Tapes #45 and 46

#45 - 384 to end of Side 1 and all of Side 2
#46 - All of side 1 and 1 to 325 of Side 2

OREGON CRIMINAL LAW REVISION COMMISSION
Room 315 Capitol Building
Salem, Oregon

January 23, 1970

A G E N D A

# # #

OREGON CRIMINAL LAW REVISION COMMISSION
Seventeenth Meeting, January 23, 1970

Minutes

Members Present: Senator Anthony Yturri, Chairman
Senator John D. Burns, Vice Chairman
Judge James M. Burns
Mr. Robert Chandler
Senator Kenneth A. Jernstedt
Mr. Frank D. Knight
Mr. Bruce Spaulding
Representative Thomas F. Young

Delayed: Representative Wallace P. Carson, Jr.
Mr. Donald E. Clark
Representative David G. Frost
Attorney General Lee Johnson

Absent: Representative Harl H. Haas

Staff Present: Mr. Donald L. Paillette, Project Director
Professor George Platt, Reporter
Mr. Roger D. Wallingford, Research Counsel

Agenda: CRIMINAL HOMICIDE
Preliminary Draft No. 2; January 1970

OBSTRUCTING GOVERNMENTAL ADMINISTRATION
Preliminary Draft No. 2; December 1969

ASSAULT AND RELATED OFFENSES
Tentative Draft No. 1; April 1969

Proposed Amendments to
OFFENSES AGAINST PRIVACY OF COMMUNICATIONS
Preliminary Draft No. 2; December 1969

The meeting was called to order by the Chairman, Senator Anthony Yturri, at 9:30 a.m. in Room 315, Capitol Building, Salem.

Approval of Minutes of Commission Meeting of January 9 and 10, 1970

Mr. Spaulding moved that the minutes of the Commission meeting of January 9 and 10, 1970, be approved as submitted. The motion carried unanimously.

Criminal Homicide; Preliminary Draft No. 2; January 1970

Section 1. Criminal homicide. Professor George Platt, Reporter for the Article on Criminal Homicide, explained that subsection (1) of section 1 established the limits of the homicide provisions and contained the amendments made by Subcommittee No. 2 but did not actually define the crime. Subsection (2) broke criminal homicide into three branches -- murder, manslaughter and criminally negligent homicide. Those terms, he said, encompassed what had heretofore been voluntary and involuntary manslaughter, murder in two degrees and negligent homicide for automobile cases.

In response to a question by Mr. Chandler, he advised that the term "criminal" was used in conjunction with "homicide" because a justifiable or excusable homicide would not be a criminal homicide.

The Criminal Homicide Article, Professor Platt said, would not encompass abortion. This subject was treated separately in the existing Oregon law as a type of manslaughter but not murder. Abortion was excluded from this Article by the definition of "human being" in subsection (3) which said "a person who has been born and was alive at the time of the criminal act." (Abortion is treated in the Article on Offenses Against the Family.) The motion approving section 1 will be found on page 14 of these minutes.

Section 2. Murder. Professor Platt explained that section 2 made two major changes in the law of murder as compared to existing law. First, it dispensed with degrees of murder. The commentary on page 8 explained the historical basis for providing more than one degree of murder as a way of allowing juries to impose a lesser penalty than capital punishment. As the criminal law system had evolved, however, first degree murder was usually determined by the element of premeditation, yet cases throughout the country, and a few in Oregon, had held that even premeditation for an instant would suffice. In reality, then, it became almost impossible for a court to instruct a jury with respect to such a minimal amount of time. Degree murder, Professor Platt said, imposed some factors which did not necessarily reflect the dangerousness of the person before the court. As an illustration of this situation, he said a husband who killed his wife's lover after lying in wait for him had clearly committed premeditated murder whereas a person who fired a gun into a house or church full of people had committed a reckless homicide generally determined to be second degree murder. He submitted that the second individual was far more dangerous to society than the first because the first man was unlikely to kill again while the second might very well repeat the same act. Dispensing with degrees of murder would give the court opportunity to examine the characteristics of each individual to consider how dangerous he was to society and to determine the sentence and penalty best suited to that individual.

Professor Platt advised that the second major change in section 2 related to the felony-murder doctrine. For the first time a very limited defense would be available to a defendant who heretofore would have been absolutely liable for a death arising out of the commission of one of the violent felonies. Under existing law this liability extended to co-felons even though they had not used the lethal weapon; under section 2 if the co-felon could show certain specific grounds in behalf of himself, he would be entitled to an acquittal of the murder charge but not of the underlying felony charge. This defense was set out in subsection (2) of section 2 and placed the burden on the defendant to come forward and carry the defense by a preponderance of the evidence.

Subsection (3), Professor Platt advised, dealt with causing or aiding a suicide and did not change the law in Oregon although it did place it in a different context. A husband who watched his wife dying slowly and painfully and finally became so emotionally disturbed that he permitted her to commit suicide would have the defense in subsection (3) available to him and could be found guilty of manslaughter but not murder. However, if the husband caused the death by deception and administered poison by telling his wife it was a sleeping pill, or if two persons made a suicide pact and one killed himself while the second did not, the defense in subsection (3) would not be applicable.

Judge Burns called attention to subsection (2) (b) which said that the one seeking to assert the affirmative defense, though he aided in the principal crime, did not aid in the act which caused the death of the decedent. He asked if this carved out an exception to the general law concerning principals and accomplices. Professor Platt replied that the provision did not make an exception because the law of complicity required a purpose to commit the substantive crime for which the person was held as an accomplice. For example, if the purpose were to rob the bank, this subsection would no longer permit the mens rea of the crime of bank robbery to be shifted to the mens rea of murder. The defendant would have to convince the jury that the murder was contrary to the criminal design of the original plan.

Professor Platt explained that the second degree felony-murder doctrine would be abolished by this draft and the focus placed upon the nature of the act; not the definition of the act. Was the act purposeful or knowing? If so, it would be murder. Was it reckless with extreme disregard for human life? If so, it would be murder. Was it merely a reckless act as defined within the General Definitions of recklessness? If so, it would be manslaughter. Was it less than recklessness with criminal negligence? If so, it would be negligent homicide.

Mr. Chandler inquired as to the exact meaning of "affirmative defense" as opposed to "defense." Mr. Paillette explained that "defense" did not shift the burden and it would remain on the state to disprove the defense beyond a reasonable doubt. In the case of an "affirmative defense," the burden of proof shifted to the defendant and he was required to establish that defense by a preponderance of the evidence. He further explained that the mere fact that the defense was characterized as an affirmative defense did not mean that the defendant was required to give notice to the state of his intent to raise the defense.

Mr. Spaulding asked how the defense was to be raised. Professor Platt replied that raising the issue was one of the areas of flexibility which varied from state to state and was a matter of case law. This, he contended, was as it should be. Mr. Paillette expressed agreement that the manner of raising the defense should not be established by statute.

