Tapes #48, 49 and 50

#48 - Side 2 only
#49 - Both sides
#50 - Both sides

OREGON CRIMINAL LAW REVISION COMMISSION
Room 309 Capitol Building
Salem, Oregon

March 18 and 19, 1970

A G E N D A

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OREGON CRIMINAL LAW REVISION COMMISSION

Nineteenth Meeting, March 18 and 19, 1970

Minutes

March 18, 1970

Members Present: Senator Anthony Yturri, Chairman
Senator John D. Burns, Vice Chairman
Judge James M. Burns
Representative Wallace P. Carson, Jr.
Mr. Robert W. Chandler
Mr. Donald E. Clark
Representative David G. Frost
Senator Kenneth A. Jernstedt
Attorney General Lee Johnson
Mr. Frank D. Knight
Mr. Bruce Spaulding

Excused: Representative Harl H. Haas
Representative Thomas F. Young

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

Agenda: Wednesday, March 18, 1970

Policy decision re gun control legislation

OFFENSES AGAINST PRIVACY OF COMMUNICATIONS
Amendments to Preliminary Draft No. 2

ABUSE OF PUBLIC OFFICE
Preliminary Draft No. 2; October 1969
Section 6 only (Concealing a conflict of interest)

OFFENSES INVOLVING NARCOTICS AND DANGEROUS DRUGS
Preliminary Draft No. 3; February 1970

ESCAPE AND RELATED OFFENSES
Preliminary Draft No. 3; January 1970

Thursday, March 19, 1970

Amendments to ESCAPE AND RELATED OFFENSES

BUSINESS AND COMMERCIAL FRAUDS
Preliminary Draft No. 2; January 1970

Printing of Commission's Final Tentative Draft

The meeting was called to order by the Chairman, Senator Anthony Yturri, at 10:00 a.m. in Room 315, Capitol Building, Salem.

Approval of Minutes of Commission Meeting of February 20, 1970

Judge Burns moved that the minutes of the Commission meeting of February 20, 1970, be approved as submitted. The motion carried unanimously.

Proposed Gun Control Legislation

Mr. Paillette related that the Commission at its February meeting had heard testimony on both sides of the issue of recommending gun control legislation. Judge Burns, Chairman of Subcommittee No. 3 to which this subject had been assigned, explained that the basic staff proposal was contained in Preliminary Draft No. 1 of the Article entitled Offenses Involving Firearms and Deadly Weapons. The subcommittee had deferred a detailed discussion of that draft pending a policy decision by the Commission as to whether some type of gun control legislation should be included therein, but the proposal made no major changes in present law except that it would provide for issuance of permits to carry concealed weapons by a central agency, the State Police.

Mr. Clark expressed concern over the availability of firearms to irresponsible individuals and said it was incumbent upon the Commission to deal with the issue of gun control. He moved that the staff and subcommittee be directed to explore the possibility of control of firearms and ancillary weapons placing particular emphasis on strong controls over handguns. In reply to Senator Burns' questions concerning specificities to be contained in the proposal, Mr. Clark said he would prefer to leave his motion non-specific to give the staff and subcommittee room to explore all the possibilities.

Judge Burns urged that the subcommittee be given more definitive instructions in the areas concerning registration of all guns as opposed to registration of certain guns; licensing of all guns as opposed to licensing of certain guns; or whether the subcommittee should consider the staff proposal which made minimum changes in existing law. Mr. Chandler concurred that the Commission should make a definite policy decision with respect to the items enumerated by Judge Burns.

Mr. Clark withdrew his motion.

Mr. Johnson maintained that inasmuch as this was such a controversial subject, the Commission should either delete gun control entirely from its report or recommend strict firearms control legislation. He said he would be willing to vote for a proposal to

license handguns only and expressed the view that this would be a substantial step forward but he would not be in favor of an ineffective, halfway approach.

Senator Burns advised that there were two specific objectives which should be borne in mind in discussing this subject: The first was to establish certain criteria which an individual would have to meet in order to obtain a license, the goal being to keep guns out of the hands of undesirable persons; the second, which would hopefully be furthered by registration, was to provide an aid to the police in tracing a gun to its owner when he perpetrated a crime.

Judge Burns moved that the Commission direct the subcommittee and staff to prepare a draft which would call for licensing and registration of all handguns. The licensing provisions which he envisioned would provide for sound, reasonable methods of obtaining a license and would authorize the average citizen to have a gun but would prevent certain designated classes of individuals from obtaining a license. Included in his motion, he said, was the directive to provide for review of licensing decisions by the courts.

Chairman Yturri asked how long the barrel of a gun could be and still qualify as a handgun. Mr. Knight read the definition in ORS 166.210 which said that a pistol, revolver or firearm capable of being concealed upon the person applied to firearms having a barrel less than 12 inches in length. The Commission was generally agreed that a definition of handgun should be contained in the proposed Firearms Article.

Chairman Yturri next asked if the Article should permit a person who had a gun license to loan his weapon to one who was not licensed. Mr. Spaulding commented that this would be analagous to loaning an automobile to one who had no driver's license and it appeared to be the concensus of the Commission that the borrower of a gun should be licensed.

Mr. Johnson again urged that if the Commission decided to adopt a licensing law, it should be a strict law requiring the applicant to show a legitimate reason for using or needing a handgun and imposing strict accountability upon that individual. In the majority of cases, he said, it was difficult to establish a legitimate use for a handgun in today's society. Chairman Yturri asked Mr. Johnson if he considered protection of the home from intruders as being a legitimate excuse for owning a handgun and was told that there might be a need if the person lived in a rural area, but people in cities should not be permitted to maintain a handgun in their home. Senator Burns commented that this approach would pose an equal protection problem under the Constitution.

Mr. Chandler stated that one of the objections expressed by opponents of gun control legislation concerned the fee for licensing and registration. He suggested that the subcommittee be directed to provide that the fees for licensing and registration be set at a figure sufficient to pay the cost of administering the program but not so large as to bar the average citizen from making application because of the cost involved.

Mr. Clark asked if inclusion of a fee in the Article would cause the entire criminal code to be sent to the Ways and Means Committee when it was introduced in the legislature. Mr. Paillette replied that the inquiries he had made concerning this subject indicated that if the bill had any fiscal impact whatever, and it would have if a fee schedule were included, it would require approval by Ways and Means.

There followed a discussion concerning the advisability of submitting the Firearms Article to the legislature as a separate bill in view of the controversial nature of the material and the fiscal impact involved. The majority of the members agreed that one of the strengths of a major revision such as the criminal code was to submit it as a complete package and that the Commission should not deviate from this policy so far as the Firearms Article was concerned.

A lengthy discussion ensued concerning the wisdom of including gun control legislation in the criminal code. Some members were of the opinion that such a recommendation by the Commission might jeopardize passage of the entire code when it reached the legislature. Senator Burns pointed out that if opposition appeared to be too strong, the proposal could be deleted before it was submitted to the legislature. Judge Burns said that while he favored gun control legislation, he was nevertheless reluctant to jeopardize passage of the code and was hopeful that the Commission would recommend the basic staff proposal.

Mr. Spaulding asked Judge Burns if his motion contemplated that it would be unlawful to possess a gun without a license and received an affirmative reply.

Vote was then taken on Judge Burns' motion to direct the subcommittee and staff to prepare a draft requiring registration and licensing of handguns. The draft would permit denial of licenses to certain specified classes and would provide a review procedure for licensing decisions. The motion carried. Voting for the motion: Senator Burns, Carson, Chandler, Clark, Johnson, Knight, Spaulding. Voting no: Judge Burns, Frost, Jernstedt, Mr. Chairman.

Senator Burns moved that the motion just passed be expanded to include licensing and registration of all guns. The motion was seconded by Mr. Clark.

Mr. Johnson moved to table Senator Burns' motion. Vote was taken on the motion to table and it carried. Voting for the motion: Judge Burns, Carson, Frost, Jernstedt, Johnson, Mr. Chairman. Voting no: Senator Burns, Chandler, Clark, Knight, Spaulding.

Mr. Chandler then moved to extend the licensing provisions of Judge Burns' motion which had passed to the bearers of all firearms. This motion would in effect require a state license to carry a firearm of any kind.

Mr. Johnson moved to table Mr. Chandler's motion. Vote was taken on the motion to table and it failed. Voting for the motion: Judge Burns, Frost, Jernstedt, Johnson, Mr. Chairman. Voting no: Senator Burns, Carson, Chandler, Clark, Knight, Spaulding.

Mr. Chandler then restated his motion and moved to require a license for any individual owning or possessing a gun in the state of Oregon. One license, he said, would cover possession of all guns which the licensed individual owned and the motion did not encompass registration of the gun itself. Motion carried. Voting for the motion: Senator Burns, Carson, Chandler, Clark, Knight, Spaulding. Voting no: Judge Burns, Frost, Jernstedt, Johnson, Mr. Chairman.

