Tape No. 79
Both sides

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 3
Ninth Meeting, July 18, 1969

Minutes

Members Present: Judge James M. Burns, Chairman
Representative David G. Frost
Mr. Frank D. Knight
Mr. Donald E. Clark (Delayed)

Staff: Mr. Donald L. Paillette, Project Director

Others Present: Justice Gordon Sloan
Professor Courtney Arthur, College of Law, Willamette University

Agenda: Inchoate Crimes, P.D. No. 1; March 1969 (Article 6)

The meeting was called to order by Chairman Burns at 2:00 p.m., Room 319, Capitol Building, Salem.

Inchoate Crimes; P.D. No. 1

Mr. Paillette pointed out that the Inchoate Crimes Draft had last been considered by the subcommittee at its meeting on April 15, 1969, and at that time the first ten sections of the draft had been considered. He advised that Professor George Platt, the reporter for the draft, would not be present today because of illness. Since so much time had elapsed since the draft had been discussed, he suggested reviewing the first ten sections before considering the last four sections.

Section 1. Attempt; definition.

Mr. Paillette noted that section 1 defines an "attempt" and that two amendments had been made in the section by the subcommittee. The word "purposely" has been deleted and the word "intentionally" inserted because "intentionally" is a term which has been approved in the Culpability Draft. The phrase "which would consitute such crime by performing or omitting to perform an act" has been deleted in that the Culpability Draft defines the word "conduct" as meaning "an act or omission and its accompanying mental state." Section 1 now reads, therefore, "A person is guilty of an attempt to commit a crime when he intentionally engages in conduct which constitutes a substantial step toward commission of the crime."

Section 2. Attempt--impossibility not a defense.

Mr. Paillette advised that section 2 has been approved as written.

Mr. Knight noted that in rape cases quite often the defense is that the actor was incapable of committing the crime because he was too intoxicated. He asked if this type of defense would come in here.

Mr. Paillette said the thrust of the section is aimed at the objective circumstances of the situation. He recalled that at the last subcommittee meeting a hypothetical involving black magic had been discussed. He thought an illustration like this pointed up the difficulty of this kind of a section because the way the section is written, if someone could show an attempt and necessary culpability on the part of the actor, it was his understanding that this type of conduct would be criminal. He added that in the type of case cited by Mr. Knight, he did not think that the fact that the actor was physically incapable of committing the act of intercourse would be a defense.

Professor Arthur commented that under the former law the general rule was that factual impossibility was not a defense. He did not think the draft would change this and that the case cited by Mr. Knight would probably be an "attempt". He asked if there was any Oregon case law on this.

Mr. Paillette advised that based on his research in this area Professor Platt felt that the section as drafted reflected what the law is presently and would not make any change in existing case law. He noted that Professor Platt had advised that although it seemed settled by the Elliott case that factual impossibility is no defense, he could find no Oregon decision dealing with legal impossibility. This type of decision would arise where the actor attempted to bribe someone he thought was a juror, for example, but who, in fact, was not a member of the jury. While this has some aspects of factual impossibility, it is viewed as a legal impossibility since the status of juror is not there.

Section 3. Attempt--renunciation a defense.

Mr. Paillette pointed out that there was a form change necessary in section 3--the paragraphs should be numbered "(1)" and "(2)" instead of "(a)" and "(b)". He advised that section 3 had been approved in subcommittee although there had been considerable discussion on it. He recalled that the belief in drafting these sections had been that since renunciation is not now a defense in Oregon and since the defense is now to be allowed by statute, there is nothing untoward about placing the burden on the defendant to come forward as an affirmative defense and also to give him the burden of proof by a preponderance.

Section 4. Solicitation--definition.

Mr. Paillette pointed out new language in this section adopted when the subcommittee previously considered the section. The phrase "purpose of causing" has been deleted and the phrase "intent to cause" inserted in its place.

Representative Frost recalled that this was the section he had moved to delete during the April meeting but that his motion had failed.

Chairman Burns referred to page 12 of the subcommittee minutes of April 15th and noted that they read, "...unless there were objections, section 4 would be considered adopted as amended...with an alternate approach to be drafted limiting its provisions to solicitation for the commission of a felony."

Professor Arthur asked what the alternative section would do to solicitation to prostitution, for instance.

Representative Frost thought the whole "solicitation thing" was a bad idea, frankly, and said he will present his thoughts on this to the Commission when it considers the draft.

Mr. Paillette referred to the draft commentary on page 23, noting that "the section applies to all crimes--misdemeanors as well as felonies" and noted that this was the intent of Professor Platt.

Representative Frost felt that solicitation to commit a crime would be making a "prosecutor's nightmare", particularly if it is left in the misdemeanor field. He thought there were many wild examples that could be given of strictly non-harmful conduct which could fall within solicitation.