Chairman Yturri asked if it was adequately clear that the paragraphs in subsection (2) pertained only to a defense to a murder charge. Professor Platt replied affirmatively and called attention to the reference to paragraph (c) of subsection (1) contained therein. Mr. Paillette noted that the last sentence of subsection (3) further clarified the intent that the defense was pertinent only to a felony-murder charge. He also pointed out that the paragraphs under subsection (2) were conjunctive requirements and the defendant was required to establish all of them in order to maintain the burden of proof.

Senator Burns commented that section 2 was a significant departure from Oregon law and asked Professor Platt to explain the reception this change had received in states which had abolished the first and second degree distinctions for murder. Professor Platt replied that the system had met with good reception. It was unnecessary to refer to new codes to draw this conclusion, he said, because a number of states had never had degrees of murder, and in those states instructions and treatment of individuals for sentencing had traditionally caused far less difficulty than in states having more than one degree.

Chairman Yturri expressed the view that section 2 was a substantial improvement over existing law, particularly because of the elimination of the premeditation factor.

Mr. Spaulding commented that adoption of section 2 would eliminate much of the basis for bargaining with the district attorney. Professor Platt indicated that Michigan had retained two degrees of murder and had apparently done so specifically for plea bargaining purposes. He personally believed that plea bargaining should not be

a consideration because there was still plenty of room remaining for negotiating a manslaughter or negligent homicide charge.

Senator Burns concurred that section 2 was a substantial step in the right direction and moved that it be approved. Mr. Spaulding seconded and the motion carried unanimously. Voting: Senator Burns, Carson, Chandler, Frost, Jernstedt, Johnson, Knight, Spaulding, Young, Mr. Chairman.

Mr. Spaulding asked if under the language of subsection (1) (b) of section 2 a person could be convicted of murder even though he was so intoxicated that he could not form an intent to kill.

Judge Burns said that the subsection traditionally applied to situations such as persons shooting into a building or dropping a heavy object onto a crowded street below. Mr. Spaulding contended that it would not necessarily be limited to that type of situation; it could include recklessly driving an automobile while intoxicated. Judge Burns indicated it could apply to someone recklessly and drunkenly driving an automobile into a parade which would be murder and he was of the opinion that it should be.

Mr. Paillette explained that under the standard of recklessness set forth in the General Definitions, the defendant would have to consciously disregard a known risk. The conscious disregard, he said, would be getting drunk in the first place. Mr. Spaulding asked if this type of conduct should make a person guilty of murder and Judge Burns noted that it would be second degree murder under the present law.

Chairman Yturri called attention to an inconsistency in that Professor Platt had earlier said that the Commission had adopted a limited defense in subsection (2) of section 2 when in connection with a felony-murder the person didn't realize his co-felon had a gun or didn't intend any violence to occur. Under subsection (1) (b) of section 2 when the person took his first drink, a voluntary act, he didn't intend to get so drunk as to run his car into a crowd of people. He asked why such a person should be subject to a charge of murder when the person in the felony-murder example was relieved of the crime of murder because he didn't realize one of his cohorts had a gun.

Professor Platt agreed there was an inconsistency in this respect and it was one that had existed in the law since man first discovered alcohol. This was the way the law had traditionally responded to cases of drunkenness. When a man became so intoxicated that he didn't know what he was doing, he said, he then had no mens rea within the established concepts of that term. Yet this was viewed as such serious conduct that the law had been willing to invent what amounted to an inconsistent concept by saying that when a person took his first drink, he knew that he was liable to get drunk and all types of dangerous results might flow from that conduct. The Model Penal Code also agreed this was inconsistent but concluded that it was the only practical way society could react to the situation.

Chairman Yturri summarized by saying that Professor Platt's answer to the question raised by Mr. Spaulding was that intoxication had always been treated as dangerous conduct and would continue to be so treated by this draft. It was further understood that subsection (1) (b) would apply to the person who was so intoxicated that he could not form an intent to kill.

Assault and Related Offenses; Tentative Draft No. 1; April 1969

Mr. Paillette pointed out that the Article on Assault and Related Offenses contained language very similar to that in subsection (1) (b) with respect to "circumstances manifesting extreme indifference to the value of human life." The Assault draft, however, used "gross indifference" rather than "extreme indifference." Since the tests should be the same in both sections, he suggested that one or the other be changed.

Professor Platt maintained that it was a mistake to use the word "gross" because it came with all kinds of definitions under case law. He expressed the belief that the existing definition of "gross" in case law was generally contrary to the definitions of that term in the proposed code.

Chairman Yturri asked if there was any objection to changing "gross" to "extreme" in section 3 of the Assault Article. There being none, it was so ordered.

Criminal Homicide; Preliminary Draft No. 2; January 1970 (Cont'd)

Section 3. Manslaughter. Professor Platt explained that the definition of "manslaughter" in section 3 made major changes in present law, the greatest being that it entirely abolished the misdemeanor-manslaughter rule. A misdemeanor-manslaughter, he said, was exemplified by a situation where a person hit another who, as a result of the blow, tripped over something, struck his head against an obstacle and died. Case law, as strictly applied, said that the striking in the first place was a wrongful act and death followed as a chain of causation. It was therefore a misdemeanor-manslaughter (death as a result of a wrongful act) and was criminal homicide. The focus under subsection (1) would no longer be on the underlying wrongful act because manslaughter was described in terms of "recklessness," a term defined elsewhere in the code as a conscious disregard of a known risk. The question of manslaughter, therefore, would turn not on whether the act was a misdemeanor but whether the act was so reckless that the person should have been consciously aware that he was running a risk that the victim would be killed as a result of the act.

He called attention to the example cited in the commentary on page 21 of the draft where a victim was pushed through a screen door and subsequently died from tetanus as a result of a cut he sustained

on his finger from the rusty screen door. The case resulted in a manslaughter conviction because of the assault and battery of pushing the victim through the screen. Under the formulation in section 3, providing the jury followed the instruction as to the definition of "recklessness," there could not be a conviction for manslaughter because a reasonable man would not expect someone to die in that fashion because he was shoved through a screen door. Whether such an act would constitute negligent homicide (section 4) would be a jury determination.

A second branch of manslaughter as presently defined in ORS, Professor Platt said, related to death resulting from a lawful act. This doctrine was not applied in the formulation of section 3. Although that particular formulation in Oregon was more receptive to the actual mens rea involved, the courts had taken the view that mere civil negligence would suffice with respect to the question of what constituted caution. Civil negligence, he contended, had no place in the criminal law.

Professor Platt pointed out that Subcommittee No. 2 experienced considerable difficulty and doubt with respect to the formulation of subsection (2) of section 3. The provision embodied the concept of provocation in existing law which reduced a murder charge to manslaughter and turned on the "heat of passion" and "adequate provocation" tests but was much more subjectively phrased than present law. The formulation in subsection (2), he said, was attempting to get away from the inflexible common law doctrine of provocation where only the most obvious and very limited kinds of situations could be held to be provocation sufficient to reduce the crime from murder to manslaughter. The subsection was not intended to say that it excused a man for killing with sufficient provocation, but it could reduce the charge from murder to manslaughter.