Mr. Chandler observed that he believed the firearms that were most often traded and the stolen guns most often involved in commerce were handguns and for this reason he felt it was more important to register handguns than long guns. In summary, he said, the action taken by the Commission today would require both licensing and registration for concealable weapons and licensing only for all other firearms.

Mr. Paillette asked if the Commission wanted alternative drafts, one of which would accomplish registration and licensing for handguns only with a separate proposal for the licensing of all guns. The members were agreed that the proposal should be submitted to them in one draft.

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

Section 21. Eavesdropping warrants; disclosure and use of information; order of amendment. Mr. Paillette reviewed the action taken by the Commission on the amendments to the Article on Offenses Against Privacy of Communications at its February meeting. Decisions were made with respect to all sections in the amendments, he said, with two exceptions, one being subsection (4) of section 21. The discussion on this subsection was set forth on pages 23 and 28 of the minutes of February 20, 1970.

Following a brief discussion Mr. Chandler moved that section 21 including subsection (4) be approved and the motion carried. Voting for the motion: Judge Burns, Senator Burns, Chandler, Clark, Jernstedt, Johnson, Knight, Mr. Chairman. Voting no: Carson, Frost, Spaulding.

Section 23. Eavesdropping evidence; notice before use. Mr. Paillette advised that the Commission had made the policy decision on section 23 to approve the release of the contents of an intercepted communication by the state to the defendant. The question which had arisen at the February meeting was in what form this information would be furnished by the state and the decision of the Commission was that the defendant should be furnished with a written transcript. The Commission also increased the time period to 30 days to give the defendant an opportunity to evaluate the derivative evidence. Accordingly, section 23 had been amended in both subsections (1) and (2) to provide for 30 days rather than 10 and he proposed that the following clause be added at the end of subsection (1):

> "and a written transcript of the contents of the intercepted communication intended to be used by the state at the trial or from which evidence was derived that is intended to be used at the trial."

Mr. Chandler commented that section 23 offered a broader discovery procedure to the defendant than was ordinarily followed in Oregon courts. Judge Burns replied that it was analagous to the situation where evidence seized by the police was made known to the defendant as a result of the execution of a search warrant. There the defendant was given a receipt for anything which was picked up in the search and seizure.

Mr. Chandler inquired if it was the intent of the draft that a transcript of an entire wiretap be turned over to the defendant on the chance that some part of it might be used at the trial even though the state did not at that time intend to use certain portions. Senator Burns replied that it was not the intent of the Commission that the state would be required to furnish the entire contents of an intercepted communication but only those portions which the state intended to use or from which evidence was derived.

Mr. Knight observed that if some portion of the wiretap were to become material and that portion had not been furnished to the defendant, under subsection (2) the 30 day period could be waived by the court in order to give the defendant more time.

Senator Burns mentioned that in some jurisdictions trials were set less than 30 days in advance. Subsection (2), he said, should not attach where the trial date was set for two weeks hence. In that situation the judge should not then be permitted to say that it was

impossible to furnish the defendant with the information in two weeks and he would therefore waive the 30 day requirement of subsection (1). Chairman Yturri advised that in order to waive the 30 day requirement, the court would have to find further that the defendant would not be prejudiced by the waiver.

Judge Burns referred with approval to subsection (2) and said it added desirable flexibility. If the situation arose where a portion of the tape was used by the state to refute the defendant's testimony and that portion had not been previously furnished to the defendant, at the next court recess the defendant could seek relief under subsection (2) and the judge could grant the defendant sufficient time to examine the tape or transcripts.

In reply to a question by Mr. Knight concerning the meaning of "prejudiced by the delay" in subsection (2), Judge Burns outlined that the term was intended to give the defendant sufficient time to examine the tape and transcripts of the wiretap before he proceeded with his defense so that there would be no prejudice to his case.

Representative Carson commented that it was implicit that "prejudice" meant "unfair prejudice" under due process; not the fact that it was a matter of proof or evidence of the crime. As Mr. Spaulding had stated earlier, any evidence that tended to indicate the defendant had committed the crime was prejudicial to him, but that meaning of "prejudice" was not intended under section 23.

Judge Burns indicated that the proposed amendment to section 23 required the state to furnish a transcript of the portion of the wiretap they intended to use or from which they had derived evidence. He asked if this language required the state to identify the derivative evidence. Mr. Paillette explained that as he understood the directions of the Commission at the February meeting, section 23 was to be amended to provide that it would put the defendant on notice that the state intended to use wiretap evidence against him and to give him a transcript of that evidence but not to furnish him with a list of all the state's derivative evidence. The proposed amendment, he said, was not meant to require the state to list its derivative evidence.

Mr. Spaulding asked if "waived" was used correctly in subsection (2) and suggested that "shortened" might be a more apt term. Senator Burns commented that this was the same language used in similar statutes throughout the code. Mr. Paillette confirmed this statement and added that subsection (2) was taken from Chapter 119 of Title 18 of the federal Act.

Mr. Chandler moved that section 23 be approved with the proposed amendments. Motion carried unanimously. Voting: Judge Burns, Senator Burns, Carson, Chandler, Clark, Frost, Jernstedt, Johnson, Knight, Spaulding, Mr. Chairman.

Section --. Unlawful dealing in eavesdropping devices. Mr. Paillette indicated that the section on unlawful dealing in eavesdropping devices was drafted by Mr. Wallingford at the request of Mr. Clark. A copy of the section as finally amended is attached hereto as Appendix A.

Mr. Wallingford explained that the prohibition contained in this section was also found in Title 18, section 2512, of the federal Act. There it applied only to interstate commerce whereas the proposed section would reach intrastate traffic in eavesdropping devices. In reviewing the draft, he said, he would recommend that the references to sending devices through the mail be deleted inasmuch as the device would come under the jurisdiction of the federal law as soon as it was deposited with the post office department.

Mr. Frost commented that a complete defense to this section would be that the device was not designed primarily for surreptitious electronic eavesdropping and that it was not used with the intent to eavesdrop. Mr. Wallingford commented that the reference to "surreptitious electronic eavesdropping" in subsection (2) (d) was intended to exempt the multitude of devices that could be used legitimately, such as tape recorders and intercommunication devices installed in the home.

Representative Frost said the section was completely unenforceable as a practical matter, a statement with which Mr. Clark disagreed. Mr. Spaulding commented that many eavesdropping devices were composed of parts which were perfectly legitimate when considered separately but a person who knew enough about them could assemble them to make an illegal device. A statute such as this would take care of that situation, he said.

Representative Frost asked if subsection (2) (a) was saying that only the telephone company or its agents would be permitted to produce, advertise, sell and lease eavesdropping devices. Representative Carson said he had the same question concerning parabolic devices used at football games by, for example, NBC. Mr. Chandler replied that NBC would be a communications common carrier under the draft because it carried the games to network affiliates and others. Representative Carson said he could see nothing wrong with the section so long as the networks were considered to be communications common carriers.

Mr. Johnson moved to amend the section by deleting the references to sending the devices through the mail as suggested by Mr. Wallingford. The motion carried.

Mr. Chandler moved to adopt the section as amended and the motion carried. Voting for the motion: Judge Burns, Carson, Chandler, Clark, Jernstedt, Johnson, Knight, Mr. Chairman. Voting no: Frost, Spaulding.

List of recommended offenses subject to electronic surveillance. Mr. Paillette called attention to a list of offenses which would be subject to electronic surveillance, a copy of which is attached hereto as Appendix B.

Mr. Clark asked why prostitution was omitted from the list and Mr. Paillette responded that the list was merely a tentative staff recommendation and the Commission was free to add or delete offenses.

Tape 2 of this meeting begins here:

Judge Burns was of the opinion that the Commission could better make the decision with respect to the crimes to be covered by this Article after the substantive crimes had been graded. Even if this list were adopted today, he said, he would still want to review it after grading of the crimes had been completed so time could be saved by taking the subject up later.

Mr. Chandler moved to defer the decision on adoption for the reason stated by Judge Burns. Motion carried.

Abuse of Public Office; Preliminary Draft No. 2; October 1969

Section 6. Concealing a conflict of interest. Mr. Paillette reviewed the Commission's previous discussion concerning the subject of concealing a conflict of interest as set forth in the Commission minutes of January 9, 1970, on pages 20 to 23 and also called attention to the Michigan statute on this subject, copies of which had been furnished to Commission members along with copies of the federal law in this area.

The Commission recessed for lunch at this point and reconvened at 1:15 p.m. with the only change in attendance from that recorded for the morning session being the absence of Mr. Knight.

Senator Burns moved to delete section 6 on concealing a conflict of interest from the criminal code. The motion was seconded by Mr. Spaulding but was subsequently withdrawn.

Chairman Yturri advised that the Joint Committee on Legislative Administration was working on this subject. Senator Burns remarked that it was an area which needed some serious study and he was not convinced that the Commission was as equipped as another committee might be to deal with it, particularly in view of the time which a thorough study would entail.

Representative Frost commented that legislative conflicts of interest would probably be best handled through a disclosure statement showing any conflict which might exist. From the standpoint of state government, however, there was potentially a very serious conflict of interest in agencies such as the highway department or OLCC where large purchases were made, but section 6 did not get to that problem.

