joint meeting addressed Part 2, [Alaska Criminal Code Revision, Tentative Draft, Part 2: General Principles of Criminal Liability; Parties To A Crime; Attempt; Solicitation; Justification; Robbery; Bribery; Perjury; Chapter 11. General Principles of Criminal Liability].

0:03:01
BARRY J. STERN, Staff Counsel, Alaska Criminal Law Revision Sub-commission (Commission), Alaska State Legislature, Juneau, Alaska, said "General Principles of Criminal Liability" is a general section that applies throughout the Revised Criminal Code (Code). He noted that he has referenced the issue a number of times as culpability. He added that there are no general rules for culpability that apply to the existing criminal code and its approach is haphazard. He pointed out in the Tentative Draft commentary section the multiple types of criminal intent that are required under existing law. He revealed that the Code will use four defined terms: intentional, knowingly, recklessly, and criminal negligence.

MR. STERN asserted that the changes made regarding culpability will make the Code easier to use and instructions easier to give. He opined that culpability is one of the most important areas of the Code due to a 1975 Alaska Supreme Court case, State v. Campbell, that addressed a statute that did not require the person to act with a guilty mind and inadvertently left out a culpability requirement. He noted that the Alaska Supreme Court ruling cited Oregon's and New York's revised codes as demonstrating "uniform sensitivity to the area of culpability."

He asserted that the intent for the Code is not just to fix the existing law for consistency sake, but to address the substantial problems in statute interpretation. He noted that judges have questioned the necessity for a criminal code revision. He pointed out the necessity to go through each statute and consider each culpable mental state due to the existing law's haphazard approach. He remarked that the four culpability terms cannot be assigned without first defining them and determining which application level. He pointed out that a person that acts with "criminal negligence" is usually going to be considered less guilty than a person that acts "intentionally." He said based on the four degrees, decisions have to be made as to when to apply "criminal negligence" for a crime, when "recklessness" is enough, and when an "intentional act" is applicable. He asserted that the four culpable mental states can set up a pretty easy degree structure in the Code. He added that the more serious offenses require that a person act "intentionally," "acting recklessly" was less serious, and "criminal negligence" was the least serious of the offenses.

0:07:12
He said the section "General Requirements of Culpability," [AS 11.11.100], specifies that a person is not guilty of an offense unless there is a voluntary act, one of the most basic principles of criminal law. He said section (b) emphasizes the following:

> A person is not guilty of an offense unless he acts with a culpable mental state with respect to each element of the offense that necessarily requires a culpable mental state.

He noted that the phrase, "each element of the offense that necessarily requires a culpable mental state," was put in to emphasize the elements of the offense that are in the definition, not the elements that have no bearing on criminal

liability such as jurisdiction or venue. He pointed out that exceptions are provided in order to impose strict liability where the person is guilty of the offense regardless of whether he knew he was doing it. He noted an example that pertains to pollution laws where a person is guilty of polluting regardless of whether he knew he was polluting or not. He noted that State v. Campbell and Speidel v. State were strict liability case examples. He added that the Legislature has the power to create offenses of strict liability. He pointed out that section (b) contains an exception for strict liability and section (a) has a concept of a violation. He explained that a violation in the Code will be a noncriminal offense that will be enforced criminally without criminal penalties. He summarized that an offense without criminal penalties does not require that a person act with a guilty mind. He noted that marijuana was an example of a violation without criminal penalties.

0:10:42
MR. STERN said section (2), [AS 11.11.100(b)(2)], states the following:

> 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.

He noted an example where a person engages in sexual penetration with a person under 13 as follows:

> Under the rules of culpability, if you just apply them very strictly, it would seem to require that the person know that she is under 13. We have a specific statute in there that says it doesn't matter if she is under 13, you are guilty and that is what section (2) is getting at. So you could have an intent to dispense with it in the statute; in other words, we are saying we don't care if you knew that she was under 13 or not, we are making that requirement. We still require that you knew you engaged in sexual penetration, it's assumed that the person knew he was engaging in the act, but he doesn't have to know the circumstances, i.e., that she is under 13 years of age.