The most obvious difficulty, as discussed by the subcommittee, was that it opened the trial to the possibilities of a great deal of psychiatric testimony to show that the defendant's mental disturbance was the kind that carried him beyond control in the sense that it would cause him to react as he did. Ultimately the decision would be made by the jury and they would be told to place themselves in that person's situation and consider the circumstances as they appeared to the defendant at the time of the act.

Stemming from the difficulty which some of the subcommittee members anticipated with respect to bringing in psychologists and psychiatrists, was the problem of whether notice should be required when the defendant intended to bring in an expert witness. That question was left open by the subcommittee.

Chairman Yturri stated that it was difficult to separate the circumstances as the defendant believed them to be from his scheme of moral values. Professor Platt agreed and noted that the Model Penal

Code said of the formulation in subsection (2) that it contained areas of uncertainty and this was desirable, a statement with which he expressed agreement. The idea, he said, was to make the criminal law responsive to the actual mens rea of the crime or what the particular actor had in his mind. It permitted the defendant to explain fully to the jury just why he acted as he did.

Mr. Paillette objected to subsection (2) and explained that it allowed the defendant a "back door approach" to diminished responsibility. Under the Responsibility Article, he said, this kind of defendant had available the diminished responsibility defense which offered an opportunity to raise the kind of question contemplated by subsection (2). Professor Platt remarked that under the Responsibility Article the diminished responsibility defense was available when the defendant's disability was the result of a mental disease or defect whereas the defense in the manslaughter section resulted from an "emotional disturbance." Mr. Paillette replied that he had difficulty distinguishing between an emotional disturbance and a mental disease or defect and expressed the view that the diminished responsibility defense in the Responsibility Article was sufficient to take care of cases of this kind without the further provision contained in subsection (2).

Mr. Johnson commented that subsection (2) would merely permit testimony at the trial which in most cases was heard in arguments before the court under the present law. Mr. Spaulding agreed but added that the judge would instruct the jury differently as to the meaning of the testimony if subsection (2) were enacted into law.

Chairman Yturri commented that considering society as a whole, the Commission should decide whether or not to adopt a "reasonable man" test or to open the gate to permit any type of defense. The question, he said, was whether to confine the defense and allow it only when the reaction was that which could be expected from an ordinary, reasonable, prudent person or to extend it to one who had some mental defect unknown to anyone, which could vary from individual to individual, and consequently permit thousands of defenses where today none would exist.

Representative Frost commented that subsection (2) recognized what was presently a statistical fact; namely, that there was less recidivism from crimes of violent passion than from crimes such as check writing or robbery. If the purpose of the law was to protect society, this would not be accomplished by locking up a person who would probably never commit a homicide again. Perhaps, he said, it created a greater problem for society to turn a check writer loose than to let someone go who had been involved in a homicide under a "heat of passion" situation. The type of testimony by psychiatrists which could lead to a lesser charge for this type of individual would be permitted by subsection (2), and he expressed the view that it was right that it should be allowed.

Senator Burns said his concern with subsection (2) was that in every homicide case he had ever seen a subjective test could be imposed and therefore, under the proposed section, instructions could be drawn which would invariably result in a manslaughter rather than a murder conviction. In every case, he said, the defendant could give a reasonable explanation for his act. Mr. Spaulding agreed and said that the defendant could always contend that he had a background which led him to where he was willing to commit the act and was unable to keep himself from doing so. Senator Burns maintained that an objective test should be adopted rather than a subjective one.

Professor Platt concurred that enactment of subsection (2) would result in a great many more of these kinds of defenses being inserted into homicide cases. As a practical matter, he said, this kind of evidence went to the jury at the present time but with the passage of the proposed section, the evidence could be received officially and it would open up the ability and the authority of the court to instruct the jury that it was proper for them to consider that evidence in determining the issue.

Mr. Paillette commented that in provocation cases at the present time it was necessary to show first the provocation and then the reaction the defendant made to that provocation. The proposed section would allow a person to dwell on the situation and work himself up to a state of rage and indignation and then be able to get the information concerning his mental state to the jury as a defense.

Mr. Knight said that if a person had the ability, because of his circumstances or background, to rationalize to himself the commission of cold-blooded murder, the section would permit him to justify his belief that the murder charge should be reduced to manslaughter. That type of person, he said, one who could rationalize his act to himself, was the kind who was apt to commit the same act again and not the type of non-repeater to whom Representative Frost referred.

Chairman Yturri pointed out that since subsection (2) would permit the defendant to show his entire background and to show why he reacted as he did in the circumstances that existed, he asked if it would then be relevant to consider whether or not the deceased victim, who perhaps aggravated him, was aware that the defendant was anything other than a reasonable man. Professor Platt replied that he did not think this information would be relevant to the case.

Judge Burns said he was impressed with Mr. Paillette's argument that inclusion of the diminished responsibility defense in addition to the defense in subsection (2) might be broadening the law unduly. Chairman Yturri asked Professor Platt if there was an overlap between subsection (2) and the diminished responsibility defense and was told that he had no doubt there would be individuals who would qualify under both defenses.

Senator Burns reiterated his objection to the fact that subsection (2) imposed a subjective rather than an objective test and for this reason every homicide could result in a manslaughter verdict rather than murder. Professor Platt advised that the test was not purely subjective inasmuch as the word "reasonable" was used in the statement.

Professor Platt pointed out that the Commission in approving section 2 had adopted a highly subjective defense in an area which had always been purely objective. Mr. Paillette advised that in the felony-murder situation in section 2 the defense was cast in terms of an affirmative defense and established six specifics that the defendant was required to prove by a preponderance of the evidence to extricate himself from a felony-murder charge. Subsection (2) of section 3, however, was not cast in terms of an affirmative defense but in terms of an exception to murder. In addition, he said, it contained no guide whatsoever to the kind of evidence which could be brought into the trial.

Mr. Spaulding asked whether a difference was intended between a reasonable explanation and a reasonable excuse. Judge Burns suggested that "explanation or" be deleted from subsection (2) so that it would read "there is a reasonable excuse." Mr. Spaulding proposed to say "explanation and excuse" rather than "explanation or excuse."

Chairman Yturri asked if it would help the situation to make subsection (2) an affirmative defense and require notice if the defendant intended to bring in expert testimony. Judge Burns commented that it would be clumsy to convert the subsection to an affirmative defense but felt it might satisfy some of the doubts expressed if Mr. Spaulding's suggestion were adopted.

Judge Burns then moved to amend subsection (2) to read "explanation and excuse" in both sentences. Mr. Johnson seconded and the motion carried unanimously.