He suggested the Commission discuss the possibility of requiring full-time government officials working in an area involving large purchasing transactions to report possible conflicts of interest.

Mr. Chandler commented that no state employe was immune from the possibility or the accusation of a conflict of interest and his statement included legislators as well as full-time salaried employes. Mr. Johnson added that some of the state's independent commissions were also susceptible. He contended that the legislature should be exempted from the statute.

Representative Carson commented that the Commission was apparently agreed that the crime should not be the conflict of interest itself but rather failure to disclose that conflict which was a step forward from the original draft of this section. He said he would oppose exempting legislators from such a statute because it would then appear to the public that the legislature was deliberately avoiding the issue so far as its members were concerned.

Chairman Yturri said he was concerned about including legislators because there was not a day that went by when the legislature was in session that half of those who voted on a measure didn't have a conflict or a potential conflict of interest. Mr. Johnson asserted that the public had recourse against the dishonest legislator because he had to stand for election whereas the appointed official did not. Furthermore, he said, the Oregon legislature was a part-time legislature and the members were dependent upon other sources of income for their livelihood so that there was a different policy consideration under those circumstances than where the official was totally dependent upon his position for his income. In the situation where he was handling large government contracts and had a conflict of interest, he was convinced that the public was entitled to know about that conflict.

Mr. Johnson then moved that section 6 be amended to exclude members of the legislature and be further amended in subsection (2) to provide that the public servant may ask for an opinion from the Attorney General if he chooses but he should not be compelled to do so.

Mr. Chandler contended that it would be a serious mistake for the Commission, composed as it was of a majority of members of the legislature, to write the legislature out of section 6. Disclosure of a conflict of interest could be handled in a simple, routine fashion within the legislature itself so that the disclosures would be available for public inspection.

Representative Carson suggested that the approach which the Joint Committee on Legislative Administration was considering was much like that used in the state of Washington and merely stated that the legislator would list the boards of directors he served on, how much

revenue was received in representing clients against the state, etc. He proposed that this information might be filed with the Attorney General and with the Joint Committee on Legislative Administration.

Senator Burns expressed agreement with both Mr. Chandler and Representative Carson. The problem, he said, was extremely difficult to resolve by statute. He then withdrew his motion to delete section 6.

Mr. Spaulding acknowledged that there appeared to be no way to resolve the problem even though the entire Commission was opposed to anyone profiting from a secret conflict of interest. The draft, he said, described conduct which could be committed often and completely innocently.

Mr. Chandler stated that the public was losing confidence in the legislative and judicial process, rightly or wrongly, and he was convinced that the criminal code should contain a broad general statement that a conflict of interest was not to be condoned and an official was required to make his conflict known before he took official action. He urged that the Commission take this opportunity to place in the code a policy statement condemning concealment of a conflict of interest. Chairman Yturri said he was persuaded that the vast majority of citizens had a high regard for judges and public officials in this state.

After further discussion, Mr. Johnson withdrew his motion to amend section 6 and moved that the section be tabled. Motion carried. Voting for the motion: Judge Burns, Senator Burns, Carson, Clark, Jernstedt, Johnson, Spaulding, Mr. Chairman. Voting no: Chandler.

Offenses Involving Narcotics and Dangerous Drugs; Preliminary Draft No. 3; February 1970

Mr. Paillette reviewed the policy decision made by the Commission in November 1969 to make little change in the existing narcotics and dangerous drug law in view of the fact that the 1969 legislature did extensive work in this area. Therefore, the draft submitted by Subcommittee No. 3 represented basically a rewrite of existing law and attempted to take the penalty sections out of ORS chapters 474 and 475 and incorporate them into the criminal code.

Section 1. Offenses involving narcotics and dangerous drugs; definitions. Mr. Wallingford explained that subsection (1) of section 1 incorporated by reference thirteen definitions found in ORS 474.010, all of which were used in the criminal code. Dangerous drugs were defined in subsection (2) by using the current list designated by the Drug Advisory Council. This differed from existing law, he said, by bringing the list of drugs into the statute and would no longer delegate to an administrative agency the responsibility of defining a dangerous drug. Mr. Paillette pointed out that a remote possibility

existed that the Drug Advisory Council might at some future time delete one of the drugs listed in subsection (2) from its dangerous drug list. Should this occur, the list would require amendment by the next session of the legislature. As pointed out in the commentary on page 3, it would be reasonable to expect that the district attorney would not proceed with a prosecution involving the drug removed from the list between legislative sessions.

Subsection (4) of section 1 was subsequently amended. See page 13 of these minutes.

Section 2. Criminal dealing in drugs. Mr. Wallingford advised that section 2 in effect restated ORS 474.020 and 475.100 and imposed uniform penalty criteria for criminal dealing in both narcotic and dangerous drugs consistent with the amendments made by the 1969 legislature.

Mr. Wallingford indicated that Mr. Knight had discussed with him before the meeting whether a specific quantity of a drug should be required in order to constitute a violation of this section. He had suggested that the section say "any quantity." Representative Carson thought that "any quantity" was implicit in the section as drafted and was told by Mr. Wallingford that there was a conflict in other states on this point.

Judge Burns advised that there was a split in authority throughout the country on this issue. A majority of the authorities held that even though the amount was de minimis, it was still a jury question. Some states, however, held that in order for the amount to be prosecutable, it had to be sufficient to constitute a dose or a "fix." The subcommittee, in discussing this point, had decided that it was better to leave the statute as drafted and let the court judicially construe the matter. In the typical case, he said, the police would have a spoon with a trace plus a trace in the cotton which, when dissolved in the laboratory, was enough to determine the presence, for example, of heroin but was not enough to constitute a dose because the defendant had already had the "fix" when the evidence was picked up.

Senator Burns commented that there was a difference between "dealing" in criminal drugs as stated in section 2 as opposed to being in possession and he suggested that the term "dealing" might not be entirely accurate. Mr. Paillette commented that the first draft of this Article drew a distinction between possession and selling but the subcommittee had decided to combine the two. Judge Burns explained that the subcommittee felt it was unwise to get into possession of various amounts and sales of various amounts and was of the opinion

that the present statute was flexible enough to cover the various methods of handling. He said he would have no objection to saying "criminal handling" or some other term in place of "criminal dealing" if the Commission wished to do so.

Chairman Yturri proposed to title the section "Criminal activity in drugs" and the members unanimously agreed to adopt that title and to substitute "activity" for "dealing" in the second line of section 2.

Mr. Spaulding questioned the propriety of defining "sells" to include "give." Selling, he said, connoted a far more serious crime than giving a marihuana cigarette to someone and was also more serious than possession.

Mr. Paillette suggested this problem might be solved by adopting the same approach taken in the draft on obscenity where a "furnishing" concept was used and where "furnishing" included a sale or a gift.

After further discussion, Judge Burns moved that the staff be instructed to draft appropriate amendments to sections 1 and 2 which would add "furnishes" to section 2 and would substitute "furnishes" for "sells" in section 1 (4) where "furnishes" would be defined to mean "sells or furnishes." If this motion were adopted, he said, it would still permit prosecution in a non-commercial situation and at the same time if two juveniles gave marihuana cigarettes to each other, it would avoid the problem of their being convicted of a crime which sounded as though they were dope peddlers. Chairman Yturri asked if section 2 would retain the possession proscription and received an affirmative reply from Judge Burns.

The motion to amend sections 1 and 2 as set forth above carried unanimously.

Senator Burns pointed out that under section 2, as under present law, the state had only to allege and prove possession and the judge then had the discretion to impose a misdemeanor or felony sentence. He was concerned over a situation where a boy with no previous record could be found in an apartment where there was a large quantity of drugs, yet he had no commercial connection with those drugs whatever. The state could prove possession and the judge, in view of the large quantity of drugs involved, could impose a felony or a heavy sentence. He suggested it might be better to separate possession from sale both as to proof and sentencing.

Mr. Clark pointed out that one of the major reasons for leaving section 2 as drafted was to take care of situations where organized crime was involved. In cases of that kind the only way to get at the wholesaler of a carload of drugs was to charge him with possession; he would never be caught in the act of selling yet he would be the individual who should receive the maximum penalty. Mr. Johnson asserted that the only way to handle the problem appeared to be to rely on the good judgment of the judiciary.

Section 3. Tampering with drug records. In reply to a question concerning the meaning of "apothecary," Judge Burns pointed out that the term was defined in the definition section by reference to subsection (7) of ORS 474.010. Mr. Paillette advised that apothecary was retained because the subcommittee was attempting to use as much of the existing law as possible.

Representative Frost asked if a woman who transferred her prescription narcotic drug from its container to a pill box would be guilty under section 3. Representative Carson pointed out that in so doing she would not alter, deface or remove the drug label and Judge Burns called attention to the exception contained in section 7 which would cover this situation.

Mr. Johnson moved that sections 1, 2 and 3 be approved as amended and the motion carried.