Mr. Knight understood that if he suggested to someone that they hold up a bank, he was committing the crime of solicitation. Once the other person agreed to the idea, it becomes a conspiracy. If the second person does not agree to the plan, then he has not committed a crime but the person making the suggestion is still guilty of solicitation to commit a crime.

Mr. Paillette advised that section 4 follows the MPC and Michigan approach.

Section 5. Solicitation--renunciation a defense.

Mr. Paillette noted that here, again, is the defense of renunciation although the language is a little different than renunciation on an attempt. He noted, also, that a form change

was necessary in the section: "(a)" and "(b)" will be deleted and "(1)" and "(2)" inserted.

Professor Arthur referred to page 3 of the draft commentary, noting that by the MPC and by the commentary that "soliciting an innocent agent to engage in conduct constituting an element of the crime" amounts to an attempt. He asked if this was not saying that solicitation does amount to an attempt and therefore solicitation would be punishable as an attempt.

Chairman Burns noted that this was an MPC example of an act which should not be held insufficient as a matter of law. It would not necessarily constitute an attempt but it would get past the directed verdict stage.

Mr. Paillette explained that the MPC includes the examples listed in the commentary on page 5 of the draft as part of its statement of the crime itself. California felt it best not to put the examples in the statute but to just have commentary on it. Professor Platt followed this approach and set them out as examples of acts which would not be held as a matter of law as insufficient substantial steps under the test for an attempt. He thought it would be possible to have them amount to an attempt.

Chairman Burns wondered if there might not be a Pirkey problem if there were different penalties between an "attempt" and a "solicitation".

Mr. Paillette did not think there would be this problem because as he recalled the section on grading (section 14) it provides that solicitation, attempt and conspiracy all be graded the same as the completed offense.

Representative Frost asked if when grading the various inchoate crimes--solicitation, possibly conspiracy, then attempt and completion--all are going to be lesser included crimes in every uncompleted or ineffectual crime. He asked Judge Burns if a judge would instruct on solicitation in an attempt case. He noted that two more elements were being added and it seemed to him that there were some very fine lines in between these things.

Chairman Burns thought the judge instructed now on attempts but he added that a judge does not normally instruct that the defendant could be found guilty of a lesser included crime such as a conspiracy to commit a burglary.

Representative Frost asked if solicitation were a lesser included crime what would be done about all of the affirmative

defenses. Is the defendant to be allowed to put on evidence of possible renunciation even though he is not specifically charged with the crime of solicitation? He thought there were affirmative defenses that pop up in various places.

Mr. Paillette felt that the only place where there would be a lesser included offense would be with the attempt.

Representative Frost set up a situation where he suggests that he and a second person rob a bank. The second person agrees and he buys dynamite and goes to the agreed site at the agreed time. After getting the fuse burning, he changes his mind and stamps out the fuse and both return home. There is a solicitation, a conspiracy and an attempt. Both are then caught. What is done at the trial--would the jury be allowed to go back to the solicitation? Would he be allowed to put on evidence of the renunciation, as a defendant, even though he is not charged with solicitation?

Chairman Burns understood Representative Frost was discussing solicitation or conspiracy as being lesser includeds to attempt, for example, not lesser includeds to robbery or burglary and Representative Frost agreed. Chairman Burns then stated he did not think the defendant would be allowed the renunciation defense.

Representative Frost thought that if the defendant were not allowed to put on this affirmative defense and the jury were instructed on solicitation, the defendant would be pretty badly deprived.

Professor Arthur observed that renunciation is a defense for attempt, for conspiracy and for solicitation, for all three, so there is no surprise there.

Mr. Paillette agreed, noting that the test is the same for all three--the actor must manifest a voluntary and complete renunciation of criminal purpose. If the crime were completed, the bank robbed, for example, he did not think the question would be reached as a lesser included on a question of solicitation. He thought the 'attempt" would always be there as a lesser included.

Chairman Burns commented that if the proof were such that a jury might find that the crime was not actually completed, he thought then that "attempt" would be submitted as a lesser included offense.

Mr. Knight added that in burglary or larceny, the defendant is tried for attempted burglary because he did not get in; if he did get in he is tried for burglary. In rape there is almost always assault with the intent to commit rape.

Representative Frost recalled that when discussing culpability the impossibility to perform the necessary criminal intent or

mens rea was discussed. If after the solicitation to rob the bank, the actor gets high on drugs to get a little "Dutch courage" and cannot perform the right attempt even though he has broken into the bank, could he go back to solicitation as a lesser included?

Mr. Paillette noted there would be a specific intent before the actor got high on the drugs. He said there were cases where an individual forms an intent to commit a crime and then gets drunk to bolster his courage to commit the crime. It is no defense then that he was too intoxicated for form the intent.

Representative Frost understood this was not a defense now by statute but as he recalled, either in the culpability section or perhaps in partial responsibility due to impaired mental condition in the Responsibility Draft, this was being changed.

