Tape #86

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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

Twenty-second Meeting, October 30, 1969

Minutes

Members Present: Chairman John Burns
Mr. Robert Chandler
Representative Tom Young

Members Absent: Mr. Bruce Spaulding

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

Agenda: Obstructing Governmental Administration; P.D. No. 1.
(Sections 9 through 15) (Article 24)

The meeting was called to order by Chairman John Burns at 1:45 p.m. in Room 315 of the Capitol Building, Salem, Oregon.

Rep. Young moved to approve the minutes of the meeting of October 9 as written. The minutes were approved unanimously.

OBSTRUCTING GOVERNMENTAL ADMINISTRATION.

Chairman Burns announced that Mr. Chandler had a special order of business with respect to the proceedings of the October 9 meeting. Mr. Chandler explained that he would like to bring up section 7 for discussion before the Commission. Chairman Burns advised that he had permission to do that.

Section 9. Tampering with public records. Mr. Wallingford read section 9 and called attention to the fact that "public record" was defined in subsection (6) of section 1 as:

> "'Public record' means all official books, documents, records or other written evidence affording notice or information to the public, or constituting a memorial of an act or transaction of a public office or public servant."

Chairman Burns asked about the reason for saying "knowing" rather than "having good reason to know". He observed that the element of proof seemed to be rather extreme. Mr. Wallingford replied that this section would require two elements of knowledge--knowledge by the person that he does not have authority, as well as knowledge of what he is doing. His reason for using that language, he said, was because of the volume of public records at present, many of which, through administrative process, are destroyed.

Mr. Chandler was concerned that the term "knowing" required too high a degree of proof for prosecution. While it was rather easy to prove that a person should have knowledge, it was difficult to prove actual knowledge, he reminded. Chairman Burns noted that it was a degree of proof not required in any other similar statute.

Another concern Mr. Chandler had with section 9 was whether the word "conceals" includes failure to make any entry on a public record. Mr. Wallingford asked if Mr. Chandler was talking in terms of an intentional failure rather than a negligent failure. Mr. Chandler agreed that he was. Rep. Young did not think that would be tampering; however, Mr. Chandler was not so sure. He cited a recent case in which the son of a prominent person was arrested for drunken driving and the state police officers failed to note this on their arrest records. Consequently, the public did not know about it for three or four days. In this case, he said, there was a deliberate failure to make an entry on what is normally considered a public record. He reported a similar case in Benton County recently where allegedly three days went by before the Benton County Sheriff made the necessary entry showing that he had arrested the OSU football coach. Again, he noted, this appeared to be a wilful failure to make a notation on what was considered a public record. In both cases, he reported, arrests made before and after these incidents had been entered.

Chairman Burns asked whether the subcommittee felt that should be a crime. Rep. Young did not think that was criminal conduct.

Mr. Wallingford reported that in the Article on Abuse of Office, section 2 concerns official misconduct in the second degree. However, that requires violation of an administrative rule or regulation, or of any statute. Mr. Chandler pointed out that there were not presently administrative rules, regulations or statutes specifically governing the records indicated in section 9. If there were laws on open meetings and public records, he would have no complaint with section 9, he said.

(Commission member, Mr. Frank Knight came into the meeting at this point.)

Chairman Burns' opinion was that in the cases mentioned by Mr. Chandler, an officer's superiors could discipline him if they felt he had violated an administrative rule. Mr. Chandler replied that in these cases it was the superiors who had made the order in the first place. His contention was that someone should be prosecuted for this offense. It seemed to him that failure to record something that should be made a public record is just as bad as

removing something from a public record which is now there. Whether someone orders that the entry not be made or conceals it in some way does not matter, he maintained. The deliberate failure to make a public record is no less a crime than many other offenses which this subcommittee has considered crimes, he said.

Mr. Wallingford thought that considering the definition of public record, this problem still might be covered in section 9 by the word "conceals". Chairman Burns and Rep. Young did not agree. Rep. Young said that it would be difficult to prosecute on that presumption. However, if a person failed to carry out his duty, he could be prosecuted under the Abuse of Office statute.

Mr. Chandler thought it was important that a public record be made when a person is taken into custody and that it be made available to anyone who wants to see it. Without this safeguard, he explained, a person could be arrested and possibly no one would know about it for several days.

Rep. Young pointed out that the present statute on destruction of public records does not require actual knowledge by a person that he lacked authority to destroy the record. In addition to that difference in section 9 and the present law, he said, he had trouble reading into the definition of "public record" the fact that it applies to records of governmental offices as is indicated in the commentary on page 42. He read again the definition of "public record" in section 1 of this draft and wondered if an editorial in a newspaper might not fall within that definition. Therefore, he suggested it should be indicated somewhere that these public records are kept in governmental offices. Mr. Wallingford replied that that was the intention by use of the word "official", which was meant to modify books, documents, etc., However, he was not sure that "official" meant exactly the same thing as "governmental", he said.