Section 4. Criminal use of drugs. Mr. Wallingford said that section 4 was a restatement of ORS 475.625. Chairman Yturri asked if many cases had been prosecuted under that statute and was told by Judge Burns that there had been very few. Mr. Paillette commented that the section was a "cop-out" type of statute and Mr. Spaulding advised that it enabled reasonable disposition of knotty questions which could not otherwise be resolved.

Mr. Chandler moved that section 4 be approved and the motion carried.

Section 5. Criminal drug promotion. Mr. Clark opposed section 5. He said that if a person went to a party where someone was using drugs in another room, the person could be found guilty of criminal drug promotion under this section. Mr. Paillette replied that section 5 used the strict liability term "knowingly" and a person could not be found guilty unless he knew drugs were in use.

Mr. Spaulding moved that section 5 be approved and the motion carried.

Section 6. Obtaining a drug unlawfully. Mr. Wallingford read section 6. Representative Frost moved its adoption and the motion carried unanimously.

Section 7. Criminal possession of drug; prima facie evidence. Representative Frost pointed out that since section 7 applied to the container in which the drug was sold, it would exempt the pusher who brought in the drug or narcotic in a burlap bag, that being the container in which he had purchased it.

Judge Burns pointed out that the section was concerned only with prescription drugs, a view with which Representative Frost did not agree.

Mr. Chandler moved that section 7 be approved and the motion carried.

Section 8. Burden of proof on exemption from drug laws. Judge Burns explained that section 8 restated existing law and placed the burden on the defendant to prove that he fell within the drug law exemption under which he was charged. Mr. Chandler moved that section 8 be approved and the motion carried unanimously.

Section 9. Seizure and forfeiture of conveyance used in violation of this Article. Representative Frost contended that to permit forfeiture of a boat, vehicle or conveyance under section 9 was going too far and approached the point of unusual punishment. It also posed a problem as to the title to the vehicle when lien holders were involved. Chairman Yturri said this point had been researched earlier and it was found that lien holders were ahead of the state.

Mr. Wallingford advised that a recent issue of the Criminal Law Reporter cited a case where the Arizona Supreme Court ruled on an identical statute and found it constitutional so long as the owner of the vehicle had some connection with the unlawful act or condoned or knew about it.

Representative Frost pointed out that subsection (1) did not require knowledge on the part of the person who was in or about the conveyance and gave carte blanche authority to any police officer to search the car. Judge Burns acknowledged that there was some constitutional question concerning the validity of subsection (1) and this fact was reflected in the commentary. The subcommittee, however, felt section 9 was essentially a restatement of existing law and the forfeiture provisions were basically useful. Inasmuch as the Commission had directed them to make as few changes as possible, they decided to include the provision recognizing that it might be challenged in the courts.

Senator Burns said he would vote against the section because he seriously questioned the validity of its warrant and search provisions.

Mr. Spaulding pointed out that subsection (1) said that the peace officer "shall" search without warrant and without an affidavit being filed. Since it did not say "may," it would appear that he had no alternative other than to search the conveyance and he would violate the section if he first obtained a search warrant.

Representative Carson moved that "shall" be changed to "may" on the fifth and eighth lines of section 9. The motion carried.

Representative Frost moved to delete section 9. Motion failed. Voting for the motion: Senator Burns, Frost, Spaulding. Voting no: Judge Burns, Carson, Chandler, Clark, Jernstedt, Mr. Chairman.

Representative Frost next moved to delete subsection (2) of section 9. Motion failed.

Judge Burns moved that section 9 as amended be adopted. Motion carried. Voting for the motion: Judge Burns, Carson, Chandler, Clark, Jernstedt, Mr. Chairman. Voting no: Senator Burns, Frost.

Section 10. Acquittal or conviction under federal law as precluding state prosecution. Judge Burns explained that section 10 restated existing law. Mr. Clark moved its adoption and the motion carried.

Escape and Related Offenses; Preliminary Draft No. 3; January 1970

Section 1. Escape and related offenses; definitions. With respect to susbsection (4) of section 1, Mr. Wallingford explained that the exemption in the last sentence was included because the persons listed therein could not be charged with escape inasmuch as the criminal escape statutes did not apply to them.

Mr. Wallingford said a question had been raised by Mr. Knight concerning the definition of "peace officer" in subsection (7) as to whether campus police should have the same authority under this Article as did other peace officers. A letter was written to the attorney for the Board of Higher Education and his reply recommended that for the limited purposes of the Escape Article, campus police officers should be given the same authority as other peace officers.

Representative Frost asked if campus police were subject to police standards and certification and was told by Mr. Paillette that they were not. Representative Frost's opinion was that it would be a mistake to give police powers to anyone who had not had the benefit of the training offered by the Board on Police Standards and Training.

Mr. Paillette advised that the police standards and training sections of the statute defined "police officer" as "an officer or member of a law enforcement unit who is employed full time as a peace officer, commissioned by a city or county, and who is responsible for enforcing the criminal laws of this state."

Mr. Johnson stated there was some advantage to letting the campus police act in escape situations. Representative Frost commented that if the campus police were not qualified police officers, it was possible to deputize them should the occasion arise. He was, however, opposed to giving blanket authority to any campus police officer without regard to his qualifications.

Mr. Johnson suggested that a proviso be added to subsection (7) to say "or other persons designated as a peace officer." Chairman Yturri maintained that the definition was better as drafted and agreed with Representative Frost that the campus police could be deputized if necessary. A majority of the Commission agreed.

Mr. Clark remarked that a correctional officer for the state of Oregon was not included in the definition section. Mr. Paillette advised that the correctional officer was included under a specific statute in the corrections code and it was therefore unnecessary to include him in this Article. Mr. Clark then asked if a jailer was covered and was told by Mr. Wallingford that the jailer need not be included in the definition because once a person was committed to a detention facility, he was in constructive custody and would be guilty of escape from a detention facility whether he escaped from inside the facility or whether he escaped while traveling with a jailer outside the facility.

Judge Burns noted that the definition of "dangerous contraband" in subsection (3) was extremely broad and said he could foresee litigation instigated by those charged under that definition on the ground that the statute was unconstitutional because of vagueness. "Contraband whose use would endanger the safety or security of a detention facility," he said, could refer to a match.

Mr. Clark pointed out that the definition of "contraband" in subsection (1) was even broader. When he had worked at San Quentin, he said, arrests were made for the crime of carrying concealed sandwiches because by prison rule sandwiches were contraband except in the dining hall. He objected to giving the weight of Oregon law to that type of "contraband." Mr. Paillette explained that the definitions of "contraband" and "dangerous contraband" became important in the subsequent sections on supplying contraband rather than on possession of it. The draft, he said, was aimed at the person who was introducing contraband into a detention facility.

Mr. Clark reiterated his objection to placing a criminal sanction on supplying prisoners with sandwiches or comic books and Mr. Paillette replied that if those articles were on the list of items prohibited from entering the prison and the individual knew they were on the list yet furnished them to the inmate despite the proscription, he would violate section 6. Prison officials, he said, could not be expected to maintain order in the institution if they had no control over what people outside the institution could bring in to the inmates. Chairman Yturri commented that it would be up to the discretion of the person in charge of the facility to use some common sense in preparing the list of proscribed articles that were barred from introduction into a jail or prison.

Mr. Wallingford advised that the draft contained the same approach as that used in Michigan and New York. The only other answer would be to attempt to set out in the statute precisely what was meant by "contraband" and that would be a correctional evaluation which the Commission was not in a position to make. Mr. Chandler related that Subcommittee No. 1 had discussed this matter in detail and reached the conclusion that it was not feasible to write that much detail into a statute. The best course was to give the person in charge of the facility the authority to determine what was or could be a problem.

Section 1 was subsequently amended. See page 25 of these minutes for amendments to subsections (1) and (3); page 26 for addition of subsection (9) defining "unauthorized departure."

Section 2. Escape in the third degree. Mr. Wallingford explained that the distinctions between the three degrees of escape were based upon factors which created higher risks of harm to others. Subsection (1) of section 2, he said, excluded juveniles because of the definition of "custody" in section 1.

Representative Frost suggested that subsection (1) of section 2 be amended to say "escape from lawful custody" and that subsection (2) be deleted. Mr. Paillette explained that the section was redrafted by the subcommittee in this manner because they wanted to make subsection (2) a defense rather than an element of the crime. "Custody" was defined to mean restraint "pursuant to an arrest or court order" and if it was the result of an illegal arrest, subsection (2) would be an issue to be raised by the defendant rather than one to be pleaded and proved by the prosecutor. Judge Burns added that the validity of the arrest would thus be determined in court rather than on the street.

Representative Frost objected to shifting the burden to the defendant and contended that the burden should be on the state to show that the arrest was legal. He then moved to insert "lawful" before "custody" in subsection (1) of section 2 and to delete subsection (2).