Mr. Paillette observed that the intoxication section of the Culpability Draft discussed at the last Commission meeting provides that "voluntary intoxication is not...a defense...but evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negative an element of the crime charged." This is not much different from the present law on intoxication. Mr. Paillette advised that similar statutes have been construed by the courts to mean that when the actor decides to rob a bank and then goes out and gets drunk before he commits the crime, the fact of his intoxication cannot be a defense to negative the culpability element.

Section 6. Conspiracy--definition.

The subsections of section 6 will be designated "(1)" and "(2)" rather than "(a)" and "(b)" to correct an error in form.

Mr. Paillette noted that this section was discussed in the correspondence between Judge Burns and Mr. Sidney I. Lezak, copies of which were mailed to Commission members and placed in subcommittee notebooks.

Chairman Burns said it seemed to him that sections 7, 8 and 9 virtually had to be considered together. The thing that bothered him about the whole thing was that the draft would allow a conspiracy between A and B and a conspiracy between C and D to be lumped together for trial so long as those two conspiracies were supposedly different aspects of the same scheme. Another thing which he felt very important is whether or not the conspirators can be tried together. Traditionally the rule in Oregon has been that the defendants are entitled to separate trials.

Mr. Knight observed that as a result of the Supreme Court's decision joint trials are almost entirely out whenever there are any statements, unless it is done with the defendant's consent.

Chairman Burns commented that this was the Bruton rule but added there are still joint trials in the federal courts. He thought it was a real policy question to be resolved. The argument, he continued, is that if it is a real conspiracy, the prosecution is hampered if it must try each conspirator separately. This must be balanced with the danger of the "birds of a feather" theory which is so fatal to most defense chances in any kind of a conspiracy case. It seemed to him that if the courts were more willing to grant severances the problem might not arise so frequently; however, a severance is almost never granted in a federal court. He admitted that there is a prosecution problem when there are a large number of defendants as this necessitates trying the same case a number of times. He felt it was a hard decision to balance the rights of the opposing parties fairly. When there are seven or eight defendants and a four or five week trial, it is questionable if a jury is going to be able to single out the defendant who is innocent and Chairman Burns was of the opinion that it almost never happens.

Mr. Clark now present.

Representative Frost said that he had been trying to sort out a definition of conspiracy and as he read the draft definition there could be a conspiracy to commit, to attempt and to solicit. This, he thought, would bring up the question, again, of the lesser included. If a defendant were charged with a conspiracy to commit, is he also liable for a conspiracy to attempt or solicit. He asked if conspiracy would have just one penalty.

Mr. Paillette replied that the penalty would depend on how the conspiracy related to the substantive crime.

Chairman Burns read from section 14 of the draft, "...attempt, solicitation and conspiracy are crimes of the same grade and degree as the most serious offense which is attempted or solicited or is an object of the conspiracy. An attempt, solicitation or conspiracy to commit a felony of the first degree is a felony of the second degree." It is necessary to look at the most serious, end crime to determine the penalty.

Representative Frost felt this would take care of the Pirkey problem because the prosecutor would not have the option of charging attempt, conspiracy or solicitation.

Mr. Paillette was of the opinion that this section involves a big policy question for the Commission as to whether or not it wants to go to this kind of grading scheme for inchoate crimes.

Mr. Paillette referred to subsection (2) of section 6 and stated that he was not sure just what it adds to the definition of conspiracy.

Representative Frost observed that the word "agrees" used in the subsection by itself has some problems. He wondered if it referred to a contractual agreement, a mutuality in purpose. Would it be a defense if one of the actors contended he understood the crime intended was robbery rather than murder. Would a conspiracy case fall on this fact of no agreement?

Mr. Knight noted that generally a co-conspirator would be held responsible for the reasonably foreseeable acts done in the commission of the crime.

Representative Frost could understand this in respect to an attempt when a substantial step has been made toward the commission but felt it would be more difficult to show agreement in respect to solicitation.

Mr. Paillette wondered if it were necessary when defining a conspiracy to try to distinguish between a conspiracy to commit an attempt or a conspiracy to aid in soliciting someone else.

Representative Frost thought this was a good point and wondered why the definition could not read, "A person is guilty of conspiracy with another person or persons if he"...with just the commission of the crime. The crime, he said, is solicitation, attempt or commission.

Professor Arthur wondered what the MPC comments were and how they justified the language.

Chairman Burns referred to the commentary on page 31 of the draft and noted that it stated that the draft "comments...are drawn largely from [MPC] material through paraphrase and examples."

Representative Frost referred to the text of the Michigan code set out on page 37 of the draft and commented that the language was much cleaner and got away from the reference to solicitation, attempt, etc.

Mr. Paillette noted that one of the comments in the memorandum from Mr. Lezak's office was, "...it is not entirely clear to me why all the detail of sections 7 and 8 is required. I prefer a short, simple, single definition of conspiracy."

Mr. Paillette advised that the Michigan statute is based on both New York and the MPC. They adopt the unilateral concept the same as the proposed draft does.

