

**ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE
HOUSE JUDICIARY STANDING COMMITTEE**

MARCH 18, 1977

JOINT PUBLIC HEARING

From tape b32r13-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 Subcommittee
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 subcommittee to the Alaska Code Commission.

Pursuant to AS 24.20.075, the Criminal Code Revision Commission (also called the Criminal Law Revision Subcommittee and commonly referred to as the "Commission") was tasked with preparing a draft revision of Alaska's criminal code by December 1977. The Subcommittee'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 18, 1978. 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.

^Criminal Code Revision Review

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ACTION NARRATIVE

0:06:06

CHAIR GARDINER announced that the committee would review page 41, [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].

BARRY J. STERN, Staff Counsel, Alaska Criminal Law Revision Subcommittee (Commission), Alaska State Legislature, Juneau, Alaska, stated that, [AS 11.21.170 Justification: Use of Physical Force by Peace Officer in Making an Arrest or Preventing an Escape], an officer must have a "reasonable belief" that an individual has committed a felony before a homicide would be justifiable. He explained that an officer may always use physical force in making an arrest when it is necessary without having to retreat in efforts of making an arrest or preventing an escape. He set forth that the real issue is not when physical force can be used in terms of non-deadly physical force, but when deadly physical force can be used.

MR. STERN explained that, [AS 11.21.170(b)(2)], the common law based issue as to when a police officer is justified in using deadly force in making an arrest is to consider a distinction between felonies and misdemeanors. He said that in common law there are very few felonies and the very few felonies that existed all involved serious threat of harm to the victim and were punishable by death. As a consequence, allowing an officer to use deadly physical force in felonious based arrests was not considered particularly harsh. He explained that the Commission referenced the Alaska State Troopers and the Anchorage Police Department manuals when considering [AS 11.21.170] in terms of when deadly physical force can be used. He specified that according to the Alaska State Trooper regulations, the use of deadly physical force is only as a last resort. He reiterated the point saying:

If any force other than deadly physical force can be used, you should use it.

He said the Commission provides in the Revised Criminal Code (Code) that deadly physical force can be used in three situations. He explained that in subsection (A), [AS 11.21.170(b)(2)(A)], when the person has committed a felony involving the use of physical force against the person, so it's not any felony, it has to be a felony involving physical force. He pointed out that the Commission eliminated the situation of using deadly physical force to arrest someone that has committed a non-violent felony such as theft, not theft from a person, just theft or embezzlement.

0:09:06

REPRESENTATIVE SPECKING asked him to confirm that deadly physical force cannot be used when making an arrest of theft.

MR. STERN replied correct.

REPRESENTATIVE SPECKING asked him to verify that an officer cannot shoot a person who is running out of a bank with \$1 million.

MR. STERN replied that is correct, unless the theft falls under one of the other two situations: sections (b) and (c), [AS 11.21.170(b) and AS 11.21.170(c)]. He pointed out that the topic pertains to a very timely issue as follows:

The Eighth Circuit Court of Appeals just considered a statute identical to the Alaskan statute that says you

can use deadly physical force to make an arrest for any felony without distinctions between whether it was a violent felony. The court held that that statute was unconstitutional as it deprived people of due process of law and they held that life is a fundamental right and that using deadly physical force to arrest someone who did not pose an immediate danger to society in terms of physical injury could not be justified.

MR. STERN noted that the Eighth Circuit Court ruling will go up to the Supreme Court and there is some strong constitutional doubt as to whether police officers can be provided with automatic blanket authority to use deadly physical force when the defendant has committed any felony. He added that the Code has a lot of felonies covered and not all of them involve threat to the victim.

REPRESENTATIVE BROWN asked if an officer should be justified in using deadly physical force if the felony involved the fraudulent use of a credit card and the individual is not at all resisting arrest.

MR. STERN asserted that the question pertains to certain circumstances in monetary laws where the crime is particularly serious.

UNIDENTIFIED PERSON asked about a bank robbery.

MR. STERN replied that a bank robbery would be considered a violent crime and there wouldn't be a problem with that.

0:11:02

He noted that section (b) expands existing law in terms of giving an officer the right to use deadly physical force and the statute states that the officer may use deadly physical force to make an arrest for any crime, felony or misdemeanor, if the person is escaping while in possession of a deadly weapon. He explained that if an officer has reason to believe that the person has a deadly weapon, even if he has committed a misdemeanor, the officer may use deadly physical force in making the arrest.

UNIDENTIFIED PERSON [*inaudible*].

MR. STERN replied that when the person is firing back at the officer, the situation is about self-defense and not using force in making an arrest. He pointed out in the statute, [AS

11.21.170(b)(1)], that deadly force is authorized under another section in the chapter, specifically self-defense.

UNIDENTIFIED PERSON [*inaudible*].

MR. STERN explained that the statute specifically provides the following:

If the person is in possession of a weapon, even if he is not using it against the officer and the officer reasonably believes that the individual has committed a crime, the officer may use deadly physical force.

He explained that the example he provided was an extension of existing law in terms of granting authority to a police officer to use deadly physical force.