Mr. Paillette pointed out that "custody" was used again in both sections 3 and 4 and in those sections he did not think it would be wise to modify "custody" with "lawful." The attempt in subsection (2) of section 2, he said, was to draw a limited, narrow exception to the crime of escape where no force was used. Representative Frost maintained that the logic of the section was tenuous when it said that it was all right to escape from illegal custody without force but if a person used reasonable force to escape from illegal custody, he would be guilty. Custody when illegal or unlawful, he said, was not custody but was void ab initio. He disliked the idea that because a person was locked up, he had no defense.

Mr. Paillette pointed out that the Commission had earlier gone on record in the Justification Article as being opposed to the street

confrontation situation to determine the lawfulness of an arrest at the time of the arrest. The subcommittee had decided to make one exception to that policy where the person walked away from an arrest peaceably without using force and where escape from a detention facility was not involved. In that situation he would have a defense for his act.

Senator Burns commented that this matter was thoroughly discussed in subcommittee. If the person was convinced that he was the victim of an illegal arrest and was taken to jail, he had recourse to obtain an immediate release. He said he could not see how section 2 would hurt anyone.

Vote was then taken on Representative Frost's motion to amend section 2. Motion failed. Voting for the motion: Frost, Mr. Chairman. Voting no: Judge Burns, Senator Burns, Carson, Chandler, Clark, Jernstedt, Johnson, Spaulding.

Senator Burns moved that section 2 be approved and the motion carried.

Section 3. Escape in the second degree. Judge Burns noted that it was second degree escape under subsection (2) of section 3 if a person escaped "having been convicted of a felony." He said this language was susceptible of two interpretations: One, that he escaped from custody imposed as the result of a felony conviction; or two, that he escaped from custody having sustained a felony conviction as the result of a different charge at some time in the past. Senator Burns explained that if a person charged with a felony escaped on his way to trial, that was different from the situation where he escaped following his conviction of a felony and section 3 was intended to apply to this latter circumstance. Mr. Paillette added that the subsection was aimed at the defendant who was charged with a felony but had not been placed in a detention facility; after the trial in which he was convicted of a felony, he was remanded to custody. If he then escaped before he reached the detention facility, he would be guilty under section 3.

Chairman Yturri suggested that the intent could be clarified by amending subsection (2) to read:

> "Having been convicted or found guilty of a felony, he escapes from custody imposed as a result thereof; or".

Mr. Clark moved the adoption of the language proposed by the Chairman with the further instruction that the commentary contain a statement that "found guilty" meant a jury or judge conviction or an entry of plea. Motion carried.

Representative Frost then moved that the following subsection be added to section 3:

"(4) It is a defense to a prosecution under this section that the person escaping or attempting to escape was in custody, detention or a detention facility pursuant to an illegal arrest."

He explained that adoption of his motion would mean that it would be a defense to second degree escape if the defendant escaped while in custody or imprisoned in a detention facility as a result of an illegal arrest.

Mr. Spaulding pointed out that if this motion were adopted and a defendant obtained a reversal in the Supreme Court after conviction in the circuit court, the reversal would wipe out his crime of killing someone while he was escaping.

Representative Frost contended there was no logical reason for having this defense available for escape in the third degree when it was not also available for escape in the second and first degrees. He intended to propose a similar motion to be included in section 4, he said.

Vote was then taken on Representative Frost's motion and it failed. Voting for the motion: Frost. Voting no: Judge Burns, Senator Burns, Carson, Chandler, Clark, Jernstedt, Johnson, Spaulding, Mr. Chairman.

Judge Burns moved to adopt section 3 as amended and the motion carried with Representative Frost voting no.

Subsection (1) of section 3 was subsequently amended. See the second paragraph under section 4 below.

Section 4. Escape in the first degree. Representative Frost pointed out that the language in section 4 used different tenses when it said "uses or threatens to use . . . in escaping . . . " Mr. Paillette advised that the intent was to refer to a situation where the escape was an accomplished fact. Chairman Yturri explained that Representative Frost's interpretation brought in the connotation of an inchoate crime when the draft said "in escaping" whereas the draft was intended to mean that the person simultaneously "used or threatened to use" force or a weapon during the course of an escape.

There were a number of suggestions for resolving this problem. It was finally determined that the best method was to delete "in" before "escaping" in subsection (1) of section 3 and in subsections (1) and (2) of section 4. Representative Frost so moved and the motion carried unanimously.

Mr. Johnson commented that subsection (1) of section 4 described an inchoate crime and merely elevated the offense of "conspiracy to escape" when the co-conspirator was actually present. Representative Frost agreed that the subsection defined an inchoate crime with one added element.

Mr. Paillette advised that the crime of escape in the first degree was not being considered from the standpoint of a conspiracy but was being viewed from the same standpoint as the rationale used in the robbery sections. There the degree of robbery was enhanced if the robber was aided by another person actually present because it increased the danger to the victim, and the same rationale applied in section 4. Mr. Spaulding commented that the element added in section 4 was that the person actually succeeded in the escape and it was not therefore an inchoate crime. He suggested that subsection (1) be amended to read:

> "Aided by another person actually present, he escapes and, while so doing, uses or threatens to use physical force."

Mr. Paillette explained that the section was intended to mean that the person had actually escaped; if it was merely an attempt to escape, he would be covered by the Article on Inchoate Crimes.

Judge Burns proposed that the section be clarified with respect to the question raised by Mr. Johnson by an addition to the commentary. The staff was directed by the Chairman to include a statement to the effect that section 4 was not intended to cover conspiracy to escape.

Mr. Chandler moved that section 4 be approved with the understanding that the commentary would be appropriately revised. Motion carried.

Section 5. Facilitating escape. Mr. Wallingford explained that section 5 did not make it a crime for a juvenile or a patient in the state hospital to escape but did make it a crime to facilitate the escape of those persons.

Representative Frost asked if this was again referring to an inchoate crime and was told by Chairman Yturri that it was not.

Mr. Chandler moved to approve section 5 and the motion carried.

Mr. Clark asked if it was possible to facilitate an escape from an institution where there was no crime of escape and was told by Mr. Wallingford that it was called "unlawful departure" for that reason. Mr. Paillette concurred that the title of section 5 was a misnomer and that the crime should not be called "escape" because the definition of "escape" excluded inmates of juvenile training schools and patients in a state hospital. Persons in those institutions, therefore, could not commit the crime of escape.

Mr. Clark moved to reconsider the action by which section 5 was approved for the purpose of amending the title to read "Facilitating unlawful departure" and to delete "escape" in the second line, substituting "unlawful departure" therefor. Motion carried.

Judge Burns asked if it was clear that section 5 applied only to those persons in a state hospital who were confined there not as a result of being charged with a crime. His purpose in raising this point was to make certain that section 5 stated clearly that if a person aided the escape of a patient in a state hospital who was confined there as a result of being charged with or convicted of a crime, the one who aided the departure would be guilty as a principal under sections 2, 3 or 4. Representative Frost stated that the definition of "detention facility" made this clear by the exclusion contained in the second sentence of subsection (4) of section 1.

After further discussion, the staff was directed to make appropriate amendments to clarify the intent of the section as stated by Judge Burns, the amendments to be presented to the Commission on the following morning. (See page 26 of these minutes for amendments.)

Section 6. Supplying contraband in the second degree. Section 7. Supplying contraband in the first degree. Mr. Clark expressed the same objection to section 6 as the one he outlined earlier with respect to the definition of "contraband" in section 1; namely, that the person supplying sandwiches to an inmate would be guilty under section 6. Mr. Wallingford pointed out that subsection (2) also brought the person confined under coverage of section 6.

Mr. Johnson said he would be disturbed by the point Mr. Clark raised if violation of section 6 could result in a felony conviction. However, throughout the code authority was extended to make violation of an administrative rule a misdemeanor and he said he could see nothing wrong with granting that same authority in this section. Mr. Spaulding agreed, as did other members of the Commission, that if the warden didn't want the inmates to have sandwiches or certain magazines, that was sufficient reason for them to be prohibited.

Mr. Wallingford noted that subsection (2) of both sections 6 and 7 included all persons confined in a state hospital. He suggested that these two subsections be limited to patients in a state hospital charged with or convicted of a crime.

Judge Burns moved that the staff draft appropriate language to accomplish Mr. Wallingford's suggestion to make it clear that sections 6 and 7 would reach only those patients confined in a state hospital who had been charged with or convicted of a crime.

Representative Frost pointed out that the provision would apply not only to those supplying the inmate with, for example, a knife but would also cover the person receiving it. An inmate with a knife, he said, who was in the hospital not charged with a crime was as dangerous to the attendants as was one who was confined because he had been convicted of a crime.

Mr. Spaulding stated that there were undoubtedly patients in the state hospitals who had enough mentality to use a knife and who were also capable of knowing that they should not have a knife in their possession. Persons in that category, he said, should be held responsible for acts of this kind. Representative Frost pointed out that "knowingly" as used in subsection (2) of sections 6 and 7 resolved the problem. If the patient acted "knowingly," he would be guilty under these two sections.

After further discussion, Judge Burns withdrew his motion to amend.

Mr. Chandler moved to approve sections 6 and 7 without amendment. The motion carried.

Sections 6 and 7 were amended on the following day. See discussion beginning on next page.