Representative Frost commented that New York has a provision on the necessity of an overt act.

Professor Arthur remarked that Oregon's law now has that necessity and so does the federal law.

Representative Frost understood, then, that the proposed section 6 would not require an overt act.

Mr. Paillette agreed and recalled that this had been discussed at a previous meeting. He referred to page 14 of the subcommittee minutes for April 15, 1969, where Professor Platt had commented: "Presently the statute requires an overt act but...under the case law it can be practically any inconsequential act. ...the essential act had already taken place--the agreement. It is concrete and easy to identify and...enough. The MPC in minor offenses of conspiracy... requires an overt act."

Representative Frost stated that it would not take an overt act to commit the crime of solicitation. There could also be a conspiracy to commit the crime of solicitation according to his understanding of section 6.

Mr. Paillette remarked that he was having the same trouble with subsection (2) of section 6. In respect to Representative Frost's discussion of an "overt act", he noted that the Michigan commentary to their section 1015, Criminal Conspiracy, indicates that, "Michigan presently does not require proof of an overt act as an element of conspiracy. The Committee could find no value in adding such a requirement, particularly since the insignificance of the acts that will meet the requirement renders it almost meaningless." Michigan also notes with respect to section 1015, he continued, that the section "does not require that the activity sought to be undertaken by the conspirators constitute the completed crime. It only requires that conspirators agree to engage in conduct constituting a crime and this would include conduct in violation of sections 1001 [Attempt], 1010 [Criminal Solicitation], or 410-415 [Accomplice Sections]. It would therefore be illegal under section 1015 to conspire to solicit another to commit an offense or to commit an act that will amount to no more than an attempt because of some factual or legal impossibility not known to the conspirators (e.g., the intended victim has just died)."

Mr. Paillette thought it was Michigan's intent to cover the same types of things by their definition of conspiracy that is intended to be covered by the proposed draft but he felt that Professor Platt spelled it out more explicitly in his draft.

Mr. Knight noted that the MPC in section 5.03 uses the language, "...constitutes such crime or an attempt or solicitation to commit such crime...."

Professor Arthur commented that conspiracy charges are brought much more often in federal courts than in state courts.

Chairman Burns added that this is because it is possible to have joint trials in the federal courts and because federal judges do not sever very often.

Mr. Clark observed that this type of statute would be a good tool to have if there was an influx of organized crime into the state.

Chairman Burns replied that it was an effective tool in one sense but it has also proved to be a crutch that has had some unfortunate backlash and cited the Appalachian case as an example of such an instance. State cases, he continued, are usually relatively simple things involving a robbery, etc., as opposed to a federal case involving mail fraud, anti-trust suits, etc. He thought that it was part of Professor Platt's idea that much of the statute would be useful, basically, as far as organized crime is concerned. Oregon is fortunite presently to have very little organized crime but must look forward to the time when it might have and have the tools ready to use.

Representative Frost moved to delete section 6 of the draft and to substitute the definition of criminal conspiracy contained in the Michigan Revised Criminal Code section 1015 (1). He stated that the next thing he would like to do would be to adopt subsection (5) of the MPC section 5.03, amending it to require the overt act but dropping the language referring to "a felony of the first or second degree" or to adopt the New York language contained in their section 105.20.

Mr. Knight remarked that unless Professor Platt had some specific reason for adopting the MPC language, he had no specific objection to adopting the Michigan language. It seemed to mean the same thing and the language seemed simpler.

Chairman Burns asked Representative Frost if he planned to make any changes in sections 7 and 8 if the Michigan language were adopted in section 6. He said he was reluctant to change just one section in that it might be that Professor Platt had the sections all tied together in a manner not readily seen.

Mr. Paillette commented that he would like to see the subcommittee take some action on the draft. He stated that when talking with Professor Platt he had advised him that the subcommittee might make some changes in the draft but that he would have an opportunity to present his views to the full Commission.

Chairman Burns stated that if he were to vote for the motion he would want to do so on the basis that at the time the draft is considered by the Commission, Professor Platt would advise as to whether or not there is something in sections 7, 8 or 9 that is keyed to section 6.

Mr. Paillette referred to the Michigan commentary on their section 1015, Criminal Conspiracy, and read:

> "This provision is based upon New York Revised Penal Law §§ 105.00-105.30 and Model Penal Code § 5.03. In general, it follows the traditional definition of conspiracy, although it possibly takes a narrower view of the scope of the conspiratorial objective. It also attempts to make the punishment provisions, mens rea requirement, defenses and non-defenses consistent with those utilized in the other inchoate crimes.
>
> "....In keeping with the traditional view, conspiracy requires an agreement to engage in or cause specific conduct. As noted...however, the bilateral relationship of conspiracy is not treated as a technical standard when it could override the basic purpose of the conspiracy provision. Thus, we provide that one can conspire with a person who has an immunity to prosecution, that the renunciation and abandonment of criminal purpose by one of two conspirators does not relieve the other conspirator of liability unless he also abandons the criminal objective, etc."

