Tape #82

Side 1 only

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

Twentieth Meeting, September 22, 1969

Members Present: Chairman John Burns
Mr. Robert Chandler
Mr. Bruce Spaulding

Members Absent: Rep. Douglas Graham

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

Chairman Burns called the meeting to order at 1:30 p.m. in Room 315 of the Capitol Building, Salem, Oregon.

He suggested two changes in the minutes of the last subcommittee meeting dated September 9, 1969: On page 2, paragraph 6, delete "this" and insert "the use of unlawful deadly force". On page 12, paragraph 3, delete "not voting" and insert "voting no". He moved to make those changes and the motion was carried unanimously. Mr. Chandler then moved to approve the minutes as amended and that motion also carried unanimously.

Justification; P.D. No. 1; August 1969

Section 17. Duress. Mr. Paillette called attention to the redraft of subsection (1) of this section. He reminded the subcommittee that the problem had been with the kind of standard that should be imposed. The original standard was one of "reasonable firmness", he recalled. In this redraft, he had employed the same standard -- the use of force to overcome earnest resistance -- found in the proposed Rape statute.

Chairman Burns asked about the origin of the term "earnest resistance."

Mr. Paillette replied that the term had been frequently used in case law relating to rape in determining whether the victim was coerced. He added that the term in the Sex Offenses draft is "forcible compulsion" which is defined as "physical force that overcomes earnest resistance."

Mr. Spaulding wondered how that would apply to a person who engaged in conduct because of threatened force to a third person. He asked which one would be required to show "earnest resistance."

Mr. Paillette replied that the defendant would need to show it. He had in mind the parent who is coerced into the commission of an offense because of a threat that his child would be harmed if he refused.

Chairman Burns wondered if putting duress in the form of a statute would invite abuse of the defense.

Mr. Chandler did not think this would happen. He felt that subsection (2) would limit its effectiveness.

Mr. Paillette explained that subsection (2) was directed toward the co-conspirator who might attempt to use this defense after he had willingly participated in a crime.

Chairman Burns wondered how the judge would instruct the jury in that case.

Mr. Spaulding thought the judge would have to give the jury an opportunity to find the facts, i.e., whether the man did intentionally or recklessly put himself in the situation where he would be subjected to duress.

Mr. Chandler added that the jury would have to determine the nature and degree of the force as well as whether the man had left himself vulnerable.

Chairman Burns asked about Oregon common law defenses of duress.

Mr. Paillette replied that he could find only three Oregon cases, those noted in the commentary, pp. 42-43.

Mr. Spaulding had no objection to the substance of the section, he said, although he thought it was rather awkward.

Mr. Chandler observed that no matter how the section is written, it will eventually be left to the jury to determine whether there was sufficient force to cause someone to be coerced.

Mr. Spaulding preferred the original version except that there was some danger in the "reasonable firmness" doctrine, he thought.

Mr. Paillette supported the original version because it was consistent with MPC, New York, Michigan and Connecticut. Therefore, he pointed out, the Oregon court would have some help in construing this concept. However, he did not think the court would have any undue difficulty with the "earnest resistance" test, he added.

Mr. Spaulding said that "threatened force sufficient to overcome earnest resistance" seemed to mean that it must actually overcome that resistance rather than just the fear that it would.

Mr. Chandler asked if he meant that there must be actual physical resistance to the force.

Mr. Spaulding said he did not think that there should be, only that the section implied as much.

Chairman Burns mentioned the situation where the threatened use of physical force upon a child would overcome earnest resistance on the part of a parent. Suppose the parent was threatened that unless he robbed a bank of $10,000 and made that money available by a certain time, his child would be killed. In the prosecution, the defendant contended that he could not overcome the thought of what might happen to his child so he acted under duress in robbing the bank. Assuming that the extortionist was not caught and the defendant went to trial without corroboration to this testimony, would this testimony be sufficient to bring the case before the jury, he wondered.