Tape 3 begins here:

Section 8. Bail jumping in the second degree. Section 9. Bail jumping in the first degree. Mr. Wallingford read sections 8 and 9. Representative Frost inquired if adoption of the sections would repeal existing law on bail jumping and received an affirmative reply from Mr. Paillette.

Mr. Clark moved that sections 8 and 9 be approved. The motion carried.

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

March 19, 1970

Members Present: Senator Anthony Yturri, Chairman
Judge James M. Burns
Mr. Robert W. Chandler
Mr. Donald E. Clark
Representative David G. Frost
Attorney General Lee Johnson
Mr. Frank D. Knight
Mr. Bruce Spaulding

Excused: Senator John D. Burns
Representative Wallace P. Carson, Jr.
Representative Harl H. Haas
Senator Kenneth A. Jernstedt
Representative Thomas F. Young

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

Agenda: Amendments to ESCAPE AND RELATED OFFENSES; Preliminary Draft No. 3; January 1970

BUSINESS AND COMMERCIAL FRAUDS
Preliminary Draft No. 2; January 1970

Printing of Commission's Final Tentative Draft

The meeting was reconvened at 9:30 a.m. by Chairman Yturri in Room 315 Capitol Building, Salem.

Escape and Related Offenses; Preliminary Draft No. 3; January 1970

Section 6. Supplying contraband in the second degree. Section 7. Supplying contraband in the first degree. With respect to the point raised by Mr. Spaulding on the previous day, Mr. Paillette inquired if the Commission wanted sections 6 and 7 to cover just the inmates of a state hospital who were confined as a result of a criminal commitment or whether they wanted to include other inmates who were knowingly making, obtaining or possessing contraband.

Mr. Spaulding said he would be in favor of including all inmates and then making a defense available to those who were completely irresponsible due to insanity.

Mr. Wallingford raised the further question of whether students in juvenile training schools should be included in sections 6 and 7 so

as to make it a crime for them to make, obtain or possess contraband. It was his understanding, he said, that contraband was governed by internal rules in these institutions.

Mr. Clark responded that this was true of prisons and jails also. He said he could see no utility in making it a criminal offense for an inmate to possess contraband. The fact that it was illegal would not stop the practice, he said. Supplying contraband from the outside, however, was an entirely different issue which should have a criminal sanction attached. Mr. Paillette agreed and added that inmates were governed by administrative control whereas those outside the institution were not.

Mr. Johnson moved to delete section 6. In support of his motion he said there was sufficient reason to include dangerous contraband in the criminal code but supplying sandwiches or magazines to inmates should not be reached by the criminal law.

To resolve the problem, Mr. Paillette suggested that sections 6 and 7 be combined into one section entitled "Supplying contraband." Section 1 containing the definitions would then be amended by redefining "contraband" in subsection (1) to mean the same as the definition of "dangerous contraband" in subsection (3) of section 1. In other words, there would be a one degree offense of supplying contraband, subsection (3) of section 1 would be deleted and in subsection (1) "contraband" would be defined to include any article or thing whose use would endanger the safety or security of a detention facility, juvenile training school, state hospital or any person therein.

Judge Burns declared that the amended definition of "contraband" should also include the phrase in subsection (1) of section 1 which said that the person "is prohibited from obtaining or possessing by statute, rule, regulation or order."

Mr. Johnson then withdrew his motion to delete section 6 and moved to adopt Mr. Paillette's suggested amendment as stated above including the language cited by Judge Burns. The motion carried unanimously. Voting: Judge Burns, Chandler, Clark, Johnson, Knight, Spaulding, Mr. Chairman.

Section 5. Facilitating escape. Mr. Paillette presented a revised section 5 designed to get at Judge Burns' objection of the previous day. (See page 22 of these minutes.) The proposed section would not take in the person who was criminally committed, he said, and was further amended to delete the term "escape." To accomplish these two objectives, two amendments were presented to the Commission. The first was an amendment to section 1:

"(9) 'Unauthorized departure' means the unauthorized departure of a person confined by court order in a juvenile training school or a state hospital that, because of the nature of the court order, is not a detention facility as defined in subsection (4) of this section."

The second amendment was a rewrite of section 5:

"Section 5. Aiding an unauthorized departure. A person commits the crime of aiding an unauthorized departure if, not being an inmate therein, he aids a person in making or attempting to make an unauthorized departure from a juvenile training school or a state hospital."

In reply to a question by Mr. Clark, Mr. Paillette advised that adoption of the proposed section 5 would not make an unauthorized departure a crime but aiding such a departure would be a crime.

Mr. Chandler moved adoption of the proposed section 5 and subsection (9) of section 1 as set forth above. Motion carried unanimously. Voting: Judge Burns, Chandler, Clark, Johnson, Knight, Spaulding, Mr. Chairman.

Mr. Johnson then moved to adopt the Article on Escape and Related Offenses, as amended, and the motion carried without opposition. Voting: Judge Burns, Chandler, Clark, Frost, Johnson, Knight, Spaulding, Mr. Chairman.

Business and Commercial Frauds; Preliminary Draft No. 2; January 1970

Section 1. Business and commercial frauds; definitions. Mr. Paillette explained that the Article on Business and Commercial Frauds contained some aspects of bribery which did not fit into the Bribery Article but dealt mainly with business records, defrauding creditors, etc.

With respect to the definition of "financial institution" in subsection (4) of section 1, Mr. Chandler asked if a corporation would fall within the definition of an "organization held out to the public as a place of deposit of funds or medium of savings or collective investment." This point was discussed and it was finally decided that even though the definition might be construed to include a corporation, it did no harm to the Article.

Mr. Johnson inquired if there was a difference between subsections (1) and (5) and suggested that since subsection (1) included subsection (5), subsection (5) might be unnecessary. Mr. Wallingford explained that the two terms were separately defined because in section 15 only

the term "benefit" was used and the benefit that could be obtained under that section, which pertained to obtaining execution of documents by deception, would not necessarily be a pecuniary benefit.

Section 2. Falsifying business records. Mr. Johnson asked if existing law contained a statute similar to section 2 and was told by Mr. Wallingford that the current law was not as comprehensive as this section. There were, however, statutes on falsifying certain specific business records.

Mr. Spaulding pointed out that under section 2 a person could commit a crime without receiving any benefit. Judge Burns cited the commentary which stated it was not the intent of the section to preserve the integrity of business records but, instead, the prohibition was directed at conduct preliminary to the commission of fraud. Mr. Paillette called attention to the Model Penal Code commentary quoted on page 5 which pointed out the need for this kind of legislation.

Judge Burns moved to approve section 2 and the motion carried.

Section 3. Commercial bribery. Section 4. Receiving a commercial bribe. Mr. Chandler said sections 3 and 4 were aimed at the purchasing agent who granted a purchasing contract to company A over company B because he received a case of company A's goods prior to issuing the contract.

Judge Burns said an even more likely situation was where, having awarded the contract to company A, the purchasing agent found a case of liquor on his doorstep at Christmas time. Sections 3 and 4, he said, were attempting to legislate morality and while he was opposed to commercial bribery, it was nevertheless a difficult matter to get at in the criminal law. Chairman Yturri commented that the section created a vehicle for anyone who was disgruntled to accuse another of commercial bribery and opened the gates to any number of charges one person might want to make against another.

Representative Frost contended that there was a civil remedy for commercial bribery situations and this subject had no place in the criminal law.

Chairman Yturri asked if the present statutes in regard to commercial bribery would be retained if sections 3 and 4 were not accepted by the Commission. Mr. Paillette replied that certainly ORS 708.715 relating to receipt of illegal compensation by bank and trust company officers and employes should be retained.

Mr. Spaulding commented that sections 3 and 4 made the special interest legislation apply to everyone and Mr. Chandler expressed the view that if it was worth keeping as special interest legislation, it should be made applicable to everyone.

After further discussion, Representative Frost moved to delete sections 3 and 4 with the proviso that ORS 708.715 and ORS 165.515 would be retained. Motion carried. Voting for the motion: Judge Burns, Clark, Frost, Johnson, Knight, Mr. Chairman. Voting no: Chandler, Spaulding.

Section 5. Sports bribery; definitions. Chairman Yturri called attention to the phrase in subsection (3) of section 5 which said any "person directly associated with a player, contestant or team member" and noted that there was no description of the capacity in which that person was associated with a player. Mr. Wallingford said one example given in subcommittee was a player's agent. Chairman Yturri stated that a person who was in business with a contestant would be "associated" with him. Mr. Wallingford responded that the definition was not intended to apply to that type of association. The subsection might be clarified, he suggested, by adding "in connection with a sports activity" at the end of the sentence.

Mr. Spaulding moved to amend subsection (3) as suggested by Mr. Wallingford and the motion carried.

Mr. Johnson asked if horse racing would be included in the definition of "sports contest" and was told by Mr. Spaulding that it was a contest and would therefore be included.

Representative Frost contended that what the sports bribery sections were really directed at was gambling but these sections were going at it in a roundabout manner and had no more force of logic than the sections which the Commission had just deleted. Chairman Yturri observed that the only gambler the sections were directed against was one who attempted to bribe one of the players involved in a sports contest.