Chairman Burns asked if there was anything in the Michigan Code which would be comparable to the draft sections 7 and 8.

Representative Frost observed that there was nothing mentioned in the draft commentary in this regard.

Representative Frost's motion to delete section 6 and substitute subsection (1) of Michigan Revised Criminal Code section 1015 passed unanimously.

Representative Frost moved to add, as a separate subsection under section 6, the language contained in New York Revised Penal Law section 105.20. This makes an overt act a necessity.

Mr. Clark recalled that the Michigan argument was that "....The Committee could find no value in adding such a requirement, particularly since the insignificance of the acts that will meet the requirement renders it almost meaningless."

Mr. Paillette directed the members' attention to the draft commentary entitled "Overt Act Requirement" set out on pages 34-35 of the draft.

Representative Frost asked if it was the intent, then, to say that for the crime of solicitation, conspiring to solicit, that the words of the solicitor are enough of an overt act.

Chairman Burns did not think that words, traditionally, have been considered to be an overt act in conspiracy law.

Professor Arthur added that the text writers always say that the overt act can be very much more remote than the act and attempt; attempt must come much closer to success; assault must come much closer than attempt.

Mr. Knight felt that the crime of solicitation would be complete with the words; there words would be the crime.

Mr. Paillette advised that the MPC does not require an overt act except for minor offenses. For a felony in the first or second degree an overt act is not needed. If the overt act is required for the protection of the defendant, this policy seems inconsistent.

Judge Sloan assumed that the reason for requiring an overt act on minor offenses is to avoid "pitty-pat" cases or charges where someone says something in jest.

Chairman Burns commented that the whole idea of the Model Penal Code approach is that "....Attention is directed...to each individual's culpability by framing the definition in terms of the conduct which suffices to establish the liability of any given actor, rather than the conduct of a group of which he is charged to be a part--an approach which in this comment...designated 'unilateral'." If the focus is on this theory, and it is sound, he observed, an overt act is not needed.

Representative Frost asked if a unilateral approach to conspiracy means it is not necessary to have an overt act.

Chairman Burns replied that traditionally the theory of conspiracy was that it was a partnership in crime, an agreement to commit a crime, and partly to give it some objective measurements, it was necessary to look for an overt act to determine the extent or scope of the partnership or agreement; while, as he understood it, the draft version looks at "the terms of the conduct which suffices to establish the liability of any given actor...."

Mr. Clark asked if it would be solicitation if someone stood up in a public meeting and invited the audience to arm itself to bring down society, etc.

Mr. Paillette recalled that Professor Platt had made the point at the previous meeting that he was not trying to get at the person making a public statement, as such, unless it could be shown that there was really a serious effort made on the part of the individual to promote the commission of a crime.

Mr. Clark thought it necessary to be very careful in this area.

Representative Frost added that this is why he thought section 4 of the draft should come out.

Professor Arthur stated that he was not in favor of pushing conspiracy very hard but he thought Judge Burns had brought out a good point. If conspiracy is a group process, three persons could agree but only one person has to commit an overt act. Under the MPC approach one person can be a conspirator even though the other two persons are acquitted because for some legal reason they are not guilty.

Mr. Paillette asked if the rationale was not that the evil concerned with is the fact that when two or more people get together to plan a crime or to agree to commit a crime that the chances of success in the crime are much greater and that the danger to society is enhanced because of this. If this is the evil concerned about, the fact that the individuals agreed to do this is sufficient to charge them with conspiracy without making it necessary for the conspirators to then go ahead and take a step towards the commission of the crime.

Representative Frost thought this was perhaps right and thought this was why an overt act should be required. He did not think any harm has been done to society until a step has been taken.

Mr. Knight commented that it is a matter of where someone can step in to stop the commission of the crime.

Representative Frost's motion to add a separate subsection under section 6 using the language contained in section 105.20 of the New York Revised Penal Law failed; Frost voting "aye", Clark and Knight voting "no", Chairman Burns not voting.

Section 7. Scope of conspiratorial relationship. Section 8. Conspiracy with multiple criminal objectives.

Chairman Burns explained that under the provisions of section 7 a person can be guilty of conspiracy even though he may not know the identity of some of his co-conspirators. Under the provisions of section 8 a person is guilty of only one conspiracy even though he conspires to commit a number of crimes (i.e., holding up all the branches of U. S. National in northwest Portland) "so long as the multiple crimes are the object of the same agreement or continuous conspiratorial relationship."

Judge Sloan commented that it seemed to him that this was an area where it is frequently made very difficult for the prosecution; at times this could be a very difficult defense to overcome.

Professor Arthur cited U. S. v. Bruno, a case involving dope smugglers importing narcotics into New York then selling them in New York to distributor middlemen who in turn sold the drugs to retailers some of whom were in Louisiana and some in Texas. He thought the intent of the section is to keep persons such as the Texas retailers from being charged with being conspirators with the New York people other than those from whom they bought the drugs.