UNIDENTIFIED PERSON asked him to clarify that the officer "reasonably believes" that a person had a weapon.

MR. STERN replied yes, even if it turned out that the person did not have a weapon.

UNIDENTIFIED PERSON [*inaudible*].

MR. STERN explained that the statute does require that an officer expects the weapon to be used and the person probably has committed a violent felony. He said when the Commission was discussing the statute, the police were saying that it is very rare that deadly physical force will be used against a person. He specified that the Code requires the officer to have a "reasonable belief" that a felony was committed. He revealed that the Commission wanted to limit the use of force in certain circumstances, specifically in theft cases that involved embezzlement. He stated that on the other hand, [AS 11.21.170(b)(2)(C)], gives the officer the authority to respond to the specifics of a situation with a very open clause which states, "may otherwise endanger life or inflict serious physical injury unless arrested without delay."

UNIDENTIFIED PERSON [*inaudible*].

0:14:15

MR. STERN replied that "deadly physical force" is force which under the circumstances in which it is used is capable of causing death and serious physical injury. He specified that "physical force" is anything less than that but includes that

too. He explained that the Code uses the term "physical force" when any degree of physical force may be used, including deadly physical force. He added that the Code sometimes limits the use of deadly force and specified that the Code says a police officer may always use physical force in making an arrest, subject to certain limits.

[Audio inaudible from 0:14:50 to 1:05:01]

1:07:00

CHAIR GARDINER announced that Mr. Stern will address changes made to the section on "attempt," [Chapter 31 Attempt and Related Offenses].

MR. STERN stated that he will provide examples where the Commission made is easier for the prosecution. He specified that "attempt" under existing law requires that a defendant show that his attempt was unsuccessful. He said an example was a rape situation where penetration cannot be proven so the prosecution cannot go for rape because reasonable doubt exists as to whether the crime was committed. He added that if the prosecution goes for attempted rape, there is a reasonable doubt as to whether there was penetration and an inability to prove that the attempt failed. He explained that the Code makes it easier for the prosecution by stating that there is no requirement that the attempt failed.

REPRESENTATIVE BROWN asked that a double jeopardy situation be addressed where somebody attempts and succeeds. He asked if a person may be charged with both attempt and robbery.

MR. STERN noted that there are three sections that are reserved: "Conspiracy," "Defenses to Solicitation and Conspiracy," and "Multiple Convictions Barred." He said "Multiple Convictions Barred" will provide that a person may be charged for either attempt or robbery, but a conviction for only one.

REPRESENTATIVE BROWN pointed out that the Code notes show that concern was raised by the Commission regarding the double jeopardy problem between an attempt and the perfected-crime.

MR. STERN stated that the second crime or the loophole the Commission is closing is in section (b), [AS 11.31.100 (b) Attempt], and that says:

In a prosecution under (a) of this section, it is not a defense that it was factually or legally impossible

to commit the crime which was the object of the attempt when the conduct engaged in by the defendant would be a crime had the attendant circumstances been as he believed them to be.

1:09:10

MR. STERN explained that there are two kinds of impossibility when dealing with attempt: factual and legal. He explained that the distinctions between factual and legal are pretty difficult. He noted that the Alaska Supreme Court held that factual and possibility is not a defense to attempt. He noted that a ruling, Gargan v. State, was a case of a man that was breaking into a coin machine box at a laundry machine and the defendant said, "I can't be guilty of attempted larceny because there's no money in the machine." He specified that the defendant was saying it was factually impossible for him to commit the crime. He detailed that the Supreme Court ruled on the defendant's appeal that there is no defense that there was no money in the coin-machine box.

REPRESENTATIVE BROWN asked what the example is for a legal-impossibility.

MR. STERN answered that an example for a legal-impossibility occurs when an individual agrees to receive stolen goods that turn out not to be stolen.

REPRESENTATIVE BROWN responded that Mr. Stern's example is rather silly where an individual is prosecuted for attempting to receive stolen goods that were not stolen, an act where a person is punished for a bad thought that harmed no one.

MR. STERN replied that the Commission included circumstances where a person should be guilty of intent when the individual thinks he is committing a crime and does an act towards the crime.

REPRESENTATIVE DANKWORTH commented that he disagrees. He likened Mr. Stern's explanation to a person that buys a drug and finds out later that he purchased sugar.

MR. STERN conceded that he gave a bad example. He offered that a better example pertains to stolen property cases where the police use previously stolen goods to catch a "fence" and technically the goods used are no longer stolen. He noted that not all jurisdictions recognize that factual impossibilities is not a defense, but the Commission considered that it should not

be a defense. He summarized that the Commission eliminated the potential for an appeal and made it easier to prove.

REPRESENTATIVE BROWN commented that the committee was doing a quick overview on attempt, solicitation, and conspiracy. He stated that inchoate crimes are very complex problems and expressed his hope that extra time would be spent on the subject.

MR. STERN replied that the Commission has not voted on "conspiracy."

[Audio ends at 1:12:07]