Section 6. Sports bribery. Section 7. Sports bribe receiving. Mr. Johnson asked why section 6 was limited to a pecuniary benefit and raised the question he had discussed earlier as to the possibility of combining the definitions of "benefit" and "pecuniary benefit" in subsections (1) and (5) of section 1. Mr. Wallingford advised that the definition of "pecuniary benefit" in section 1 included "benefit" but "benefit" did not incorporate the definition of "pecuniary benefit." Therefore, if "benefit" were used in the draft rather than "pecuniary benefit," he said, the benefit would not then be limited to money.

Mr. Johnson moved to delete "pecuniary" before "benefit" in subsections (1) and (2) of section 6. Judge Burns asked if adoption of this motion would expand the scope of the section and was told by Mr. Johnson that it was his intent in making the motion to broaden the benefit to include a nonpecuniary as well as a pecuniary benefit.

Vote was then taken on Mr. Johnson's motion to amend and it carried. Voting for the motion: Judge Burns, Chandler, Clark, Johnson, Mr. Chairman. Voting no: Frost, Knight, Spaulding.

Mr. Johnson next moved to delete "pecuniary" before "benefit" in subsections (1) and (2) of section 7. Motion carried. Voting for the motion: Judge Burns, Chandler, Clark, Johnson, Spaulding, Mr. Chairman. Voting no: Frost, Knight.

Mr. Chandler moved to adopt sections 6 and 7 as amended. Motion carried. Voting for the motion: Judge Burns, Chandler, Clark, Johnson, Knight, Spaulding, Mr. Chairman. Voting no: Frost.

Section 8. Tampering with a sports contest. Mr. Paillette advised that section 8 was not approved by the subcommittee nor was the staff in favor of it but it had been included in this draft to give the Commission an opportunity to consider the subject. If section 8 were approved, he said, it would have a definite effect on the sections in ORS chapter 462 pertaining to horse racing and those sections would then have to be studied to see whether or not they should be repealed. Mr. Wallingford pointed out that the penalties in ORS chapter 462 for tampering with horses were felonies whereas the penalty for violation of section 8 would in all probability be a misdemeanor. He advised that the derivation of section 8 was the Model Penal Code.

Mr. Johnson moved to delete "and usages" from section 8. Chairman Yturri stated that if this motion were adopted, the section would cover the situation where someone was shouting at a referee despite the fact that this was a long standing custom. "Usages," he said, referred to customs and traditions. Mr. Johnson indicated his objection to the term was that arguments could arise over what acts actually were customs.

Vote was then taken on Mr. Johnson's motion and it failed. Voting for the motion: Johnson. Voting no: Judge Burns, Chandler, Clark, Frost, Knight, Spaulding, Mr. Chairman.

Mr. Wallingford cited as examples of the type of activity intended to be covered by section 8 cases where a burning salve was rubbed on a boxer's gloves or where the water was "spiked."

Mr. Clark then moved to approve section 8. Motion failed and the section was thereby deleted. Voting for the motion: Chandler, Clark. Voting no: Judge Burns, Frost, Johnson, Knight, Spaulding, Mr. Chairman.

Section 9. Defrauding secured creditors. Mr. Spaulding pointed out that real property was not covered by section 9.

Judge Burns commented that conditional sales contracts on automobiles traditionally contained a clause that the vehicle could not be taken outside the state and inquired whether section 9 would expand or maintain present law in this regard. Mr. Wallingford outlined that it would expand existing Oregon law but it did require an intent to hinder enforcement of the interest. So long as the payments on the contract were current, that intent would not be present, he said.

Mr. Johnson moved to delete section 9 and the motion was seconded by Representative Frost.

Mr. Knight commented that in most situations of this kind the person was judgment-proof so the personal property was the only security which the creditor had. Representative Frost acknowledged that the seller was taking a risk but the interest he was receiving was ample payment for his speculation.

Judge Burns observed that if a person took a mortgaged car out of the state and thereby made it more difficult for the bank or finance company to collect on the mortgage or sales contract, it would be a jury question as to whether he had the intent to hinder enforcement of the security interest. He asked Mr. Knight if he would want to prosecute cases of that kind. Mr. Knight said the situation was analagous to the bad check artists. It was a form of stealing to take merchandise out of the state and fail to make payments on it. The seller could sue for collection but it was a policy question as to whether this should be a crime to be prosecuted by the state or whether the merchant should be placed in the position of extending credit at his own risk and relying on a civil remedy.

Mr. Chandler contended that when a person took merchandise with intent to defraud the seller, he should be subject to a criminal charge. Mr. Johnson replied that this approach encouraged merchants to give credit to persons who were not responsible individuals on the theory that the district attorney would act as a collection agent for them.

Vote was taken on Mr. Johnson's motion to delete section 9. Motion carried. Voting for the motion: Judge Burns, Clark, Frost, Johnson, Spaulding, Mr. Chairman. Voting no: Chandler, Knight.

Section 10. Defrauding judgment creditors. Chairman Yturri said he had favored deletion of section 9 because he agreed that it was analagous to the bad check situation, that creditors would be using district attorneys as collection agents and would therefore grant credit far more liberally without taking the precautions they should be expected to take. He expressed approval of section 10, however, because it covered a different situation in that the creditor had already taken steps to reduce the claim to judgment.

Representative Frost contended that the creditor should resort to a civil remedy in these situations. When the creditor knew where the merchandise was, he could repossess it. Section 10, he said, was again attempting to legislate morality.

Mr. Chandler maintained that in many cases it would cost the creditor more to go to California to repossess the merchandise than the car or furniture was worth and he should be protected in cases of that kind.

Representative Frost moved to delete section 10 and the motion carried. Voting for the motion: Judge Burns, Clark, Frost, Johnson, Spaulding. Voting no: Chandler, Knight, Mr. Chairman.

Section 11. Receiving deposits in a failing financial institution. In response to Mr. Spaulding's question, Mr. Wallingford advised that ORS 711.415 was similar to section 11.

Mr. Paillette reported that in the interim since this Article had been considered by the subcommittee, the Law Improvement Committee had authorized a revision of the banking code. The bankers, he said, were undertaking to finance the revision of the laws in this area and the drafting would be done through the Law Improvement Committee. For this reason the banking laws would be in a state of flux for approximately the next two years. He also pointed out that adoption of section 11 would delete the criminal sanctions from the banking code. If it were not adopted, he said, those sanctions should be retained in the existing code.

Chairman Yturri asked Representative Frost if he believed that creditors should be left to their civil remedies in the situations covered by section 11 and received an affirmative reply.

Mr. Spaulding remarked that under subsection (2), whether or not the assets would pay out the liabilities would depend on the circumstances, and Representative Frost said it would hinge on the bank's bookkeeping system and how they entered their assets.

Mr. Johnson said that the existing law in this area was probably written during the depression days and in today's society where the banks were insured it was a much less serious problem.

After further discussion, Mr. Chandler moved to delete section 11 and the motion carried. Voting for the motion: Judge Burns, Clark, Frost, Johnson, Spaulding. Voting no: Chandler, Knight, Mr. Chairman.

Mr. Chandler asserted that the Commission was making a serious mistake by refuting sections in this Article. The Model Penal Code revisors, he said, had gone through this material in great detail and

were satisfied that there was a need for these statutes. The state could not afford, he said, to turn the small depositor in a bank over to the mercies of a bank officer who knew his institution was failing but still accepted deposits nor could it afford to say that a court judgment meant so little that if the mortgagee could sneak the merchandise out of the jurisdiction, it was all right to do so. In reply to Representative Frost's contention that there was a civil remedy for all of these offenses, Mr. Chandler said that any action a debtor took to defraud the seller was a crime, and creditors in most instances could not afford to sue for small sums.

Section 12. Fraud in insolvency. Judge Burns commented that fraud in insolvency was something that up to now had not been handled criminally in the Oregon law except to some extent under the federal statutes. There were not enough district attorneys and police, he said, to prosecute every case of this type which might arise and the result would be selective law enforcement. While selective law enforcement was something that could not be entirely avoided, one of the objectives of code revision was to reduce the likelihood as much as possible and it would not be reduced by adding to the criminal law offenses which heretofore had not been crimes.

Mr. Paillette remarked that this Article incorporated a number of sections which were previously outside the criminal code but which did have criminal penalties attached. Fraud in insolvency, he said, was a crime under existing law.

Mr. Johnson pointed out that there were in today's society a number of people who were irresponsible, and one of the ways of preventing crime was to put the burden on the businessman rather than on the state to prevent that type of person from getting into a position where he could exercise his irresponsibility.

Chairman Yturri expressed the view that it should be a crime for a bank officer, knowing there were not enough assets to pay off his depositors, to accept money for deposit. Judge Burns stated that this act would be a crime under the federal bankruptcy statutes at the present time, but he was unable to answer the Chairman's question as to whether it would be a crime under the federal statutes for a state bank to accept funds under those circumstances.