0:12:13
He stated that the next section, [AS 11.11.110 Construction of Statutes with Respect to Culpability], is an introductory section that defines the terms for the culpable mental states

required for the commission of an offense: intentionally, knowingly, recklessly, criminal negligence, or by the use of such terms as "with intent to defraud" or "knowing it to be false." He continued as follows:

> When only one such term appears in a statute defining an offense, it is presumed to apply to every element of the offense unless an intent to limit its application clearly appears; that means a person knowingly engaged in sexual intercourse with a person under 13. The presumption is it applies to each element of the offense that 'knowingly' applies to the conduct, the sexual penetration and to the circumstance. You might also have, 'he knowingly had physical contact resulting in serious physical injury' or something like that and the result would be serious physical injury; it would be presumed to apply to that. The result, 'knowingly' would apply to the contact and the result of the contact, the serious physical injury.

MR. STERN summarized that one term could be used to apply to each element of an offense. He noted that elements of the offense are: conduct, circumstances, and the result. He continued as follows:

> An example of this is given in the commentary like, 'unlawful imprisonment requires the restraint of a person,' the conduct is a restraint and it goes on to say, 'the restraint of a person without consent,' 'without consent' is a circumstance, and it goes on. There's a degree of unlawful imprisonment which says that if you restrain someone without consent and you expose them to a risk of serious physical injury, you are guilty of a more serious offense, the risk of serious physical injury would be the result of that conduct.

He set forth that the whole area of culpability is fairly difficult in terms of first impression and looking at it for the first time. He summarized that culpability rules apply throughout the Code and make it easier to use than the existing approach.

0:14:38

REPRESENTATIVE MILES asked if using only one term to apply to every element in a statute was dangerous from a legal standpoint as far as the statute's strength being challenged.

MR. STERN replied that using one term was a shorthand way of doing it. He continued as follows:

> Instead of saying, 'knowingly engaged in penetration, knowing the person to be under 16;' it's trying to make the statue shorter. I think with a specific rule like that, I don't think there would be much of a problem with that. The important thing of course is for you to consider how that applies when you are considering the statute, to realize that one term applies to all of the conduct in the statute.

REPRESENTATIVE MILES responded as follows:

> That seems to be where my problem is. If we go back to the penetration, 'knowingly committed the penetration, forcefully,' but the third part, 'I didn't know she was under 13.' I think it seems to me that an attorney would make a hell of a case out of that particular aspect for throwing out the whole defense.

0:16:16
MR. STERN answered as follows:

> With that example, we had a specific provision in there that says, 'it doesn't matter if she is under 13' and that's how we've been. In those circumstances where we want to throw out the requirement that he knows a circumstance exists, we put it in there, clear as day, in that case it wouldn't be a problem with that.

REPRESENTATITVE MILES said another example pertains to an armed robbery and noted that it does not matter if the perpetrator's gun is loaded or not. He continued as follows:

> If the guy goes in and pulls off the job and gets nabbed, and let's say he shoots his victim, points the gun at him, somebody comes up and clobbers him from behind, the gun goes off, he obviously didn't know the gun was loaded.

MR. STERN replied that the statute that applies in the noted scenario specifically states, "Whether loaded or unloaded," therefore it does not matter whether the person knows the deadly weapon was loaded or not.

REPRESENTATIVE MILES asked what other states have done.

MR. STERN answered that every revised code has the same basic rules in some format in terms of saying only one element presumably applies to each. He revealed that he reviewed culpability related cases from Oregon and New York and none had resulted in an appeal. He noted the Campbell v. State case that was thrown out due to the statute not having a culpability requirement. He summarized that the defined terms will make it easier for jury instructions.

0:18:55
CHAIR GARDINER noted that the Commission considered Oregon's revised code as one of the better ones. That state had one Supreme Court case where the Commission picked up on and revised the Code.