Mr. Knight moved to delete subsection (2) of section 3 and Senator Burns seconded. The motion was defeated. Voting for the motion: Senator Burns, Chandler, Knight. Voting no: Judge Burns, Carson, Frost, Jernstedt, Johnson, Spaulding, Young, Mr. Chairman.

Mr. Johnson moved to adopt subsection (2) as amended. Motion carried. Voting for the motion: Judge Burns, Carson, Frost, Jernstedt, Johnson, Spaulding, Young, Mr. Chairman. Voting no: Senator Burns, Chandler, Knight.

Mr. Knight commented that in fairness to the state the defendant should be required to give notice if he was going to call in expert testimony and also that the state should be permitted to examine the defendant in the same manner as provided in the Responsibility Article. Chairman Yturri expressed agreement.

Professor Platt read section 5 of Tentative Draft No. 1 of the Responsibility Article:

> "The defendant may not introduce in his case in chief expert testimony regarding partial responsibility under section 2 of this Article unless he gives notice of his intent to do so in the manner provided in section 6 of this Article."

Section 7 of the Responsibility Article further provided:

> " . . . the state shall have the right to have at least one psychiatrist of its selection examine the defendant."

After further discussion, Judge Burns moved to add appropriate language to section 3, or elsewhere at the discretion of the staff, to equate the Criminal Homicide Article with the two provisions contained in the Responsibility Article cited above by Professor Platt. Mr. Knight seconded and the motion carried unanimously.

Professor Platt then explained that under subsection (3) of section 3 all cases of intentionally causing or aiding a suicide would be prosecutable as manslaughter. As noted in the commentary on page 18, cases in which duress or deception was used by the defendant were also prosecutable as murder. Subsection (3), he said, reflected existing Oregon law.

Representative Frost moved that section 3 as amended be adopted. The motion carried. Voting for the motion: Judge Burns, Carson, Chandler, Frost, Jernstedt, Johnson, Spaulding, Young, Mr. Chairman. Voting no: Knight. Abstaining: Senator Burns.

Section 4. Criminally negligent homicide. Mr. Spaulding pointed out that there were a number of decisions on negligent homicide where the courts had adopted the civil definition of "gross negligence" and thereby incorporated that definition into the criminal statutes. Professor Platt replied that section 4 would obviate those decisions. He pointed out that State v. Hodgdon, 244 Or 219, 419 P2d 647 (1966), equated gross negligence with recklessness and appeared to approximate the degree of negligence presently required under ORS 163.091 with the meaning of "criminal negligence" as defined in the proposed criminal code. In reply to a question by Mr. Spaulding, he stated he would prefer not to make use of the case law on this subject because the cases were in conflict and confusing. Representative Carson agreed there were advantages to starting over again with a new definition.

Judge Burns asked what set of circumstances would fall within section 4 that would not fall within ORS 163.091. Professor Platt replied that ORS 163.091 applied only to automobile homicides whereas section 4 would treat not only automobile homicides but any homicide the jury believed to be criminally negligent. This draft took the position that if the act of the driver were found to be criminally

negligent, then it was too serious a matter to be treated as a misdemeanor and juries should only be allowed to treat the crime as a felony. If the prosecutor wanted the offense treated as a misdemeanor, he should select a reckless conduct or a reckless driving charge and not bring a homicide charge. It was anticipated, he said, that the penalty under section 4 would not be as severe as was the present penalty for manslaughter arising out of an automobile accident.

Judge Burns asked what the standards were that a prosecutor could look to in deciding whether to charge an automobile death under section 4 or under some other section. Professor Platt said he would have to know the facts of a specific case in order to answer the question. Judge Burns remarked that under the present statute most automobile death cases were brought under ORS 163.091 rather than the general manslaughter statute. He asked if under the proposed draft a prosecutor would have to prosecute all auto death cases under section 4. Professor Platt replied that it would be possible to prosecute such cases under the manslaughter section or even under the murder section if the facts warranted such action. Mr. Knight commented that as far as the degree of proof required was concerned, it would be easier to prosecute a drunk driving case under manslaughter than under negligent homicide.

Judge Burns posed a hypothetical situation where a driver, not intoxicated, ran a red light, hit a car and caused a death. Would that, he asked, make a jury question on manslaughter for recklessly committing a homicide. Professor Platt replied that it would not but it might make a jury question on criminal negligence. Senator Burns pointed out that the definition of "criminal negligence" said "a gross deviation from the standard of care that a reasonable person would exercise . . . " He expressed doubt that running a red light would rise to the dignity of a gross deviation. Professor Platt expressed agreement and said the set of facts stated by Judge Burns should not be treated as a felony-homicide but probably should be treated as reckless driving or reckless conduct. The final decision, however, would rest with the prosecutor. Senator Burns commented that under present law running a red light would not constitute negligent homicide so section 4 would not change the law in that respect.

Judge Burns called attention to the definition of "recklessly" and asked if a man, by running the red light, could create a jury question by the fact that he was not drunk, should have been aware of the red light, yet consciously disregarded it.

Professor Platt maintained that there should be some flexibility with respect to what constituted the difference between manslaughter and criminal negligence. The definitions the Commission had adopted and which were now being applied to the Criminal Homicide Article performed the function of allowing the kind of debate which was needed before the jury to aid them in deciding whether certain conduct was criminal.

Judge Burns said his concern was that under present law there was some indication of the meaning of "gross negligence" in case law. The proposed draft, however, said that if a person killed recklessly, the charge would be manslaughter whereas it would be criminally negligent homicide if he killed negligently; "recklessly" said he was aware of and consciously disregarded a risk whereas as "criminally negligent" said he failed to be aware of a risk, etc. This might very well result in a person who ran a red light and killed someone when he was sober being charged with manslaughter because the jury could be told that he was aware of and consciously disregarded the risk. If that same man were drunk and committed the same offense, it would be more likely that his conduct would then be criminally negligent because he failed to be aware of the risk.

Professor Platt said he agreed that this would be the question which would be submitted to the jury. Chairman Yturri pointed out that the district attorney would be the one who would make the decision. Judge Burns agreed and added that traditionally the prosecutor would charge the highest degree which he could reasonably expect to stand up in court.

Judge Burns indicated he would feel more comfortable with the language if the commentary contained two or three typical examples of the types of conduct which would fall within each section as opposed to the other sections. Professor Platt said the commentary furnished examples of the differences between recklessness in the extreme, recklessness and criminal homicide but he was not certain he could find typical examples relating to automobile homicides.

Chairman Yturri asked if it was intended by section 4 to permit someone who was drunk, ran a red light and killed someone to come within the purview of criminally negligent homicide and yet allow someone who was sober and committed the same act to be guilty of manslaughter. Professor Platt replied that under the right set of circumstances a sober man could be guilty of manslaughter or even murder and under other circumstances the same thing could be true of a drunk man.