Mr. Chandler moved to delete section 12 and the motion carried. Voting for the motion: Judge Burns, Clark, Frost, Johnson, Spaulding. Voting no: Chandler. Abstaining: Knight.

Section 13. Misapplication of entrusted property. Mr. Knight asked if the offense described in section 13 would be covered under embezzlement. Mr. Paillette advised that under embezzlement the state had to show that the person converted funds to his own use whereas section 13 went to just an unauthorized use.

Mr. Johnson commented that the law had always placed a high level of responsibility upon the fiduciary and expressed approval of section 13. Representative Frost was of the opinion that section 13 fell into the same category as the previous sections which had been deleted; there was, he said, a civil remedy available for this type of offense.

Judge Burns stated that section 13 covered a wide range of existing statutes but was not basically new law.

Mr. Johnson moved that section 13 be approved and the motion carried. Voting for the motion: Judge Burns, Chandler, Clark, Johnson, Knight, Spaulding, Mr. Chairman. Voting no: Frost.

Section 14. Issuing a false financial statement. Mr. Wallingford explained that section 14 restated existing law and required an intent to defraud.

Mr. Chandler moved to delete section 14 and the motion failed.

Representative Frost stated that the OMFP statute covered issuing a false token and asked whether a false token could include a false financial statement. Mr. Paillette replied that section 14 applied to a time before the person actually received any money for issuing a false statement.

Representative Frost next asked if section 14 described an inchoate crime and if inclusion of the section would raise a Pirkey problem in that a person might be charged not only under section 14 but also might be charged with attempted theft under the Article on Inchoate Crimes. Mr. Paillette said in his opinion it would not present a Pirkey problem but concurred that the crime could be prosecuted as an attempted theft by deception. It would, however, be simpler to prosecute under section 14 because the problem of proving a substantial step towards the commission of the crime of theft would be avoided.

Mr. Spaulding moved to approve section 14 and the motion carried. Voting for the motion: Judge Burns, Chandler, Johnson, Knight, Spaulding, Mr. Chairman. Voting no: Clark, Frost.

Section 15. Obtaining execution of documents by deception. Mr. Paillette explained that section 15 essentially restated existing law and was an "odds and ends" type of section. The staff felt they could recommend that most of the statutes listed on page 42 of the draft could be repealed if section 15 were adopted.

Mr. Wallingford said an example of the type of offense which would be covered by section 15 was where a nonresident attempted to obtain a resident fishing or hunting license because the resident license cost considerably less.

Judge Burns moved to approve section 15 and the motion carried. Voting for the motion: Judge Burns, Chandler, Clark, Johnson, Knight, Spaulding, Mr. Chairman. Voting no: Frost.

Chairman Yturri commented that since so much of this Article had been deleted, it would be necessary to compose another title for it and directed the staff to do so. The staff was further instructed to conform the definitions to the sections remaining in the Article.

Mr. Johnson then moved that the Article be approved as amended with the understanding that the staff would retitle the Article and make appropriate revisions to the definitions. The motion carried. Voting for the motion: Judge Burns, Clark, Frost, Johnson, Spaulding, Mr. Chairman. Voting no: Chandler, Knight.

Next Meeting of the Commission

It was agreed that the Commission's next meeting would be held on Friday and Saturday, April 3 and 4.

Mr. Paillette advised that approval by the Commission of only four Articles would complete the substantive revision, with the exception of a few miscellaneous offenses which would be picked up by the subcommittee on grading and sentencing. Those remaining were:

Obscenity and Related Offenses
Gambling Offenses
Offenses Against the Family
Offenses Involving Firearms and Deadly Weapons (Not yet considered by Subcommittee No. 3)

A date for a meeting of Subcommittee No. 3 was discussed and the members decided to meet on Friday, March 27, in order to have the firearms draft ready for the Commission's April meeting.

Printing of Commission's Final Tentative Draft

Mr. Paillette advised that $5,000 had been budgeted for the purpose of printing the final tentative draft of the substantive code. He had discussed the printing with the State Printer who estimated that the final copy on 8 1/2 x 11 paper would run to about 192 pages plus the cover. The type style would be similar to that of the Michigan Revised Criminal Code with the text of the sections double spaced and the commentary single spaced and set out in a double column. The texts of the revisions of other states, included on the blue sheets in the drafts which the Commission had been considering, would not be in the final draft. The cost estimate by the State Printer, including composition, was:

1,000 copies	$5,200
2,000 copies	$5,800
3,500 copies	$6,650

Mr. Paillette said the minimum number of copies which the Commission could expect to distribute would be 1,000 and this number would, of course, exclude furnishing copies to members of the Oregon State Bar. He asked if the Commission thought it would be feasible or worthwhile to distribute a questionnaire to the Bar to see how many members would want a copy and whether they would be willing to pay for them. Chairman Yturri suggested that Mr. Holloway, Secretary of the Oregon State Bar, be contacted to see if such a questionnaire could be included with one of the Bar's mailings.

Mr. Paillette said that the Committee on Continuing Legal Education was considering a session on the criminal code and they would probably want to print up their own draft. Judge Burns advised he had been in contact with CLE members and one of the things they needed to know was when the code would become effective. Mr. Johnson indicated he had been told that CLE would not hold a session on the criminal code until after it had passed the legislature. Judge Burns stated that from the standpoint of making the code effective by having the lawyers educated, it was quite important that the effective date be kept in mind. Mr. Paillette indicated this had been discussed at the inception of the Commission's work but a conclusion had not been reached as to whether it should be one year or possibly even two years after the code was enacted.

Mr. Chandler stated that the bid by the State Printer appeared to him to be very reasonable. The first thousand copies would cost $5.20 apiece, the next thousand would be 80 cents each and the next fifteen hundred would be 60 cents each. He thought it would be a mistake to stop at 1,000 copies if there were any way to avoid it.

The Commission discussed the number of lawyers who could be expected to buy a copy of the draft and the majority agreed that over the space of a year's time at least 500 would probably do so. The Commission further agreed that free copies should be distributed to judges, district attorneys, sheriffs, etc. but anyone else who wanted one should be charged $5 per copy. The members also expressed approval of the style and format of the final draft as delineated by Mr. Paillette.

The meeting was adjourned at 12:30 p.m.

Respectfully submitted,

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission

Section _____. Unlawful dealing in eavesdropping devices. (1) A person commits the crime of unlawful dealing in eavesdropping devices if he knowingly:

(a) [Sends through the mail,] Transports in intrastate commerce, manufactures, assembles, possesses or sells an eavesdropping device knowing that the device is designed primarily for use in wiretapping or mechanical overhearing or recording of a conversation; or

(b) Places in a newspaper, magazine, trade circular, catalogue or other publication an advertisement of an eavesdropping device knowing that the device is designed primarily for use in wiretapping or mechanical overhearing or recording of a conversation.

(2) It shall not be unlawful under this section to [send through the mail,] transport in intrastate commerce, manufacture, assemble, possess, advertise or sell devices that may be used for eavesdropping if:

(a) Done by a communications common carrier, or its agents, in the normal course of the communication common carrier's business; or

(b) Done by a public servant, or a person acting under his direction, in the normal course of law enforcement or investigative activities authorized by this Article; or

(c) Done by a person under contract with a public servant or governmental agency incident to an authorized business transaction; or

(d) The device is not designed primarily for surreptitious electronic eavesdropping and is [mailed,] transported, manufactured, assembled, advertised, possessed or sold with the intent that it be lawfully used as designed.

Appendix B
Criminal Law Revision Commission
Minutes, March 18, 1970

TO: Criminal Law Revision Commission

RE: Recommended Designated Offenses Subject to Electronic Surveillance

Article		Section	Title of Offense
_____.	Homicide	_____.	Murder
_____.	Sexual Offenses	_____.	Rape, First Degree
		_____.	Sodomy, First Degree
_____.	Kidnapping	_____.	Kidnapping, First Degree
		_____.	Coercion
_____.	Arson	_____.	Arson, First Degree
_____.	Robbery	_____.	Robbery, First Degree
		_____.	Robbery, Second Degree
_____.	Escape	_____.	Escape, First Degree
		_____.	Escape, Second Degree
_____.	Narcotics & Dangerous Drugs	_____.	Criminal Dealing in Drugs
_____.	Gambling	_____.	Promoting Gambling, First Degree
		_____.	Promoting Gambling, Second Degree
		_____.	Possession of Gambling Records
		_____.	Possession of Gambling Devices
_____.	Bribery	_____.	Bribe Giving
		_____.	Bribe Receiving
_____.	Riot & Disorderly Conduct	_____.	Treason
_____.	Business & Commercial Frauds ...	_____.	Commercial Bribe Receiving
		_____.	Commercial Bribe Giving
		_____.	Sports Bribe Giving
		_____.	Sports Bribe Receiving
		_____.	Tampering With Sports Contest
_____.	Obstructing Governmental Administration	_____.	Witness Bribe Giving
		_____.	Witness Bribe Receiving
_____.	Theft	_____.	Theft by Extortion