Mr. Spaulding thought it would be under present law.

Chairman Burns asked if there was not danger in extending this defense wtih respect to a third person. He recalled that ths subcommittee had decided earlier that for the crime of obtaining money under false pretenses, it would not require a false token for corroborative purposes. Since this defense is extended to situations involving a third person, he questioned whether the judge should send it to the jury which would be suggesting the defense to the jury without the corroborative evidence.

Mr. Chandler's opinion was that it really did not make much difference because a person coming to trial with a wild story and no corroboration, would have trouble persuading a jury to believe him.

Mr. Spaulding added that if that person did have a good enough story for the jury to believe, there would be a good chance it would have actually happened and it would be no fault of his that the real criminal was not apprehended and that he could not provide corroboration to his testimony.

Chairman Burns asked the subcommittee if they favored the original section over the revised one.

Mr. Chandler indicated it made no difference to him. However, he added, if there was some concern by Chairman Burns, it might help to make this defense one that had to be pleaded at the start of the trial so that the state would have some advance warning.

Chairman Burns thought there should be a notice required. He moved to insert as subsection (2), language to the effect that if anyone wishes to rely on the defense of duress under subsection (1) of this section, he shall give notice of intent to do so at the time of arraignment unless, for good cause, at a later time. Subsection (2) would then be (3) and subsection (3) would be (4). He thought it would be preferable to insert the notice provision rather than requiring that it be pleaded affirmatively.

Mr. Paillette asked if there was any wish on the part of the subcommittee to put the burden of proof on the defendant and it was agreed that there was none. He agreed that a notice requirement would not harm the section.

Chairman Burns was of the opinion that the amended draft was better than the original but he also thought there was a certain responsibility to help the court and if "reasonable firmness" is on the books of other states, and there is a legislative history behind it, it would be well to go in that direction.

Mr. Spaulding thought the original section was clearer, he said.

Chairman Burns asked Mr. Paillette if he were proposing to extend this section to all types of homicide.

Mr. Paillette replied that he was not excluding all types of homicides, just murder. He pointed out that what is first and second degree murder would be simply murder in the proposed code. The draft on homicide speaks in terms of criminal homicide, which includes murder. Criminal homicide is murder, manslaughter or criminally negligent homicide under the draft.

Chairman Burns observed that criminally negligent homicide might not be graded as severely as first degree kidnapping and that it might be inconsistent to exclude the defense of duress for criminally negligent homicide while allowing it in other crimes.

Mr. Spaulding and Mr. Chandler agreed that the exclusion would not apply to criminally negligent homicide.

Mr. Paillette commented that it was his intention only to exclude murder. Criminal homicide is murder if it is committed intentionally or knowingly or if it is committed recklessly under circumstances manifesting extreme indifference to the value of human life, he explained.

Mr. Spaulding asked if it was Mr. Paillette's intention that by excluding murder, he would exclude murder in the first and second degrees.

Mr. Paillette agreed but pointed out that in the new draft there would be no first and second degrees of murder but simply the crime of murder.

Chairman Burns asked if duress would be available as a defense to manslaughter as that term is presently understood.

Mr. Paillette replied that it could be although it would be highly unlikely since duress would usually be raised in the situation where a person intentionally committed an act he was forced to do.

Mr. Chandler asked for a definition of manslaughter.

Chairman Burns pointed out that manslaughter was the unlawful, unpremeditated, unmalicious killing of another. He suggested that Mr. Paillette make a note to review duress after the Commission considers homicide. He said that if this subcommittee generally approved this section with murder being excluded, he would move the addition of a subsection inserting a notice requirement on behalf of the defendant, leaving Mr. Paillette to work out the exact language so that the subcommittee could give a final approval at the next meeting.