Professor Platt further explained that the draft should not be concerned with the instrument of death, be it a gun, a knife or an automobile. The concern should be the activity and the surrounding circumstances and how the death resulted.

Mr. Paillette supported section 4. In looking at the Hodgdon case, he said, where the court attempted to equate gross negligence with recklessness, the decision could not be equated with the proposed code's definition of recklessness although the decision was closer to the Commission's definition of recklessness than to criminal negligence. Section 4 meant that it would be easier under certain facts to make a case of negligent homicide, particularly in automobile deaths, than under the present negligent homicide statute since it would not be necessary to show the degree of culpability that was required under existing law.

Mr. Chandler moved approval of section 4 and the motion carried unanimously. Voting: Judge Burns, Senator Burns, Carson, Chandler, Frost, Jernstedt, Johnson, Knight, Spaulding, Young, Mr. Chairman.

Senator Burns commented that under ORS chapter 484 there was a section making it a crime to leave name and address at the scene of an accident in which a fatality occurred. This was often used as a vehicle by the prosecution in lieu of a negligent homicide charge where the defendant left the scene and it carried a greater penalty than did the negligent homicide statute. He asked if this same type of crime would be brought into the proposed criminal code and if the same culpability requirement would be imposed. Mr. Paillette replied that this had already been accomplished to a certain extent with respect to offenses defined outside the criminal code through application of culpability definitions by reference.

Chairman Yturri said he had been contacted by several justices of the peace who were concerned with persons found on the highway who were drunk in their stalled vehicles. They had suggested that the charge of "driving while under the influence" be changed to a charge such as "operating a vehicle while under the influence." They were of the opinion, he said, that "operating" would cover this type of situation. He asked Mr. Paillette if the Commission would be considering this area of the code and was told that the staff had not planned to delve into the traffic code.

Section 1. Mr. Johnson moved that section 1 be approved and also that the entire Article on Criminal Homicide, as amended, be approved. The motion carried. Voting for the motion: Judge Burns, Senator Burns, Carson, Chandler, Frost, Jernstedt, Johnson, Spaulding, Young, Mr. Chairman. Voting no: Knight.

Obstructing Governmental Administration; Preliminary Draft No. 2; December 1969

Section 2. Obstructing governmental administration. Mr. Chandler asked if it would be considered an "obstacle" under subsection (1) if he told someone to get out of town for the day and was told by Mr. Wallingford that the word was intended to refer to a physical obstacle.

Mr. Chandler asked if section 2 was intended to cover situations where a district attorney had a case involving bribery but was doubtful he could get a conviction on the bribery charge and would therefore have the option of charging under this section. Mr. Wallingford replied that if the elements of bribery were present, the person could not be prosecuted under section 2 in lieu of bribery because bribery would not involve intimidation or physical interference.

Senator Burns said his concern was how far down the line the Commission should go in making the hindering or obstructing of governmental administration subject to criminal sanction. It certainly should extend to legislators or to major state departments, he said, but questioned the advisability of extending the same provision to, for example, an ad hoc advisory committee to the water board. Mr. Paillette replied that under the definition in section 2 any type of governmental function would be included.

Chairman Yturri asked if section 2 would cover school teachers who were out on strike. Mr. Wallingford replied that section 2 was not intended to cover that type of activity. Some states, he said, had a specific exemption for labor disputes. Chairman Yturri commented that labor disputes, unless they were concerned with a governmental body, would not be covered by section 2. School districts, however, were creatures of the legislature.

Mr. Wallingford explained that the means of obstructing governmental functions listed in section 2 were intended to be active rather than passive. Chairman Yturri said that picketing would probably fall under the section. Mr. Wallingford expressed the view that constitutionally the Commission could not prohibit picketing by school teachers, police or fire departments as a physical interference or obstacle. Picketing perhaps would be physical, he said, but it could not be made a crime. Chairman Yturri said his question was whether picketing was made a crime by the language in section 2.

Mr. Paillette pointed out that section 4505 of the Michigan Revised Criminal Code, which was used as a model for section 2, included under subsection (2) a statement that the section did not apply to the "obstruction, impairment or hindrance of any governmental function in connection with a labor dispute with the government."

He called attention to the list of ORS statutes which were being replaced by section 2 and explained that in order to combine and consolidate all these statutes to avoid duplication and overlap, it was necessary to have language broad enough to encompass various types of activities.

Mr. Johnson commented that he was concerned with those who wrote letters of intimidation and asked whether section 2 would cover this type of conduct. Representative Frost pointed out that section 2 required some actual hindrance and the intimidation would have to result in an actual obstruction of governmental administration. Senator Burns commented that intimidation would probably be covered by the Article on Inchoate Crimes.

Senator Burns then moved that section 2 be approved. The motion carried. Voting for the motion: Judge Burns, Senator Burns, Chandler, Jernstedt, Knight, Spaulding, Young, Mr. Chairman. Voting no: Carson, Frost and Johnson.

Tape 2 begins here:

The Commission recessed for lunch at this point and reconvened at 1:30 p.m. with the following members present: Chairman Yturri, Judge Burns, Senator Burns, Representative Carson, Mr. Chandler, Mr. Clark, Representative Frost, Mr. Johnson, Mr. Knight, Mr. Spaulding and Representative Young. Staff members present were Mr. Paillette and Mr. Wallingford.

Section 3. Refusing to assist a peace officer. Chairman Yturri read the section.

Mr. Chandler moved approval of section 3 and the motion carried unanimously. Voting: Judge Burns, Senator Burns, Chandler, Clark, Frost, Knight, Spaulding, Mr. Chairman.

Section 4. Refusing to assist in firefighting operations. Mr. Clark asked if provisions similar to section 4 were included in another part of the code and was told by Mr. Wallingford that subsection (1) of section 4 was not covered elsewhere. Subsection (2) might be covered by the section on failure to disperse upon a lawful order in the proposed disorderly conduct statute but this provision was nevertheless included here to give fire and police departments extra authority in the event of an emergency.

Judge Burns moved that section 4 be approved. Motion carried. Voting for the motion: Judge Burns, Senator Burns, Clark, Frost, Knight, Spaulding, Mr. Chairman. Voting no: Chandler.

Mr. Chandler explained that he had voted against section 4 because he objected to the arrogant and unknowledgeable conduct of some public officials in and around fires who unnecessarily inconvenienced the public by closing picnic and camping grounds or by closing roads and sometimes airports as much as 40 miles removed from the scene of the fire.

Section 5. Bribing a witness. Section 6. Bribe receiving by a witness. Mr. Wallingford read sections 5 and 6 and advised that the language therein was similar to that used in the Bribery Article.

Mr. Chandler moved approval of sections 5 and 6. Mr. Clark seconded and the motion carried unanimously. Voting: Judge Burns, Senator Burns, Carson, Chandler, Clark, Frost, Knight, Spaulding, Mr. Chairman.