Chairman Burns asked the origin of the definition of "public record" as used in this draft. Mr. Paillette replied that it was a Michigan definition.

Rep. Young said he was still concerned with the "knowledge" question and preferred the language "knowing, or should have known". He maintained the state would never be able to prove actual knowledge.

Mr. Chandler moved to amend section 9 by inserting after "knowing" in the second line, "or having good reason to know". The motion carried unanimously.

Mr. Chandler moved to further amend section 9 by inserting after the word "mutilates," in the third line, "fails to make a required entry,".

Chairman Burns noted that this brought up the question of what constitutes a "required entry". Rep. Young said the only "required entry" would be one required by statute.

Mr. Wallingford suggested that the problem might be solved by changing the definition of "public record" in subsection (6) of section 1 by inserting after "evidence" in the second line, "created by any governmental office or agency". Rep. Young agreed that such an amendment might solve the problem. He so moved the amendment and the motion carried unanimously.

Mr. Paillette returned after having been gone for a few minutes. He wanted to know the reason for the subcommittee's action in adding "or having good reason to know" after "knowing". It was explained to him that the subcommittee felt that "knowing" was too restrictive and that proving actual knowledge would be very difficult. Mr. Paillette voiced disagreement with that line of reasoning. It was his opinion that inserting "or having reason to know" creates more problems than it solves. Use of this language, he said, brings up a question which has been discussed many times in the past in attempting to construe criminal statutes. What kind of a test does one employ, subjective or objective? Secondly, he doubted if that language was any better because inevitably, the evidence on the question of actual knowledge will be circumstantial. Therefore, he said, if there is enough evidence to show reason to know, there would be enough evidence to bring the question before the jury.

Mr. Chandler remarked that under this section, as originally drafted, the judge would have to instruct a jury that the statute requires that the defendant "knew". Even though a defendant maintained that he did not know, there could be evidence that he might have known. Under the amended version, the judge would instruct that either he knew or should have known. In cases where there is evidence that the defendant had prior experience and training to indicate he should have known, the jury would have to take that into consideration.

Chairman Burns wondered if the problem would be solved by deleting the phrase "knowing that he lacks lawful authority" since that phrase is not contained in the present statute. Mr. Chandler understood that suggestion to imply that a courthouse janitor could be prosecuted under this statute as easily as the county clerk. Chairman Burns said that inclusion of the word "wilfully" would eliminate that possibility. He added that "wilfully" would have to be accompanied by a criminal intent.

Mr. Paillette reminded the subcommittee that "knowingly" was one of the words of criminal intent in the Culpability Draft

approved by the Commission. He read the definition from subsection (8) of section 1 of that draft:

> "'Knowingly' or 'with knowledge', when used with respect to conduct or to a circumstance described by a statute defining a crime, means that a person acts with an awareness that his conduct is of a nature so described or that a circumstance so described exists."

In reply to a question by Chairman Burns, Mr. Paillette said that "wilfully" has not been used in the proposed code. He explained that the reason was that it had been decided to have only four different types of criminal culpability--intentional conduct, knowing conduct, reckless conduct or criminally negligent conduct. He also recalled that the purpose of this approach was to eliminate the confusion of present statutes where several different words are used to describe conduct.

Chairman Burns agreed that his earlier suggestion was not a good one. He then requested that Mr. Paillette read the section on official misconduct from the draft on Abuse of Public Office to determine whether Mr. Chandler's amendment to section 9 of this draft was redundant. Mr. Paillette read the following:

> "Section 2. Official misconduct in the second degree. A public servant commits the crime of official misconduct in the second degree if he knowingly violates any statute or lawfully adopted rule or regulation relating to his office."

Mr. Paillette added that official misconduct in the first degree would require an intent to obtain a benefit for himself or to harm another. Chairman Burns concluded that the motion was in order.

Mr. Wallingford pointed out that the Abuse of Office statute applies only to public servants, whereas this section would apply to public servants as well as the general public. Mr. Chandler said his motion would apply only to public servants because you could not require a private citizen to make an entry on a public record. Mr. Wallingford said it seemed to him that a failure to make a required entry would be considered official misconduct in that case.

Rep. Young asked if an income tax return would be considered a public record. Mr. Wallingford replied that under the definition of "public record" it would not. Mr. Chandler stated that an arrest sheet, however, at the police station is a public record. He reiterated his view that failure to enter an arrest on this public record is wrong.