Mr. Knight posed a situation involving organized crime where the prosecutor thinks he can convict members of the organization of trying to fix the horse races. He tries the individuals on this conspiracy and they are acquitted. Later the prosecutor catches the same individuals in the numbers racket and indicts them on this. Their defense is that the conduct is all part of one conspiracy and that they have been acquitted previously. The defendants contend that to be tried again would be double jeopardy. The conspiracy is for organized crime in Oregon and once they have been acquitted, Mr. Knight thought they would be free from any conspiracy charges from there on out.

Mr. Paillette observed that a substantive crime would have been committed and asked if the individuals would not be charged on this. Even though there is but one conspiracy, if there are five separate crimes, those involved would be guilty as accomplices.

Mr. Knight thought there would be problems with the proposed statute. He thought the prosecution would have to fight the statute every time because the defense would be raised each time the conduct was part of a conspiracy.

Mr. Paillette reiterated his stand that what was being discussed were completed crimes whereas the draft section is concerned about a conspiracy with multiple criminal objectives--not a conspiracy that has resulted in multiple crimes. If there are multiple crimes, he continued, the individuals will be charged with a completed substantive offense and the draft section would not be a defense to it.

Mr. Knight referred to section 8, to the language, "...continuous conspiratorial relationship. The provisions...apply although the agreement is renewed with, or the conspiratorial relationship is extended...." and said this still meant to him that once a person in organized crime has been acquitted or convicted on a conspiracy charge, he had double jeopardy from then on out.

Chairman Burns called the members' attention to paragraph two of the commentary on page 42 of the draft which set out an illustration of the effect of multiple criminal objectives.

Judge Sloan did not think the example set out in the commentary was a good example because it states that in planning to rob a bank the conspirators steal a car, steal some guns, etc., and any prosecutors just agree to do these acts, he wondered if the prosecutor was going to have to prove that the individuals conspired to do each of them.

Mr. Paillette thought that the intent in the hypothetical set out in the commentary was to point out that if the individuals agree to steal a car and steal a gun and then to rob a bank, bearing in mind that what is being discussed is an inchoate crime so that the acts have not been completed, that the persons involved cannot be charged with a conspiracy to steal a car and a conspiracy to steal a gun and a conspiracy to rob a bank--it is but one conspiracy. It is not intended to imply that if the individuals have, in fact, stolen a car and stolen a gun and then robbed the bank that they have not committed three separate crimes.

Judge Sloan asked if, in order to get a conviction under this proposed statute, a prosecutor would have to prove a conspiracy to do each criminal act. That is, if the prosecutor fails to prove a conspiracy in regard to any one of the multiple crimes planned to achieve the purpose of the conspiracy would the defendant be considered not guilty. He felt that if a defendant contended that he had agreed to rob a bank but that he had not agreed to steal a car or rob a hardware store in order to obtain a gun, that he would not be guilty of the conspiracy because it is one continuous conspiracy.

Mr. Paillette stated that if a defendant were charged with a conspiracy to commit robbery and were acquitted, he could not then be charged with a conspiracy to steal the car in order to commit the bank robbery.

Judge Sloan commented that it seemed to him that a provision of this kind could very well tie the prosecutor's hands and make prosecution very difficult in some instances.

Mr. Knight felt that having the statute provisions in made no more sense than having a statute stating that if a person commits three bank robberies he can be tried for only one or if he writes ten bad checks he can be tried for only one.

Chairman Burns stated that everyone was overlooking the difference between a conspiracy and a substantive crime. If a person writes ten checks, he is guilty of ten crimes; if he conspires to write ten checks, he has committed but one conspiracy, not ten, and he can be convicted of just one conspiracy.

Judge Sloan asked what the prosecutor would allege in this respect.

Chairman Burns replied that he would allege that the individuals conspired and the object of the conspiracy was to write ten bad checks. He thought that the easiest way to answer the question would be to get some typical indictments so that they might be studied and he thought he could do this easily through Mr. Lezak's office. The charging language of the conspiracy indictment, he continued, is relatively simple. Some of the indictments may be lengthy but this is because, traditionally, they have alleged a number of separate overt acts. This is tactical because it impresses a jury and it is not necessary to prove all of the overt acts as long as one of them can be proved.

Mr. Knight understood, then, that the broader a conspiracy the more protection it would afford a participant; that is, if the conspiracy is broad enough to encompass setting up a criminal syndicate to operate throughout the whole state, involving prostitution, drugs, numbers, some homicides, etc., once a conspirator is tried on one of the crimes that is an outgrowth of that conspiracy, he is "home free" because he has double jeopardy.

Professor Arthur was of the opinion that the provision was meant to protect the person who really agreed only once from being punished for multiple criminal objectives. Conspiracy as a crime, he said, is the agreement and the intent is to punish for the agreement.