There followed discussion on the amount of time which should be required in the notice. Chairman Burns read from HB 1665 which was passed during the last session of the legislature:

> "If the defendant in a criminal action proposes to rely in any way on alibi evidence, he shall, not less than five days before the trial of the cause, file and serve upon the district attorney a written notice of his purpose to offer such evidence, which notice shall state specifically the place or places where the defendant claims to have been at the time or times of the alleged offense together with the name and residence or business address of each witness upon whom the defendant intends to rely for alibi evidence. If the defendant fails to file and serve such notice, he shall not be permitted to introduce alibi evidence at the trial of the cause unless the court for good cause orders otherwise."

Chairman Burns directed Mr. Paillette to insert language to the effect that the defendant is required to give notice at the time of arraignment, or later for good cause shown with the suggestion that it would be better to insert it as subsection (2) and the other sections be renumbered accordingly. The subcommittee voted unanimously to pass Mr. Burns' motion. He then moved to approve section 17 as amended and that motion carried with Mr. Chandler and Mr. Spaulding voting "aye" and Chairman Burns voting "no."

Section 18. Entrapment. Mr. Paillette explained that this section does not change present law. Although there is no statute on this, the draft restates the doctrines of entrapment which have been recognized in Oregon case law.

Mr. Chandler moved and Chairman Burns seconded the motion to approve section 18.

Mr. Spaulding favored inserting the word "intentionally" before "induced" in the third line of subsection (1) since, he pointed out, a police officer might have done something unthinkingly but would not have intended to induce him.

Mr. Paillette responded that he thought the last phrase, "for the purpose of obtaining evidence" would take care of that problem.

It was agreed that the phrase implied that the action would be "intentional."

Mr. Spaulding voiced his satisfaction with the section and Mr. Chandler's motion carried unanimously.

Offenses Against Privacy of Communications; P.D. No. 1; September 1969
Mr. Wallingford advised that this section is directed toward the various forms of invasion of privacy, primarily eavesdropping. There are three types of invasion of privacy covered in this draft, he explained: Wire tapping, bugging and what is called conventional eavesdropping, a subject on which there is no present Oregon law. The conventional form of eavesdropping is eavesdropping without the use of any mechanical device.

Section 1. Offenses against privacy of communications; definitions. Mr. Spaulding wondered why Mr. Wallingford had used the word "commonly" in subsection (2).

Mr. Wallingford answered that "commonly", as used in this sentence, refers to devices that are not particularly designed for nor adapted to eavesdropping but are actually used for that purpose.

Chairman Burns favored deleting the word "commonly." It seemed to him that the problem was to reach the act of attempting to eavesdrop, record or bug. He assumed that if someone used a bug, even though it might not be effective in picking up the conversation, he still had committed a crime.

Mr. Wallingford agreed. He pointed out that another section makes it a crime to install an eavesdropping device whether it works or not.

Chairman Burns moved to delete the word "commonly" in subsection (2) and the motion carried unanimously.

Mr. Spaulding moved to adopt section 1 as amended and that motion also carried without opposition.

Section 2. Eavesdropping. Chairman Burns asked Mr. Wallingford to give some explanation of Berger v. State of New York before going into section 2. He noted that the commentary indicated subsection (6) of ORS 141.720 was probably unconstitutional in view of the Berger case. He wanted to know why that would apply only to subsection (6) of that statute.

Mr. Wallingford replied that he was not certain that it would apply only to subsection (6) but that according to Berger, subsection (6) was clearly unconstitutional because it was patterned after a New York statute which was held unconstitutional. The reason for its unconstitutionality was that after obtaining an ex parte order for wiretap, the period of time in which it could be validly used (60 days) was too long.

Chairman Burns understood that Berger had not said that obtaining ex parte orders was unconstitutional; it simply stated that it was an unreasonable length of time. He asked if they had specified a reasonable length of time.

Mr. Wallingford was under the impression that New York was redrafting its statute, specifying 10 days. He did not think the Supreme Court had laid down any guidelines on what a reasonable time would be, however.