Mr. Knight said he could not see how Mr. Chandler's suggested amendment would take care of that situation since a police officer files his public record by giving it to his chief. Mr. Chandler replied that every police department maintains a list of arrests made in the past 24 hours and that those lists are public records.

Rep. Young asked if Mr. Chandler contemplated that "required" entry meant one required by law. Chairman Burns suggested that "official" entry might be better and Mr. Chandler said he was not opposed to that suggestion.

Mr. Wallingford regarded Mr. Chandler's suggested amendment as going beyond the intent of this statute. Technically, he said, it could not be considered "tampering" with a public record because there is a non-existant public record until the entry is made.

Mr. Chandler contended that what it amounts to is failing to create or maintain a public record when there is a requirement to do so. Chairman Burns emphasized that an arrest docket, with names already on it, was an existing public record.

Mr. Paillette proposed that the "knowledge" element be left entirely out of section 9 so that it would read: "A person commits the crime of tampering with public records if, without lawful authority...." The subcommittee agreed that change improved the meaning of section 9.

Chairman Burns then moved to rescind the action taken previously to amend section 9 and to amend it now by deleting the words "knowing that he lacks lawful authority" and inserting "without lawful authority". The motion carried unanimously.

Chairman Burns continued discussion on the suggested amendment of Mr. Chandler to insert "fails to make a required entry". He asked how anyone could without lawful authority, fail to make a required entry. In other words, he said, who would have lawful authority not to make a required entry. Mr. Chandler replied that probably no one would have the right not to make a required entry. However, the official custodian of those records has a requirement to make an entry.

Chairman Burns' interpretation was that if this is to be an official act performed by a person in an office of some kind, and if there is to be an administrative edict to do a certain thing, then failing to do so would be in violation of section 2 of Abuse of Office. Mr. Paillette agreed that it would be covered in that statute.

Mr. Chandler inquired about the case in Benton County where the sheriff's office failed to make an entry of an arrest. The subcommittee concluded that that case would be prosecuted under the official misconduct section of the Abuse of Office statute. In view of these assurances, Mr. Chandler withdrew his motion to amend section 9. He then moved to approve section 9 as amended. The motion carried unanimously.

Section 10. Resisting arrest. Mr. Wallingford passed out copies of a redrafted section 10. He explained that he had noticed that the original section 10 had been structured incorrectly. While restructuring it, he had decided to rephrase it for clarity although the substance remains the same as the original. He mentioned that section 15 of P.D. No. 2 of the Article on Justification refers to use of physical force by saying:

> "A person may not use physical force to resist an arrest by a peace officer who is known or reasonably appears to be a peace officer, whether the arrest is lawful or unlawful."

This section would make that kind of resistance a crime, he explained. Chairman Burns pointed out what appeared to be an inconsistency in the two sections. Section 15 of the Justification draft uses the language "by a peace officer who is known or reasonably appears to be a peace officer" while section 10 of this draft says "a person known by him to be a peace officer...."

Mr. Paillette remarked that there was a distinction between the two sections. The Justification draft indicates that a person cannot base a self defense plea on the question of identity of a peace officer in the event he is charged with assaulting the officer. However, in this section, he said, the defendant is to be charged with a specific crime, i.e., resisting arrest. Therefore, he thought there was good reason to require that the defendant actually knew the person attempting to arrest him was a peace officer before he could be charged with the substantive crime of resisting arrest.

Chairman Burns submitted a hypothetical situation for consideration by the subcommittee. Suppose, he said, that Rep. Young is representing a defendant who is charged with resisting arrest. In the subsequent trial, the defendant takes the stand and states that he did not know that the person who was attempting to arrest him was a policeman because he was not in uniform and, further, that since he was a new man on the police force, the defendant did not recognize him. Since the Justification defense does not require an affirmative plea, this defendant is going to plead not guilty. What kind of instructions will the jury get under these circumstances,

he wondered. Would it be statutory instruction based on section 15 under Justification which the state would be entitled to give, or would the instruction be based on section 10 of this draft, he asked.

Mr. Knight stressed the difference in not "knowing" a person was a peace officer and not "believing" him to be a peace officer. There could be a situation where a person claimed to be a peace officer but the defendant did not believe him. In view of section 15 (Justification), Chairman Burns said, the state could not carry the burden. The jury would be instructed that unless the defendant knew or unless it reasonably appeared to him that the man was a peace officer, the defendant could not be found guilty.