Section 7. Tampering with a witness. Mr. Chandler said he objected to section 7 because it was not broad enough. He said his understanding of the section was that if he told someone to get out of town because that person was going to be called as a witness on a case on which he didn't want to testify, he would be committing the crime of tampering with a witness. However, if that same person's lawyer told him to leave town for the same reason, no crime would have been committed.

Senator Burns said it was not a crime for the lawyer to so advise his client because the client had not yet been summoned as a witness. Mr. Chandler contended that it should be criminal conduct, when a lawyer had been apprised that his client might be called as a witness, for him to suggest that if the client had a trip to take, he would be wise to take it at once before he was officially summoned as a witness.

Mr. Chandler said he thought his objection would be met if the commentary included a statement to the effect that "person" as used in line 2 of section 7 included an attorney. Mr. Paillette advised that an attorney would be covered under section 7 as it was drafted.

Senator Burns commented that Mr. Chandler's purpose would be accomplished by inserting in subsection (2) " . . . to which he has been or may be legally summoned." Mr. Wallingford said the same result would obtain if a period were placed after "official proceeding" in subsection (2).

Judge Burns noted that the opening paragraph of section 7 applied to someone who induced or attempted to induce a witness or a potential witness and that language was proper when read in conjunction with subsection (1). However, the language also applied to subsection (2) and in that context was not accurate because subsection (2) would not come into play until the witness had actually been subpenaed. In other words, the phrase "he believes may be called as a witness" in the opening paragraph had no application to someone who had already been summoned as provided in subsection (2).

Several amendments to correct the language criticized by Judge Burns were proposed. Mr. Knight ultimately moved that section 7 be amended to read:

> "A person commits the crime of tampering with a witness if:
>
> "(1) He knowingly induces or attempts to induce a witness or a person he believes may be called as a witness in any official proceeding to offer false testimony or unlawfully withhold any testimony; or
>
> "(2) He knowingly induces or attempts to induce a witness to absent himself from any official proceeding to which he has been legally summoned."

The motion carried with Mr. Chandler voting no. Mr. Chandler explained that he voted no because he wanted to place a period after "official proceeding" in subsection (2) and delete the rest.

Mr. Johnson moved to approve section 7 as amended. Motion carried. Voting for the motion: Judge Burns, Senator Burns, Carson, Clark, Frost, Johnson, Knight, Spaulding, Young, Mr. Chairman. Voting no: Chandler.

Section 8. Tampering with physical evidence. Judge Burns asked if section 8 would cover a person who grew a beard or shaved off his beard. Chairman Yturri pointed out that section 8 referred to the material portions of evidence as distinguished from immaterial and covered books, records, files, etc.

Mr. Johnson commented that there was no legal requirement that records be kept. Judge Burns answered that there would be under section 8 if there was a prospective official proceeding in the offing. Chairman Yturri asked how far in the future a "prospective official proceeding" would extend. In income tax situations, he said, the statute of limitations did not apply in the case of fraud or where there was more than a 25 percent deficiency. He asked if a person who destroyed his records after five years would be in violation of section 8 in view of the reference to "prospective official proceeding" contained therein.

Representative Frost said in certain types of cases attorneys routinely went through a doctor's file and culled the file by suggesting that certain materials were not relevant. He asked if this conduct would be prohibited by section 8. Chairman Yturri said he thought it would and added that lawyers would be constantly violating section 8 as drafted.

Mr. Chandler stated that the intent of section 8 was to preserve the integrity of official proceedings and make sure that everything necessary to determine the facts or the truth of the matter was available to the court. He contended there was no excuse for destroying anything that weighed on the matter.

Mr. Johnson explained that some of the material which was culled from a file was prejudicial and the client had no obligation to keep that type of material. He maintained that Mr. Chandler's point of view would penalize the person who kept everything and weigh the cases in favor of the person who was poor at keeping records.

Judge Burns said he would prefer the language in section 241.7 of the Model Penal Code which said "believing that an official proceeding or investigation is pending or about to be instituted."

Chairman Yturri said he could see no objection to section 8 if it were limited to a pending action or one about to be instituted. If a person then destroyed, altered or concealed physical records, he would be impairing their verity or availability. Also, it should be made clear that subsection (3) pertained to evidence which was material to the pending proceeding.

Chairman Yturri asked why the subcommittee had not adopted the language of the Model Penal Code and was told by Mr. Paillette that this possibility was not discussed in subcommittee. The language in section 8, he said, was derived from the New York Revised Penal Law.

Senator Burns moved to substitute section 241.7 of the Model Penal Code for section 8. No vote was taken on this motion. Judge Burns said he preferred the language in subsections (1), (2) and (3) to that in the two subsections of the Model Penal Code section.

Chairman Yturri asked Judge Burns if he believed subsection (3) was clear that it related only to physical evidence that was really material. Judge Burns said that the area of lack of materiality was discussed at great length when the Perjury Article was being considered and the Commission had decided that the intent was not to provide a way out for a person who engaged in forbidden conduct just because some judge at a later time might say that the evidence was not material. The Chairman asked if it would make a difference if the evidence was not admissible in any event and Judge Burns replied that if something were destroyed when the person had reason to believe that it would be admissible, it would pose a question of fact for the jury.

Mr. Paillette called attention to the language of section 5045 of the Michigan Revised Criminal Code and suggested it might meet some of the objections expressed by the Commission.

Mr. Chandler moved to amend section 8 by striking "or prospective" on line 4 and inserting after "proceeding", "or a proceeding or investigation which is about to be instituted,".

Mr. Spaulding suggested that the opening paragraph of section 8 be amended to read:

> "A person commits the crime of tampering with physical evidence if, with intent that it be used, introduced or suppressed in an official proceeding which is then pending or to the knowledge of such person is about to be instituted, he:"

Mr. Chandler withdrew his motion and moved to amend section 8 as stated by Mr. Spaulding.

Mr. Knight asked if "suppress" would cover a situation where the evidence had been destroyed so that it was not available to be suppressed. Mr. Spaulding replied that such a situation would be covered because the intent was to suppress the evidence.

Judge Burns suggested that Mr. Spaulding's language could be improved by inserting ", rejected or unavailable" in place of "suppressed".

After further discussion, Mr. Spaulding restated the previous motion that section 8 be amended to read:

"A person commits the crime of tampering with physical evidence if, with intent that it be used, introduced, rejected or unavailable in an official proceeding which is then pending or to the knowledge of such person is about to be instituted, he:"

The motion carried to amend section 8 as set forth above.

Chairman Yturri left the meeting at this point and Senator Burns presided until his return.

Mr. Chandler moved to approve section 8 as amended. Judge Burns seconded and the motion carried unanimously. Voting: Judge Burns, Senator Burns, Carson, Chandler, Clark, Frost, Johnson, Knight, Spaulding, Young.