In reply to a question on whether since one part of the statute was unconstitutional, it would be necessary to invalidate the whole statute, Mr. Paillette observed that under the usual rules of statutory construction, if the rest of the statute could stand alone, there would be no reason to declare the entire statute unconstitutional.

Chairman Burns asked to have that point double checked and to have it brought up for discussion in the next subcommittee meeting. He was concerned, he said, because Mr. Wallingford had cited ORS 141.720 and he assumed that his intention was to leave it in the law.

Mr. Wallingford replied that when this section was drafted, it was with the understanding that ORS 141.720 would be kept in substance but amended to conform with Berger.

Mr. Chandler questioned the wisdom of referring to a statute which may no longer be in effect due to a procedural revision.

Mr. Paillette explained that although the Legislature has already been informed that the Commission will not finish a procedural revision by 1971, they may not chose to continue with the procedural revision. In order to be on the safe side, he said, the substantive revision must be drafted to be compatible with the existing procedural statutes.

Chairman Burns thought that perhaps the statute number should be left blank in this draft.

Mr. Wallingford reminded that even if this substantive revision is not adopted, in light of the Berger case, ORS 141.720 should be amended by the next legislature because the Supreme Court has held that a statute almost identical to it is unconstitutional.

Mr. Chandler asked whether the statute was unconstitutional purely on the grounds of the time element.

Mr. Wallingford reported that the New York statute was cited on five grounds. While the Oregon statute was patterned after New York, it had more safeguards than did the New York statute. The only objection that would apply to the Oregon statute was on the two month period for surveillance, he added.

Mr. Paillette observed that the trouble with the Berger case was that it did not say what period of time would be considered constitutional.

Chairman Burns requested the minutes show ORS 141.720 will have to be amended.

Mr. Spaulding made a motion to leave a blank space and delete the reference to ORS 141.720 with an asterisk to show that this refers to whatever number is given the statute that replaces it. The motion carried unanimously.

Mr. Wallingford began his explanation of section 2 by saying that it contained most of present Oregon law on the subject of eavesdropping. He explained that bugging required the consent of all parties while wiretapping required the consent of only one of the parties.

Mr. Spaulding said he had never understood why the same requirements did not apply in both instances.

Mr. Wallingford informed that the rationale for the difference was that some incoming calls are crimes in themselves or pose a threat, e.g., the kidnapper's call or the obscene call.

Mr. Chandler said this did not explain the case where the call might be an outgoing one made for the purpose of trapping someone. He wondered why it would not be all right to bug his own hotel room in order to record a conversation if he consented to it.

Mr. Wallingford replied that while drafting this statute, his first impression was that it would have been all right to do that with the consent of only one of the parties. But, he pointed out, that would be a minority point of view in the United States.

Mr. Chandler maintained that if the consent of one of the parties was sufficient in subsection (1) it should also be sufficient in subsection (2).

Mr. Paillette thought there was perhaps a good reason for someone who was in another's home or apartment to expect more privacy than in the case of a telephone call, particularly a threatening or obscene one. He reported that Mr. Wallingford's original draft had not made any distinction between the two subsections in that respect, but he had requested that it be redrafted.

Mr. Chandler argued that if it were legal to bug a telephone conversation with the agreement of only one party, then it should be legal to bug a room by the same standard. Likewise, if it is not legal to bug a room without the consent of all parties, then it should not be legal to bug a telephone without the consent of both parties. In his opinion, it was basically the same question, he said. He disliked the idea of imposing an artificial difference on the passing of information based upon the use for which the information was intended, i.e., the difference on whether there is a hidden microphone on the wall or a tap on the telephone, and he did not think that was right.

Chairman Burns referred to an insurance situation where the adjuster attempts to get a statement from a claimant, for instance. In this situation, it is not required that everyone give his consent. Since the adjuster is the one who wants the statement, he can give his consent to the eavesdropping simply by flicking on a switch. The other person may not know a thing about it and is at a disadvantage.