Mr. Wallingford noted that one of the burdens the state would have would be to prove to the jury that the person who attempted the arrest was a peace officer. That could be proved by other evidence, however, he added.

Rep. Young asked if resisting arrest as now drafted in section 10 would apply to someone other than the person being arrested. Mr. Wallingford answered that it would. He explained that this section is a departure from existing law. The common law rule is that the right to resist an unlawful arrest does extend to third parties. He would assume that the same rule would apply under section 10, he said. Mr. Wallingford referred to a letter from Judge Unis of Portland in regard to this section in which he stated:

> "In the recent cases stemming from the June riot in Portland, I concluded that there might be some justifiable basis for giving a citizen the right to use reasonable resistance to unlawful official action when provoked by arbitrary police action. This article seems to support such a conclusion."

The article referred to by Judge Unis was one by Paul Chevigny of the New York Civil Liberties Union who argues against this type of legislation primarily on constitutional grounds. One of the problems Chevigny points out is that if a person exercising a First Amendment right to assemble is unlawfully arrested by a peace officer, resists the arrest--later determined to be unlawful because the underlying offense he was charged with was, in fact, lawful--he can then be charged with resisting arrest regardless of whether the initial charge was valid or not.

Chairman Burns compared the language to that of the Escape draft which is similar in that a person is guilty and subject to sanction for escape even if his original incarceration was illegal.

Mr. Chandler said his theory had always been that there was possible redress in court for any mistakes made regarding false arrest or false imprisonment. He was concerned, he said, with the idea of letting every citizen determine the law as it applies to him. As unpleasant as it may be, it is necessary to maintain an orderly process for making the decisions required of peace officers and private citizens, he said.

Chairman Burns remarked that there is no existing statute for resisting arrest. Mr. Wallingford noted that the major change this section would make is that while there is no existing statute, case law would support the citizen's right to resist an unlawful arrest. Mr. Paillette reported that some of these same questions were raised in discussion of the Justification draft. Although there are no Oregon cases that affirm a citizen may resist an unlawful arrest, it is implied in certain cases. In these cases, the court has said that a citizen could not carry his resistance to the extent of using deadly force. It is therefore indicated that anything less than deadly physical force would be all right under existing law, providing the arrest was unlawful.

Chairman Burns stated that permitting the resistance of an unlawful arrest would promote anarchy. Mr. Wallingford replied that in this matter, it is a question of weighing certain equities. As Mr. Chevigny points out, he said, a citizen feels he has a right to be secure from unlawful seizures by arbitrary police action while recognizing that there may at the same time be some social reason for taking that right away.

Mr. Chandler agreed that a citizen has a right to be free from unlawful arrest, but he asserted that his means to defend that right was not with his fist at the time of arrest, but in court.

Mr. Paillette posed another problem concerning the right to resist arrest. If a person can use reasonable force to resist an unlawful arrest, there are immediately two questions to argue. First, what is reasonable force and to what extent should it be applied; secondly, what constitutes lawful or unlawful arrest is frequently a very complicated question. It is not a question which can be easily answered on a subjective basis by each citizen. Mr. Knight added that such a rule would encourage each person, as he was being arrested, to have his trial at the moment.

Mr. Wallingford cited a recent Maryland case, State v. Jones, 244 A2d 459 (1968), in which the defendant was stopped and arrested by a state trooper on no probable cause. He disarmed the trooper, started for his car, but then returned and struck the officer twice with the pistol. While the conviction was upheld on the basis of unreasonable use of force, the court stated:

"The authorities seem in accord that one illegally arrested may use any reasonable means to effect his escape, even to the extent of using such force as is reasonably necessary...[but] even where the use of force is authorized the force employed may not be more than is reasonably demanded by the situation...."

Mr. Wallingford noted that while the court recognized that the defendant had a right to resist, they felt he went too far in that resistance. They intimated that had the defendant made his escape without coming back to hit the officer, the result might have been different.

Mr. Chandler moved to approve section 10 as redrafted. The motion carried unanimously.

Section 11. Rendering criminal assistance; definition of term. Mr. Wallingford explained that section 11 defines what is meant by rendering criminal assistance as that term is used in sections 12 and 13. These sections cover "hindering prosecution" which is presently called "being an accessory after the fact". He read the section, which included six subsections, concluding that if a person performed any of those acts mentioned in the six subsections along with the requisite intent, he would be guilty of hindering prosecution in the second degree if it is a felony, and in the first degree if it is a crime punishable by life imprisonment.

In response to a question by Chairman Burns, it was pointed out that this would take the place of the present "accessory" statute. Principals and accomplices are covered under the draft on Parties to Crime, Mr. Paillette explained.