Section 9. Tampering with public records. Mr. Clark asked why the phrase "without lawful authority" was needed in section 9 and was told by Mr. Chandler that certain persons, such as the State Archivist, had lawful authority to destroy records under specified circumstances.

Mr. Chandler moved that section 9 be approved and the motion carried unanimously with the same ten members voting as voted on the previous motion.

Representative Frost was excused at this point.

Section 10. Resisting arrest. Senator Burns explained that the subcommittee, after considerable discussion, had decided to impose criminal liability only if it was known by the person referred to in section 10 that the officer was actually a police officer.

Mr. Wallingford advised that subsection (3) was a departure from existing case law in Oregon which allowed an individual to resist an unlawful arrest by reasonable force. Mr. Paillette explained that the rationale of subsection (3) was basically the same as that applied in the Justification Article where the "no-sock principle" was employed.

Judge Burns noted that flight was not comprehended by section 10 and asked if it were covered elsewhere. Mr. Wallingford replied that if an arrest had been made, flight would be escape in the third degree in that the person would be in constructive custody. Judge Burns asked what the situation would be if an arrest had not been made and was told by Mr. Wallingford that flight would not be a crime in that circumstance.

Mr. Knight asked when the arrest was actually made and was told by Mr. Wallingford that it was made at the moment the officer verbally or physically made it known that the individual was under arrest.

Mr. Paillette commented that if a person ran away from a police officer, this act would be covered by the Escape Article rather than this Article because he would not be "resisting arrest" if he ran and used no force or other means to bring him under section 10.

Judge Burns asked if the crime of resisting arrest could be committed by someone other than a person who was about to be arrested and received an affirmative reply from Mr. Wallingford.

Judge Burns moved to approve section 10 and the motion carried. Voting for the motion: Judge Burns, Senator Burns, Carson, Chandler, Johnson, Knight, Spaulding, Young. Voting no: Clark.

Section 11. Hindering prosecution. Judge Burns noted that the opening paragraph of section 11 contained three separate intents:

(1) Intent to hinder the apprehension, prosecution, conviction or punishment of a person who has committed a crime punishable as a felony;

(2) Intent to assist a person who has committed a crime punishable as a felony;

(3) Intent to assist a person who has committed a crime punishable as a felony in profiting or benefiting from the commission of the crime.

Judge Burns asked what would be comprehended by intent #2 which would not be included in #1 or #3. Mr. Wallingford explained that the third intent applied primarily to subsection (6).

Mr. Paillette explained that section 11 as originally drafted consisted of three sections -- rendering criminal assistance which defined that term; hindering prosecution in the second degree which covered a felony; and hindering prosecution in the first degree which covered a crime punishable by life imprisonment. Subcommittee No. 1 had decided to combine the three sections. In combining them the two intent elements were included the same as in the original draft and the third was added from the definitional section of "criminal assistance." On reflection, he said he would agree that the second statement of intent was unnecessary.

Mr. Chandler moved that section 11 be amended to read:

> " . . . if, with intent to hinder the apprehension, prosecution, conviction or punishment of a person who has committed a crime punishable as a felony, or with the intent to assist a person who he knows has committed a crime punishable as a felony, he:"

Mr. Chandler explained that his motion assumed that the Commission agreed on the inclusion of intent #1. Intent #2 was to assist a person he knew had committed a crime punishable as a felony. Whether or not he was assisting him to profit or to secure a benefit made no difference; the purpose was to prohibit anyone from helping him. Intent #3, he said, was deleted because it was redundant except as to the reference to profiting or benefiting and that was covered by subsection (6).

Judge Burns suggested that the last intent phrase read " . . . to assist a person who he knows or has good reason to know has committed a crime . . . " Mr. Chandler accepted that amendment to his motion.

Vote was then taken on the amended motion and it carried. This action was later rescinded by unanimous consent.

Mr. Paillette asked if it was the Commission's intention to say that the prosecution would not only have to prove that the person rendered the assistance but also that at the time he rendered it he knew that the individual had committed a crime punishable as a felony.

Mr. Wallingford called attention to the commentary at the bottom of page 65 and the top of page 66 which said:

> "Knowledge that the person aided has committed a crime is simply evidence of the intent to aid the offender to escape justice."

Mr. Paillette contended that requirement was sufficient without also requiring proof that a person knew the individual had committed a crime punishable as a felony. This, he said, was an unreasonable burden to place on the state.

Mr. Knight pointed out that he could not think of a situation where the second intent would not be covered by either intent #1 or intent #3. Mr. Paillette expressed agreement and suggested that the second intent was the one which should be deleted rather than the third.

By unanimous consent the Commission withdrew the amendments made to section 11. Judge Burns then moved to amend section 11 by deleting the second intent. The motion carried unanimously. As amended, section 11 would read:

> "A person commits the crime of hindering prosecution if, with intent to hinder the apprehension, prosecution, conviction or punishment of a person who has committed a

crime punishable as a felony, or with the intent to assist a person who has committed a crime punishable as a felony in profiting or benefiting from the commission of the crime, he:"

Mr. Chandler moved to approve section 11 as amended and the motion carried unanimously. Voting: Judge Burns, Senator Burns, Carson, Chandler, Clark, Johnson, Knight, Spaulding, Young.

A recess was taken and the meeting was reconvened by Chairman Yturri.

Section 12. Compounding. Mr. Johnson commented that the conduct described in subsection (1) was bribery and was told by Mr. Spaulding that it would not necessarily refer only to bribery. There could be a criminal charge brought in connection with an automobile accident which would not be prosecuted if it could be settled to the plaintiff's satisfaction.

Mr. Clark said it could involve a case where someone threw a rock through a window and said to the owner, "I will pay the damages." The case could then be settled without the necessity of prosecution. Senator Burns said that situation would be covered by the provision for compromising in ORS chapter 134. In that event, Mr. Spaulding said, an exception should be included in section 12 to say "except as provided in ORS chapter 134" and Senator Burns agreed.

Mr. Knight indicated that if a person wrote a bad check for $100, then went back and made the check good, that should not be compounding a felony. On the other hand, if the store owner made the check writer pay $150 to get his $100 check back and said that if he did not pay $150, he would prosecute him, that situation should be covered by the compounding section.

Chairman Yturri said he had seen notices distributed and signed by justices of the peace which said, "If you do not pay X dollars by a specific date, a complaint will be filed against you." This conduct would probably fall within the compounding section.

Judge Burns asked if "he" in subsection (1) referred to non-officials and was told by Mr. Spaulding that it referred to both officials and nonofficials. Judge Burns said in that event section 12 was duplicative of the sections on giving or receiving a bribe which made it a crime for a public servant to accept a bribe to act in a manner in violation of his official duties. If a person went to the district attorney and offered him $100 not to prosecute, that would be covered by those sections, he said. Senator Burns pointed out that such conduct could also fall under section 2 of this draft, "Obstructing governmental administration."