MR. STERN added that the case Chair Gardiner referenced was a kidnapping case. He explained that Oregon had a section that said it was first degree kidnapping if you "terrorize the victim." He said Oregon's Supreme Court interpreted "terrorize" to require some kind of ghoulish intent on the part of the defendant to put on a horror mask and scare the victim to death. He related that the Commission just put, "In fear of physical injury" into the statute.

REPRESENTATIVE MILES asked if the number of appeals had gone down when criminal codes were revised.

MR. STERN replied that he did not have any figures on that. He noted that a judge's transcript had been provided to the committee where he said the level of appeals were about the same. He asserted that there have been appeals on reinterpretation, but nothing that the state cannot handle.

REPRESENTATIVE MILES asked about any reversals.

MR. STERN replied that the reversal question was not posed to the Oregon judge. He noted that the judge did not indicate that there had been significant problems with interpretation. He shared that ten states have revised their criminal codes over the last three or four years and none have indicated any

problems in terms of creating havoc. He noted that Alaska's 30 percent reversal rate was considered extremely high in criminal cases. He said the Commission has not gone back and looked at every case to see whether reversals were caused by an existing statute, but the Commission could point to a good number of cases that were reversed due to existing statutes.

MR. STERN said section (b), [AS 11.11.110(b)], states that culpability is required even if a statute does not require culpability.

0:23:34
He said section (c), [AS 11.11.110(c)], was particularly useful for giving instructions for an offense that requires one culpable mental state. He summarized that proving a higher mental state of culpability means a defendant is guilty of a lower culpable state.

He said the next section, [AS 11.11.120(a)], is the "Effect of Ignorance or Mistake upon Liability." He explained that section (a) was a basic principle and specifically provides that knowledge that the conduct is an offense is not an element of the offense. He remarked that a person cannot plead ignorance or state that they did not know the statute existed. He noted that a reversal occurred where a judge did not provide instructions on criminal negligence, one of the basic principles, so the Commission decided to include the statute.

0:25:33
He said section (b), [AS 11.11.120(b)], states the following:

> A person is not relieved of criminal liability for conduct because he engages in the conduct under a mistake of belief or fact.

He added that section (b) goes on to address three circumstances where a mistake may prevent a defendant from being guilty of a crime as follows:

1. 'The factual mistake negates a culpable mental state required for the commission of an offense.' The best example of this is in the theft area, you must have an intent to deprive the owner of the property. So if you walk into a restaurant and you mistakenly pick up somebody's raincoat that looks like yours, you haven't committed a theft, you take it out with you, but you

had no intent to deprive because you thought it was your raincoat.

2. 'The factual mistake constitutes a defense or exemption.' An example of this is that we have one situation in the Code that said, 'If the victim of statutory rape in under 16 but over 13, a reasonable mistake as to age will be a defense.' i.e., the person did not know the person was under the age, so that would be a defensible charge.
3. 'The factual mistake is the kind that supports a defense of justification as provided in Chapter 21 of this title.' The existing statute provides that a homicide is justifiable by a police officer when you are arresting someone that has committed a felony. The statute is, 'has committed a felony.' Now I read that to mean that the officer has to be right in his assessment of the situation, because reasonable belief that a person has committed a felony, at least according to the statute, is not sufficient. I think if the court ever got the case based on our statute, they would read it into the statute, but this says that a reasonable mistake when you are acting in self-defense or making an arrest is okay, because it is built right into the statute. In other words, you have a right to act upon appearances when you think you are being threatened with physical force, you happen to be wrong, it's okay as long as your mistake was a reasonable one.

0:28:26
MR. STERN said the next section, [AS 11.11.130], "Intoxication or Drug Use as Defense," was a restatement of the existing statute on intoxication as follows:

> 'Intoxication is not a defense to a criminal charge unless the intoxication goes to show that the person cannot form an intent that is required.' For example, theft requires an intent to deprive. If you take someone's raincoat while you are drunk, you haven't acted with the intent to deprive, you have a defense under the existing law and we are not changing that.

He added that the statute also applies to drug use. He summarized that a person saying, "I'm not guilty of the offense because I was drunk," is not a defense.

He said section (b), [AS 11.11.130(b)], provides when drug use is not a defense where recklessness is an element of the crime. He explained that "recklessness" requires that a person has to be aware of a risk and disregards it. He disclosed that section (b) is a specific provision that addresses a situation where, for example, a drunk driver pleads not guilty because he was not aware of the risk and therefore did not act recklessly.

UNIDENTIFIED PERSON [*inaudible*]

0:31:46
MR. STERN replied that with criminal negligence, a person does not even have to be aware of anything, he just does not act.

UNIDENTIFIED PERSON [*inaudible*]

MR. STERN answered that it does not matter whether he knew it or not when a person is under 13.

[*Audio inaudible from 0:32:33 to 1:04:51*]

1:04:54
CHAIR GARDINER called the committee meeting back to order and announced that Mr. Stern would address [AS 11.21.130 Justification: Use of Physical Force in Defense of Self, subsection (b)].

MR. STERN said he previously provided the committee with three circumstances when a person provokes the attack or its usual combat. He pointed out that AS 11.21.130(b) covers circumstances where a person is justified to use self-defense when he asks to withdraw from the encounter and his counterpart refuses to stop.

He said deadly physical force is used pursuant to, [AS 11.21.130(c)], under circumstances when a person reasonably believes 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.

1:07:15
He said, [AS 11.21.130(c)(1)], deadly physical force may be used when in response to deadly physical force; e.g., a person shoots a gun at you or confronts you with a club and threatens to beat you.

He said subsection (d), [AS 11.21.130(d)], specifies a "duty to retreat." He explained that retreating is a doctrine in common

law that states that if a person can avoid using deadly physical force by an obviously safe retreat, a person should take retreat if there is no risk to oneself and the person is not in their dwelling. He said Alaska does not have a specific "duty to retreat" and referenced the state's pre-statehood decisions where the duty to retreat is one thing to consider in terms of whether the use of force was necessary. He revealed that the Commission included in the Code the duty to retreat prior to using deadly physical force if the person knows that with complete safety as to himself and others, he can avoid the necessity of using deadly physical force by retreating. He specified that a person does not have to believe safe retreat was possible, but must know or have an assurance.

MR. STERN pointed out that, [AS 11.21.130(d)(1)], provides an exception where a person has no duty to retreat in their dwelling when being attacked or if he is not the initial aggressor. He added that a peace officer has no duty to retreat in using deadly physical force when making an arrest. He summarized that, [AS 11.21.130], codifies what the law is as to the use of deadly physical force and does not change the current laws.

1:09:21
He said, [AS 11.21.140 Justification: Use of Physical Force in Defense of a Third Person], provides that any person may use physical force in defense of another person when he believes the other person would be justified in using that degree of force. He added that the defense of a third person could be anyone on the street and does not require an individual to be a relative, master, or mistress. He asserted that the statute conforms to the recently revised codes and was what the Commission thought the law should be in Alaska. It encourages people to come to the aid of someone who is a victim of a violent crime. He cited an example of the "Kitty Genovese Case" where 19 people just watched Ms. Genovese being stabbed to death in New York. He offered that existing law discourages people to act.

He said, [AS 11.21.150. Justification: Use of Physical Force in Defense of Premises], was divided into three different circumstances when a person could use physical force in defense of premise. He explained that subsection (a) involves damage to premises and covers the situation where someone vandalizes the outside of a person's home. He revealed that existing law allows a person to use deadly physical force to prevent a felony to their dwelling. This may include a situation where a perpetrator is committing felonious criminal mischief. He set forth that the

Commission made the determination that deadly physical force may only be used when a person fears injury by a person who is doing damage to the dwelling.

1:11:38
REPRESENTATIVE BROWN pointed out that the Commission provided for escalation in the Code.

MR. STERN agreed.

REPRESENTATIVE BROWN communicated that the law escalates when the situation escalates from non-deadly to deadly physical force to defend property.

MR. STERN stated agreement.

REPRESENTATIVE BROWN called attention to spring gun cases and explained 19th century practices where spring guns were set to shoot trespassers on private property. He pointed out that the use of spring guns precipitated case law as to what was justifiable.

MR. STERN noted that the Commission specified that the use of spring guns is not justifiable. He explained that the use of deadly physical force requires a person to be present in order to have a reasonable belief that deadly physical force is required.

1:14:00
REPRESENTATIVE MILES asked if he would be allowed to shoot a person in the leg if the perpetrator was stealing a TV from his home.

REPRESENTATIVE BROWN pointed out that shooting a person in the leg is considered deadly physical force.

MR. STERN replied that there is no threat of physical force and shooting the perpetrator is not justified. He said Representative Miles would be charged with a crime.

REPRESENTATIVE BROWN offered that a defense exists if the mental state for intent to kill cannot be shown.

MR. STERN remarked that deadly physical force depends on the circumstances. He noted an example where deadly physical force to a small person may not be deadly physical force to a big person.

He called attention to the "Use of Force as to Premises," [AS 11.21.150 Justification: Use of Physical Force in Defense of Premises]. He explained that non-deadly force may only be used during the commission or attempted commission of damage to premises. He added that deadly physical force may be used during the commission or attempted commission of arson. He noted that the statute provides that any person may use deadly physical force and it does not have to be the owner. He explained that the statute encourages a person to act when he sees wrong being done.

1:18:03
MR. STERN said section (b), [AS 11.21.150(b)], addresses the use of force to prevent a criminal trespass and primarily gets at trespass on a person's land. He stated that the Commission made the value judgment that only non-deadly force can be used when the only crime is trespassing on a person's land and the person does not fear physical injury or deadly physical force. He added that non-deadly force does not include everyone and can only be used by the person who owns the land or an expressed or implied agent of the landowner.

He said section (c), [AS 11.21.150(c)], addresses when force can be used during a burglary. He revealed that after much debate, the Commission decided that a person may use physical force, including deadly physical force, when a person reasonably believes it necessary to terminate what he reasonably believes to be a burglary in a dwelling or occupied building. He added that there is no need for a person be in fear of injury to himself.

UNIDENTIFIED PERSON asked if a person can go over to their neighbor's house if the person saw someone breaking in.

1:20:00
MR. STERN noted that the question was a specific issue that was considered by the Commission. He shared the following example:

> Someone comes home one night and sees across the yard, someone climbing into their neighbor's window. The person shouts 'stop,' the person doesn't stop, the person shoots the burglar and it turns out to be the person's neighbor that forgot his key. The statute states that the person shooting his neighbor would be justifiable. Now you might have some circumstances where there's an unfortunate result.

UNIDENTIFIED PERSON asked him to confirm that the act is justifiable.

MR. STERN answered yes, if the person reasonably believed it necessary.

UNIDENTIFIED PERSON asked if the person who is shooting has to be inside the house.

REPRESENTATIVE BROWN added that the statute says "physical force" and not "deadly physical force."

MR. STERN replied that physical force always includes deadly physical force whenever a statute uses physical force that is not qualified.

REPRESENTATIVE BROWN asked how close the Commission's vote was for the statute.

MR. STERN answered that the vote was pretty close, approximately seven to five. He explained that some states have adopted the same statute while other states have required that a person be in a dwelling or in fear of physical injury.

UNIDENTIFIED PERSON asked for confirmation that if he has any problems that he is allowed to shoot a perpetrator who enters his dwelling.

1:21:16
MR. STERN answered that the statute says, "To terminate what he reasonably believes to be a burglary in the dwelling." He explained that the intruder must be over the threshold to the dwelling. He set forth that the Commission's feeling was that Alaskans are particularly concerned about their home being sacred. He stated that AS 11.21.150 recognizes that "A man's home is his castle." He added that "castle" includes his neighbor's home as well.

[*Audio ends at 1:25:30*]