Mr. Chandler remarked that all this does is record the statement. It does not change what the person is going to say.

Chairman Burns commented that it could be used for impeachment purposes.

Mr. Chandler asked whether it was more useable for impeachment purposes than a statement by the adjuster that he had kept a careful set of stenographic notes to everything that was said.

Chairman Burns thought there was a difference between these situations and that the difference should be indicated in the statute.

Mr. Chandler continued that if most states were going to allow the situation where the police could persuade a complaining witness to call up a suspect and lead him into a conversation where he admits that he engaged in criminal conduct, then the same thing should apply to the situation where a person is in someone's home or apartment and is overheard by a policeman standing in the next room.

Chairman Burns reminded that the reference was to bugging, not overhearing.

Mr. Chandler pointed out that the language was "overhears or records."

Mr. Wallingford called attention to the fact that the language was "overhears or records by means of an eavesdropping device." However, this situation is covered in section 6, he reported.

Chairman Burns was not inclined to go along with making it a crime for a person standing in the next room to overhear the conversation of others.

Mr. Chandler considered that the only difference was whether there was any mechanical aid to this overhearing.

Mr. Spaulding agreed but pointed out that the mechanical aid adds something in the form of a tap; otherwise people would realize they could be overheard and would take precautions accordingly. He thought the purpose of the law was to avoid the surprise or entrapment of people who would not realize they could be heard.

Mr. Chandler disagreed. He thought the legislative history on eavesdropping and wiretapping would show that it was originally a federal crime rather than a state crime and was solely for the purpose of keeping the operator on the old-fashioned phone system from listening in on private conversations.

Mr. Spaulding agreed but felt the basic reason was to protect privacy. The mechanical devices referred to in this draft invade privacy, he noted.

Mr. Chandler compared these devices to a cumputerized central credit file and observed that one did not invade the privacy more than the other.

Chairman Burns commented that although we generally think of eavesdropping primarily in the case of a private detective attempting to obtain information in a divorce or criminal case, according to the Wall Street Journal, it is probably used most extensively in the business field where one large corporation attempts to obtain secrets from another.

Mr. Wallingford pointed out that businesses used the same private detectives; it was just a question of investigating different activity. He reported that requests from businesses far outnumbered those by private individuals.

Chairman Burns concluded that it would be a radical change if the subcommittee took Mr. Chandler's suggestion that a conversation could be recorded by means of an eavesdropping device at the consent of only one of the parties.

Mr. Chandler said he favored language in subsection (2) which would require the consent of all persons but he urged the subcommittee to be consistent because he could see no substantial difference between the two situations covered.

Mr. Paillette pointed out a practical reason for drawing a distinction between subsections (1) and (2). From the standpoint of police officers gathering evidence -- and he reminded the subcommittee that this section related to situations where there was no order granted under ORS 141.720 -- there would be times, he said, when it would be necessary for police to act

much faster with respect to a telephone conversation than with respect to a planned meeting in someone's home. In the case of a planned meeting, there would be advance notice of the meeting and it could be argued that the police would have had time to get an order making it legal.

Mr. Paillette cited two cases he thought might be of interest to the subcommittee. The first case was U.S. v. Missler from the Fourth Circuit Court of Appeals and involved a hijacking defendant who, to arrange for the death of a key prosecution witness, went to his prospective trigger man's home to discuss the "contract." Unknown to him, his contact had notified the FBI who overheard the conversation while hiding in the house at the prospective trigger man's invitation. In this case the court said:

> "No case involving overheard conversations provides a really satisfactory guideline.
>
> "Here the crux of the controversy is the legitimacy of the presence of such third parties and their testimony as to what they overheard from the unsuspecting appellant's lips.
>
> "Other courts, with equal force and eloquence, have expressed the opinion the Katz's requirement of a warrant does not apply if either party is cooperating with the law enforcement officials.
>
> "We think, however, that to decide the instant case we need not lay down a broad general rule regarding the effect of a single party's consent without regard to other circumstances. A narrower ground of decision is available. As the parties seem to agree, and we think correctly, Katz teaches that Fourth Amendment protection extends only to situations in which the complaining person had a reasonable and legitimate expectation of privacy."
>
> 5 Crim. L. Rep. 2405

The second case Mr. Paillette cited was a New Jersey case, State v. Kusnitz, where a detective just listened with his ear while standing in the hallway of an apartment house. In this case, the judge said:

"No case has been cited and I know of none in which merely listening by a law enforcement officer without the aid of a device extending his hearing into private quarters has been held to violate Constitutional rights. I am satisfied that, in general, eavesdropping by law enforcement officers without the use of any electrical, mechanical or other device, and without wiretapping, is not a search or seizure requiring the issuance of a warrant, at least in this case in which the officer was in a public hallway where anyone who listened could hear the communication."

5 Crim. L. Rep. 2048

Mr. Chandler referred to the first case. Suppose, he said, although the FBI did not have any mechanical device, they had cut a hole through the ceiling and inserted a grill to cover it.

Mr. Wallingford expressed the opinion that it would have made no difference. He explained that the opinion was in terms of "reasonable expectation" of a private place, i.e., when it would be reasonable for a person to think his conversation would be protected. That is not a reasonable expectation in a friend's house while it is in your own house. It was indicated that had the conversation been in the other man's home, it would have been an invasion of privacy but since he was in the home of someone else, he had no reason to expect as much privacy as he would in his own home. Eavesdropping over the telephone involves the same type of thing, he added. You take your risks knowing that your conversation may be overheard.

Chairman Burns asked if analogy was drawn between the home and the office.

Mr. Wallingford replied that most people would certainly expect as much privacy in their office as they would in their home.

Mr. Spaulding added that in a conversation in the street, a person would also expect privacy.

Chairman Burns was satisfied that there was a distinction between subsections (1) and (2). He moved to approve subsection (1). The motion carried with Mr. Spaulding and Chairman Burns voting "aye" and Mr. Chandler voting "no." Chairman Burns then moved to approve subsection (2) and that motion passed unanimously.

Chairman Burns asked if subsection (3) should not include "knowing or having reason to know" with respect to a device being used for criminal eavesdropping. He could see where "knowing" would put a heavy burden on the state, he said.

Mr. Spaulding and Mr. Chandler agreed that this language should be included.

Chairman Burns moved that subsection (3) be amended by adding "or having good reason to believe" after the word "knowing." The motion passed unanimously. The subcommittee then voted on a motion to approve section 2 as amended and that motion passed with Mr. Spaulding and Chairman Burns voting "aye" and Mr. Chandler voting "no."

Mr. Spaulding asked if under present law, there was an exception to putting a device in one's own home.

Mr. Wallingford replied that there was and that it had been left out of this section intentionally. Under present law, a suscriber to the phone or one of the residents of a home can bug his own phone or home and it is not a crime. In referring to the invasion of privacy, he could not see the logic for that exception, he said.

Mr. Spaulding agreed that this action should be criminal.

Section 3. Possession of an eavesdropping device. Mr. Wallingford explained that this section was analogous to the statute prohibiting the possession of burglar's tools. It was his impression that this statute would require the state to prove an intent that the device was to be unlawfully used.

Chairman Burns asked Mr. Paillette if he were satisfied that this section was drawn in accordance with constitutional standards.

Mr. Paillette replied that he was.

Mr. Chandler asked if Mr. Paillette would object to inserting the concept of "with intent, knowledge or expectation."

Mr. Paillette had no objection because, he reasoned, this would require culpability. He pointed out that the objection to the Portland municipal ordinance on possession of burglar's tools was that there was no intent or knowledge required. The mere possession of certain types of burglar's tools was made illegal, which in effect, made possession of a screwdriver or a crowbar illegal.

Mr. Spaulding asked about that part of section 3 which stated, "with the intent that it be unlawfully used by himself or another for eavesdropping." He wondered if that meant that it must be used for eavesdropping without the consent of at least one of the persons involved. His thought was that it could be the same kind of device whether both participants knew about it or not.

Mr. Wallingford explained that there had been an attempt to cover that situation by saying, "unlawfully used." What that actually means, he added, is that it would be used in violation of section 2.

Mr. Paillette compared this section to the one on possession of burglar's tools. He noted that the culpability element is stated a little differently with respect to the element of knowledge:

> "A person commits the crime of possession of burglar's tools if he possesses any burglar tool with intent to use the tool or knowing that some person intends to use the tool to commit or facilitate a forcible entry into the premises or theft by physical taking."

Mr. Paillette recalled the discussion of the Forgery draft in the Commission meeting. There were three sections in that draft relating to possession type crimes. The argument was raised by Professor Platt that assuming that the Commission adopted his recommendations on Inchoate Crimes, possession of such device or possession plus the knowledge would be covered under that draft.

Mr. Wallingford remarked that the statute under discussion was aimed at the people who deal in the sale of eavesdropping devices to others.

Mr. Paillette felt that for a successful prosecution under this section, there would have to be more than just possession of these devices shown.

Mr. Wallingford compared the New York statute which said, "under circumstances evincing an intent to use or to permit the same to be used in violation of....", to the Michigan statute which used the language, "intends to use...or knows that another intends to use....".

Mr. Paillette said he thought a separate statute was needed for possession of burglar's tools and possession of eavesdropping devices in place of a single statute covering all possessory crimes. He asked if Mr. Chandler advocated the Michigan language, "intends to use that device to eavesdrop; or knows that another intends to use that device to eavesdrop."

Mr. Chandler agreed that this was better in his opinion because it required knowledge or knowledge of intent. However, he would favor "reasonable expectation" of another's intent or "knows or has reason to know" rather than "knowledge." He moved to approve section 3 as amended by inserting that concept after "or" in the last line with the language to conform to that used in subsection (3) of section 2.

Mr. Spaulding thought a person would be just as guilty if he intended another to use the device as if he had reasonable grounds to believe another was going to use it.

Mr. Chandler pointed out that having reasonable grounds to believe another is going to use a device is not the same as intending that he use it.

Mr. Wallingford again referred to Michigan's language, "if he intends to use it or knows that another intends to use it" and thought that would cover the problem.

Mr. Paillette agreed with Chairman Burns that in both cases, the defendant had to possess the device.

Mr. Spaulding thought the statute went far enough in making it unlawful for a person to intend that someone else would use the device. He thought there should be some proof of intent required but not knowledge.

Mr. Paillette remarked that the person who should be attacked is the one who manufactures and peddles these devices, knowing full well that someone is going to use them for illegal eavesdropping. It seemed to him that this was the area in which the section had the greatest value.

Mr. Spaulding was concerned about this approach because, he pointed out, even though some of these devices are manufactured for legitimate purposes, there is a good chance that someone is going to use them illegally.

Mr. Paillette reminded him that the element of knowledge would still have to be proved.

Mr. Spaulding continued by quoting from the statute, "or had reasonable grounds to believe." Certainly, he said, if a person was going to manufacture them by the thousands, he would know that someone would eventually use one unlawfully even though he would not have intended that. He urged that there should be a requirement to prove intent.

It was pointed out that in the case of possession of burglar's tools, it was required that either intent to commit the crime or knowledge that someone else was going to commit it must be shown.

Mr. Wallingford could see the problem, he said, because when the section is qualified by saying, "knowing or having reason to know", it could be proved that any mass manufacturer would have reason to know that some of the devices would be used unlawfully.