Judge Sloan wondered if the subject of multiple crimes and multiple charges is limited to just conspiracy or if it is something that has been considered in the way of a double jeopardy statute or something relative to the charging and sentencing on local crimes generally. He added that he could not see any particular benefit to the statute except as it may relate to multiple crimes, multiple charges and multiple sentences as would apply to any crime.

The subcommittee recessed at 4:00 p.m. and reconvened at 4:20 p.m.

Chairman Burns stated that various subcommittee members had discussed the possibility of passing section 8 along to the full Commission with the plan that Mr. Knight and Professor Platt get together and work out some language satisfactory to both of them. He asked if there was objection to this and hearing none announced this approach would be followed.

Section 9. Joinder, severance and venue in conspiracy prosecutions.

Chairman Burns recalled that this was the section to which he had some objection. He advised that he had corresponded with Mr. Lezak about this because he felt it would be of some help.

Mr. Clark asked how a state would handle a conspiracy problem that involved people within a state and without who planned the conspiracy by telephone.

Chairman Burns thought the use of interstate telephone lines might involve some federal jurisdiction but could not see a problem here as it would not negate state involvement if the object of the conspiracy were a state crime.

Chairman Burns advised that section 9 would work a rather profound change in Oregon law. Presently, even in a conspiracy case, an Oregon defendant has a right to a separate trial. The draft would allow the defendants to be tried jointly unless the court ordered a severance. Also, he continued, subsection (1) (b) allows separate conspiracies to be tried together as long as the separate conspiracies "constitute different aspects of the scheme of organized criminal conduct." He thought this provision would be new in the United States.

Mr. Knight thought that as a practical matter the state would have to request severance whenever they had a confession because the defendant would have to be tried separately. The Supreme Court has said that a jury cannot be instructed to disregard something or apply it to only one defendant because the jury cannot be trusted to do this.

Chairman Burns was not sure this rule would apply to trials in which the defendants were all joined.

Mr. Knight was of the opinion that it would be necessary to have separate trials for joint defendants if a confession had been made after the defendant was placed in custody.

Chairman Burns remarked that he apparently had not read the cases carefully and if this is what they say, it seemed to him that section 9 should be sent back to the reporter to be reworked. His understanding was that the Bruton doctrine would not be applicable in a conspiracy type trial where all the defendants were present and being proceeded against.

Mr. Paillette did not see what violence would be done to the Bruton ruling by the provisions of section 9 and drew attention to the language in subsection (2) which states, "...the court shall

order a severance...as to any defendant who so requests, if it deems it necessary or appropriate to the fair determination of his guilt or innocence, and shall take any other proper measures to protect the fairness of the trial."

Representative Frost understood that presently in Oregon the right to a separate trial is not discretionary, it is a matter of right.

Chairman Burns replied that in Oregon it is a matter of right (ORS 136.060) and the draft provision would make it the equivalent of the present federal rule as to joinder or severance in conspiracy cases.

Mr. Paillette noted that the language contained in subsection (1) (b) of section 9 was the language to which Sid Lezak and Jack Collins objected and quoted from the memorandum: "However, the draft would permit joinder for trial of different conspiracies representing 'different aspects of a scheme of organized criminal conduct' and having totally different parties. I object. Should such a situation arise, all parties should either be joined in a single conspiracy, or separate conspiracies should be charged, or the various defendants should be charged with particular substantive crimes."

Chairman Burns raised the question as to how and who makes the determination of whether or not the conspiracies are "so related that they constitute different aspects of [the same] scheme of organized criminal conduct." Would this be made by a judge and jury; when would it be determined?

Mr. Knight observed that if the conspiracy were very large, there would also be a venue question.

Chairman Burns wondered how venue would be determined if there is no overt act in the definition of conspiracy.

Judge Sloan thought there would be an extremely difficult question presented for trial judges, particularly, by the statement, "the admissibility against him of the acts or declarations of another shall [not] be enlarged...." contained in subsection (1) (b) of section 9.

Chairman Burns noted that the inclusion of section 9 in the draft was justified in the commentary as follows: "The provisions of this section are readily identifiable as largely procedural in nature. Placing them here as part of the substantive law seems justified, however, because they operate so importantly on the substantive law of conspiracy. These procedural matters so often affect the outcome of the prosecution that they are in the

practical sense inseparable from the substantive definition of conspiracy." Chairman Burns still wondered, however, if it might not be better to carry the provisions over until the procedural part of the code is considered.

Mr. Paillette thought this could be done easily enough. If the provisions of the draft up to section 9 were adopted and no changes made in the procedural law, he did not feel there would be any particular problem in applying the current procedural statutes to it.

Chairman Burns suggested sending the section along to the Commission with the recommendation either that the subcommittee does not approve the substance of it or, alternatively, that the subcommittee recommends that the section be taken out and put into the procedural section. The Commission could then make the decision when Professor Platt is available to present his views. This approach was agreeable to the subcommittee members.