Mr. Wallingford advised that section 12 was intended to include deals made between private parties, not involving public servants. Mr. Johnson said the section did not read that way in subsection (1) because it was ordinarily the district attorney who initiated prosecution for a crime. Mr. Spaulding replied that it was the complainant who officially initiated the prosecution. Judge Burns urged that section 12 be clarified to state precisely to whom it referred. As written, he said, it overlapped other provisions of the code.

Mr. Knight advised that one of the Oregon cases on compounding was where a police officer accepted $5 not to issue a ticket. The Model Penal Code and the New York Code, he said, made it an affirmative defense if the amount requested or received did not exceed the amount which would constitute restitution. Mr. Paillette explained that the original draft contained such an affirmative defense and similar language was contained in the draft on theft by extortion. The subcommittee had deleted the defense because they believed it complicated the issue.

Judge Burns read the language of the section on bribe receiving and pointed out that if the district attorney accepted a pecuniary benefit on the agreement that he would refrain from prosecuting an individual, he would be under section 12 as well as under the bribe receiving section and he objected to the crime being covered by both sections.

Mr. Knight pointed out that section 12 was talking about the victim of a crime who said to the offender, "If you don't pay me X dollars, I am going to file a complaint."

Mr. Johnson expressed a preference for the language in section 242.5 of the Model Penal Code. He moved that section 12 be amended to read:

> "A person commits the crime of compounding if he accepts or agrees to accept any pecuniary benefit in consideration of refraining from reporting to law enforcement authorities the commission or suspected commission of any offense or information relating to an offense."

Judge Burns asked if the amended language would be substantially different from section 12 as drafted. Mr. Paillette replied that it would clarify the question of whether the section referred to public servants, which would be an improvement. He said, however, he did not necessarily agree that the section was poorly drafted because an individual could by one transaction violate more than one criminal statute.

Mr. Spaulding suggested that Mr. Johnson's motion be amended to read "crime or offense" rather than "offense." Mr. Paillette explained that it was unnecessary to include both terms. "Crime," he said, was limited to felonies and misdemeanors whereas "offense" encompassed violations also. It was agreed that "offense" would be retained as in the original motion and the effect would be that a person could thereby commit the crime of compounding a violation, a misdemeanor or a felony.

Vote was then taken on the motion to amend section 12 and it carried without opposition.

Chairman Yturri asked if the Commission also wished to include an affirmative defense in section 12 similar to that in the Model Penal Code. Senator Burns said that since the Commission had approved a compromise section relating to misdemeanors, it might be appropriate to insert before the amended language just adopted: "Except as provided in section ____ [compromise],". The affirmative defense could then be omitted. The section number to be inserted would require the person to obtain a court approved compromise.

Mr. Paillette indicated that Senator Burns' suggestion would not provide for the person who had received a bad check and had not filed a complaint. If the victim wanted to take what was due him in restitution without filing a complaint, there was nothing wrong with that type of conduct, he said.

Mr. Johnson mentioned that not infrequently the situation occurred where an employe embezzled funds. The bonding company or the employer then worked out an agreement with him to repay the money over a period of time. The company then harassed the man for the rest of his life and it was really a form of blackmail, at least until the debt had been repaid. The crime was never reported to the authorities in these instances, he said. Mr. Spaulding said that the company should not be invited to intimidate the embezzler. The public in cases of that kind had an interest in prosecuting the offender because he might obtain employment elsewhere and repeat the crime. Mr. Johnson said this was his reason for objecting to inclusion of the affirmative defense.

Representative Carson pointed out that if some boys tipped over an outhouse and the father agreed with the owner that the boys would work on Saturdays to repair the damage, the father would then be committing the crime of compounding. Mr. Spaulding said it was all right to let the boys make restitution but it should be up to the public as to whether this conduct required prosecution.

Chairman Yturri expressed the view that it would be better to include the affirmative defense and noted that the Model Penal Code and New York had also concluded that was the best way to handle the problem. Mr. Johnson said he would agree when the defense referred to a relatively small offense but not when it involved a major crime such as embezzlement.

Judge Burns suggested that the problem might be solved by including a defense if the crime was less than a felony. Mr. Paillette commented that would be one way to solve the problem and another would be to limit the crime of compounding to felonies and not allow a defense. This would follow the rationale embodied in the present law.

Judge Burns then moved that section 12 as amended be further revised by deleting "offense" in the two places it occurred and inserting "felony."

Mr. Johnson moved to amend Judge Burns' motion by leaving the section as previously adopted and permitting an affirmative defense which would be limited to misdemeanors. Judge Burns commented that law enforcement agencies and courts had enough to do without prosecuting those who compounded a misdemeanor.

Senator Burns indicated that he would go along with Judge Burns' motion as the lesser of two evils. The Commission, he said, would later consider the question of compromising misdemeanors when they reached the procedural sections and could approach that issue then.

Mr. Johnson withdrew his motion to amend Judge Burns' motion and vote was taken on the original motion to substitute "felony" for "offense" in section 12. Motion carried.

The section as finally amended would read:

> "A person commits the crime of compounding if he accepts or agrees to accept any pecuniary benefit in consideration of refraining from reporting to law enforcement authorities the commission or suspected commission of any felony or information relating to a felony."

Senator Burns moved that section 12 as amended be approved. Motion carried without opposition. Voting: Judge Burns, Senator Burns, Carson, Chandler, Clark, Johnson, Knight, Spaulding, Young, Mr. Chairman.

Section 13. Hindering prosecution and compounding; no defense. Mr. Johnson moved that section 13 be approved. The motion carried unanimously with the same ten members voting as voted on the previous motion.

Section 14. Simulating legal process. Mr. Spaulding moved that section 14 be approved. This motion also carried without opposition with the same ten members voting.

Materials Distributed to Commission

Mr. Paillette reviewed the background materials distributed in accordance with the request of the Commission at its previous meeting:

(1) U. S. Code, Title 18, Chapter 11, the federal statutes on conflict of interest;

(2) Michigan conflict of interest statute; and

(3) U. S. Code, Title 18, Chapter 119, the codification of the Safe Streets and Crime Control Act, Title III, relating to communications and wiretap.

Offenses Against Privacy of Communications; Preliminary Draft No. 2; December 1969

Mr. Paillette called attention to the amendments conforming sections 1 through 8 of the Article on Offenses Against Privacy of Communications to the revisions adopted by the Commission at its meeting on January 10. The balance of the amendments on pages 4 through 24 revised the draft to comply with the requirements of the Omnibus Crime Control Act of 1968 and were patterned after the New York procedural code except in one or two instances where the staff felt the New York code went beyond the requirements of the Safe Streets and Crime Control Act. The requirements of Title III of that Act would have to be met, he said, assuming, of course, that the Commission decided to provide for wiretap by statute in Oregon.

The Commission members decided they would need time to study the material before discussing it further.

The meeting was adjourned at 4:00 p.m.

Respectfully submitted,

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission