

Page 1
PERJURY AND RELATED OFFENSES
Preliminary Draft No. 2

PROPOSED AMENDMENT

November 7, 1969

Section 6. Perjury and false swearing; retraction. It is a defense to any prosecution for perjury or false swearing that the defendant retracted his false statement in the course of the same proceeding in which it was made. Statements made in separate hearings at separate stages of the same judicial or administrative proceeding shall be deemed to have been made in the course of the same proceeding.

COMMENTARY - PERJURY AND FALSE SWEARING;

RETRACTION

It is the common law rule that while retraction may be used to show inadvertence in making the statement, perjury once committed cannot be purged even by a correction during the same hearing. (See U. S. v. Norris, 300 US 564, 57 S Ct 535 (1937)).

There is growing authority in support of a retraction defense to perjury, based upon the theory that it serves a socially desirable purpose in the search for truth. Similar provisions have recently been adopted by the states of Michigan, Illinois and New York. The U. S. Supreme Court argues against this rationale in the Norris case, supra:

"The argument overlooks the tendency of such a view to encourage false swearing in the belief that if the falsity be not discovered before the end of the hearing it will have its intended effect, but, if discovered, the witness may purge himself of crime by resuming his role as witness and substituting the truth for his previous falsehood. It ignores the fact that the oath administered to the witness calls on him freely to disclose the truth in the first instance and not to put the court and the parties to the disadvantage, hindrance, and delay of ultimately extracting the truth by cross-examination, by extraneous investigation or other collateral means."

The Model Penal Code reporters support their adoption of a retraction provision as follows:

"The draft attempts to preserve incentive to correct falsehoods, without impairing the compulsion to tell the truth in the first place. The danger that witnesses might be encouraged to take a chance on perjury is limited by the draft's requirement that recantation take place before the falsity becomes manifest." (Tent. Draft No. 6, 1957, p. 129)

In accord with this view is Brannen v. State, 94 Fla 656, 114 S 429 (1927), wherein it was held:

"The law encourages the correction of erroneous and even intentionally false statements on the part of a witness, and perjury will not be predicated upon such statements when the witness, before the submission of the case, fully corrects his testimony."

The Model Penal Code section 241.1 (4) reads:

"(4) Retraction. No person shall be guilty of an offense under this section if he retracted the falsification in the course of the proceeding in which it was made before it became manifest that the falsification was or would be exposed and before the falsification substantially affected the proceeding."

The New York retraction section adopted the Model Penal Code language (See New York Revised Penal Law section 210.25). The Michigan and Illinois retraction sections do not require proof that the correction was made "before it became manifest that the falsification was or would be exposed and before the falsification substantially affected the proceeding."

These special safeguards would seem to make the provision overly complex. It would impose upon the defendant the burden to prove that (1) the retraction was made before the prior falsification substantially affected the proceeding, and (2) before it became manifest that the falsification was or would be exposed.

If we assume that the retraction reduced or eliminated the effect of the prior falsification, how do we measure the effect of the falsification upon the proceedings when we take into account that its end result was predicated in part upon the corrected testimony?

How does one determine that it was "manifest" that the falsification was about to be exposed? "Manifest" is defined as "apparent to the senses, especially that of sight, or to the mind; evident; obvious; clear; patent". (Webster's New World Dic 1968). If, therefore, exposure is "patently evident" or "clearly obvious" it is too late to retract. One of the problems that presents itself is whether this test is objective or subjective; to whom must exposure be "manifestly" evident?

The opportunity to retract prior perjury and insulate oneself from future criminal liability promotes the search for truth at the expense of excusing culpable criminal conduct. It absolves an individual injustice in return for facts that will hopefully insure social justice. Consistent with this purpose, the proposed section requires only that the defendant retract during the course of the same proceeding in which he perjured himself.

TEXT OF MODEL PENAL CODE

Section 241.1. Perjury.

(4) Retraction. No person shall be guilty of an offense under this Section if he retracted the falsification in the course of the proceeding in which it was made before it became manifest that the falsification was or would be exposed and before the falsification substantially affected the proceeding.

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TEXT OF ILLINOIS CRIMINAL CODE OF 1961

Sec. 32-2. Perjury

(a) A person commits perjury when, under oath or affirmation, in a proceeding or in any other matter where by law such oath or affirmation is required, he makes a false statement, material to the issue or point in question, which he does not believe to be true.

(b) Proof of Falsity.

An indictment or information for perjury alleging that the offender, under oath, has made contradictory statements, material to the issue or point in question, in the same or in different proceedings, where such oath or affirmation is required, need not specify which statement is false. At the trial, the prosecution need not establish which statement is false.

(c) Admission of Falsity.

Where the contradictory statements are made in the same continuous trial, an admission by the offender in that same continuous trial of the falsity of a contradictory statement shall bar prosecution therefor under any provisions of this Code.

Penalty.

A person convicted of perjury shall be fined not to exceed \$1,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to 14 years, or both fined and imprisoned.

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TEXT OF NEW YORK REVISED PENAL LAW

§ 210.25 Perjury; defense

In any prosecution for perjury, it is an affirmative defense that the defendant retracted his false statement in the course of the proceeding in which it was made before such false statement substantially affected the proceeding and before it became manifest that its falsity was or would be exposed. L.1965, c. 1030, eff. Sept. 1, 1967.

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TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Perjury and False Swearing: Retraction]

Sec. 4930. No person shall be convicted of perjury if he retracted his false statement in the course of the same proceeding in which it was made. Statements made in separate hearings at separate stages of the same trial or administrative proceeding shall be deemed to have been made in the course of the same proceeding. The burden of injecting the issue of retraction is on the defendant, but this does not shift the burden of proof.

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