Section 10. Conspiracy--renunciation of criminal purpose.

Mr. Paillette explained that this was a renunciation defense, again, only it applies to conspiracy. The language is a little different from that used in previous sections but it is an affirmative defense and the burden is on the defendant by a preponderance.

Mr. Clark asked if it would be necessary for the defendant to thwart the success of the conspiracy by renunciation.

Mr. Paillette replied that it would have to be shown that the defendant not only wanted to thwart the success of the conspiracy but that he actually did renunciate voluntarily and that this caused the conspiracy to fail.

Chairman Burns referred the members to the draft commentary appearing on page 53 concerning this subject.

Mr. Knight wondered about the application of the defense where the conspiracy is one, continuing conspiracy covering eight bank robberies and the defendant has renunciated after robbing just two of them. The defendant would not be held responsible in the next six robberies so, therefore, is he only partially guilty?

Section 11. Duration of the conspiracy.

Representative Frost noted that this was strictly the application of the statute of limitations. He thought the points set out were reasonable points of determining a statute.

Mr. Paillette advised that in respect to the statute of limitations, generally, the Commission has adopted the policy that it is procedural. He was reluctant, just for the organization of the code, to begin fragmenting it, placing some procedure in one place and some in another place.

Mr. Knight thought the statute of limitation on conspiracy could probably go into the procedural section but he thought there were special problems involved in determining a statute of limitation for conspiracy which probably would not apply to a statute of limitation covering misdemeanors or felonies in general.

Mr. Paillette agreed with this and thought this was the reason section 11 was placed in the draft.

Chairman Burns asked if there was any objection to the specific wording in section 11--above and apart from the question of whether it should be kept in the draft or placed in the procedural section.

Mr. Paillette advised that the language of the section follows exactly the language of MPC section 5.03 (7) and that California has a similar provision. Michigan, Illinois and New York have made no provision for abandonment as it affects the running of the statute of limitation for the crime of conspiracy.

Chairman Burns understood that there is no present law dealing with this and Mr. Paillette said that this was correct.

Mr. Clark asked how this was covered, then, and Chairman Burns stated that there were no cases on it so that it has apparently never come up.

Chairman Burns suggested passing section 11 along to the Commission and raising before the Commission the question of whether it should be in this section or in the procedural section. The Commission can then make this decision. Since there were no objections, this approach was adopted.

Section 12. Solicitation and conspiracy--availability of certain defenses.

Representative Frost asked if the provisions of the section would statutorily encourage entrapment. He referred specifically to the language, "feigned the agreement" and "immunity to prosecution".

Mr. Knight did not think it would--not under the definition of entrapment.

Chairman Burns referred to the opening phrase in subsection (1), "Except as provided in subsection (2) of this section," and noted there was no subsection (2) appearing in the section.

Mr. Paillette replied that an error was made in typing the draft and the MPC material appearing on page 62 (a blue sheet) should have been made subsection (2) of section 12.

Mr. Paillette explained that the intent of subsection (2) of MPC section 5.04 is to tie it in with their section on accomplices, section 2.06. MPC section 2.06 (5) states that: "A person who is legally incapable of committing a particular offense himself may be guilty thereof if it is committed by the conduct of another person for which he is legally accountable, unless such liability is inconsistent with the purpose of the provision establishing his incapacity."

Mr. Paillette drew attention to the draft commentary on page 63: "...a 'victim' of a crime, although he has participated in its completion, and who...cannot be held for the substantive crime [because, for example, the crime is defined in such a way that the victim is excluded as a class of persons who would be guilty], cannot be held for soliciting the crime or conspiring to commit the crime. Examples would be crimes for which the consenting behavior of more than once person is inevitably incident, such as statutory rape, abortion, bribery or unlawful sales."

Mr. Paillette advised that there is a similar section in the draft on Parties to Crime dealing with accomplices to completed criminal acts and the provisions of section 12 would not be inconsistent with this. He continued by quoting from MPC section 2.06 (6): "...a person is not an accomplice in an offense committed by another person if: (a) he is a victim of that offense...".

Professor Arthur thought that, basically, subsection (2) of section 12 represents current law all around and there are a number of cases, federal and otherwise.

Mr. Paillette said that he had researched the Oregon cases for his draft on Parties to Crime and he noted that there were a number of Oregon cases on the question of when a person is an accomplice for the purposes of the accomplice testimony rule. For example, the prosecutrix in a statutory rape case is not an accomplice and in a recent Multnomah County abortion case, State v. Barnett, the woman was not an accomplice.

Chairman Burns asked if there was objection to section 12 and hearing none announced that the section would be considered passed.

Consideration of sections 13 and 14 of the draft was deferred until the next subcommittee meeting.

The meeting was adjourned at 5:00 p.m.

Respectfully submitted,

Maxine Bertruff, Clerk
Criminal Law Revision Commission