Mr. Chandler withdrew his motion for an amendment but left standing his motion to approve section 3. That motion carried unanimously.

Section 4. Forfeiture of eavesdropping devices. Chairman Burns asked Mr. Wallingford why he had specified the State Police in this section since there is presently a provision for dispositoin of forfeited property through the sheriff's office.

Mr. Wallingford replied that he had thought the State Police would have machinery to dispose of this sort of thing through legitimate channels.

Mr. Spaulding moved that section 4 be amended by inserting a period after the word "state" in the last line and deleting "for disposition by the Department of State Police." The motion passed unanimously. The subcommittee then voted to approve section 4 as amended.

Section 5. Divulging an eavesdropping order. Mr. Chandler moved to approve section 5 as amended by inserting a blank in place of ORS 141.720 with an asterisk to indicate that this refers to whatever number is given the statute that replaces it. The motion carried unanimously.

Section 6. Violating a private conversation. Mr. Wallingford pointed out that this section would be new to Oregon law.

Chairman Burns asked about the public policy of broadening the criminal law to this extent.

Mr. Spaulding thought this section would make gossiping illegal and while he did not approve of gossiping, he did not think it was wise to legislate on it.

Mr. Wallingford noted that in State v. Cartwright, cited in the commentary at p. 24, the Oregon Supreme Court, with Justice Sloan dissenting, held that information obtained by listening with the ear to a conversation in an adjacent bedroom which resulted in the information needed to obtain a search warrant was admissible.

Chairman Burns asked if the trend was away from the unreasonable search aspect.

Mr. Wallingford answered that the most recent Supreme Court decisions have seemed to emphasize that the Fourth Amendment is designed to protect people and not places, so that perhaps would indicate a trend in this direction. He noted that Cartwright was decided before the Katz case, which overruled the physical trespass theory.

Mr. Spaulding moved to delete section 6 and Chairman Burns seconded the motion.

Mr. Chandler understood this to mean that it would not be a crime to violate a conversation.

Mr. Paillette pointed out that if this section were deleted, there would be no way to prevent the introduction of evidence obtained in this way.

The subcommittee voted on Mr. Spaulding's motion to delete section 6. The motion carried unanimously.

Section 7. Divulging illegally obtained information. Mr. Wallingford informed the subcommittee that this was a restatement of existing law. He noted that the "6" in the last line should be deleted since that section had also been deleted.

Mr. Spaulding moved to adopt section 7 as amended by the deletion of "6" in the last line and the motion carried unanimously.

Section 8. Defenses. Chairman Burns asked if ORS 165.540 would be repealed by adoption of this section.

Mr. Wallingford replied that it would be.

It was agreed that subsection (1) should conform to previous sections by deleting the reference to ORS 141.720 and leaving a blank.

Mr. Spaulding thought that under subsection (2) a person should be guilty of divulging any information obtained in this manner. He should not have the legal right to peddle this information even though he obtained it lawfully in the ordinary course of his employment.

Mr. Wallingford agreed with Mr. Spaulding that he should not have that right. He reported that the language was from Michigan but that it also restates present Oregon law.

Mr. Chandler referred to Illinois section 14-3 (b). The last part of that subsection says, "...so long as no information obtained thereby is used or divulged by the hearer", and that would take care of the problem, he thought.

Chairman Burns had a question with regard to "peace officer" in subsection (1) as he had earlier in section 13 of the Justification draft. He wanted the minutes to show that "peace officer" means a duly commissioned peace officer (See Minutes, September 9, 1969, p. 16).

Mr. Paillette advised that it would be adviseable to put the definition of "peace officer" in the General Definitions.

Mr. Chandler moved to adopt section 8 as amended. The motion carried unanimously.

The meeting adjourned at 4:30 p.m.

Respectfully submitted,

Connie Wood, Secretary
Criminal Law Revision Commission