Chairman Burns questioned use of the language "by means of force, intimidation or deception" in subsection (4). Mr. Wallingford replied that he did not know whether a passive act would be punishable. Chairman Burns thought it would have to be accompanied by reckless or criminal intent and referred to the first part of section 11 which mentions "with intent to hinder the apprehension, prosecution, conviction or punishment." Mr. Wallingford said that language was not intended to require an affirmative act.

Rep. Young wondered about the possible situation where, for example, Senator Burns has a client who checks in with him daily to see how things are going. Suppose one day Senator Burns advises his client that there is a warrant out for his arrest. The client thanks him and quickly leaves town. Under subsection (2) of section 11, Senator Burns has warned his client of impending apprehension. Although he may not have intended to do so, Senator Burns has hindered apprehension by giving notice of the warrant.

In answer to Rep. Young's concern, Mr. Paillette said he did not think that the attorney in such a case would be any more susceptible under this draft than he would be under the existing statute defining an accessory. ORS 161.230 defines an accessory:

"All persons are accessories who, after the commission of a felony, conceal or aid the offender, with knowledge that he has committed a felony, and with intent that he may avoid or escape from arrest, trial, conviction or punishment."

Mr. Chandler noted that the Illinois Criminal Code of 1961 makes an exception in the case of a husband, wife, parent, child, brother or sister, while the other states do not. It was pointed out that this was the humanitarian point of view, taking into recognition that human nature is such that persons in that category are likely to help one another without any culpable intent. Chairman Burns said it had been his experience that in many cases a relative is often the one who helps in aiding in the escape or concealment of the one being sought. It was his feeling that the humanitarian approach was not realistic and that the statute involved was sometimes the only deterrent in such cases.

Chairman Burns repeated his concern with subsection (4). He thought it would be just as effective to say, "prevents or obstructs anyone....", indicating by whatever manner or means it is accomplished. If the criminal intent is present as set out in the first part of section 11, he did not think it would make any difference whether it was by means of force, intimidation or deception. It was Mr. Wallingford's impression that the basis for that language was to protect the Fifth Amendment right to be silent. It was not meant to imply that a person had an obligation to answer questions asked of him by the police, nor to imply that if he refused to answer, it was an intent to hinder the person's apprehension.

Mr. Knight remarked that if he refused to answer questions about a person who was wanted by the police, even though he knew where the person was, he would be concealing him. Mr. Paillette said that conduct could also be considered deception.

Mr. Wallingford was not convinced that there should be a penalty for this type of conduct. Mr. Paillette suggested that leaving subsection (4) as it is would at least offer some specific language. In a case of silence that might possibly deserve prosecution, one could argue that this was an act of deception even though the defendant might not have said anything, or said he did not know, when in fact, he did know.

Mr. Wallingford cited United States v. King, 402 F2d 694 (1968):

"Title 18, Sec 4 USCA, MISPRISON OF FELONY: Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States is guilty...."

In that case, he said, the court held that the government must show four elements:

(1) One or more principals had committed and completed the crime.

(2) Defendant had full knowledge of the fact.

(3) Defendant failed to notify the authorities.

(4) Defendant took an affirmative step to conceal the crime.

In this case, he reported, it was subsequently found that the fourth element was lacking because there had been no affirmative act on the part of the defendant. Mr. Wallingford thought this rationale would apply to the discussion on accessory after the fact. He therefore did not think that silence could be construed to be an affirmative step. If a person chose to answer but gave a deceptive answer, that might be considered an affirmative step, he said.

Mr. Chandler moved to approve section 11. The motion carried unanimously.

Section 12. Hindering prosecution in the second degree. Section 13. Hindering prosecution in the first degree. Chairman Burns had a question regarding both sections on how it was to be determined whether a person had committed a felony or a crime punishable by life imprisonment. He reminded the subcommittee that when a person is arrested and charged with a felony, there is a presumption that he is innocent until proven guilty. Under strict legal interpretation, he has not committed that felony until the jury has returned a "guilty" verdict. He pointed out that if this was intended to attach to pre-trial hindering, it might be better to use the words "charged with" rather than "committed".

Mr. Chandler asked at what time a person was considered "charged". Chairman Burns replied that it would be when the information was filed against him. Mr. Chandler then pointed out that someone could furnish a car to a bank robber as he ran from the bank, but before he was charged with the crime. Chairman Burns

said Mr. Chandler had raised a very good point. He conceded that person would probably be considered charged when he was taken into custody and told he was under arrest. On the other hand, he asked if filing an information charging armed robbery, for example, would be retroactive. Mr. Chandler and Mr. Paillette both agreed that it would be. Chairman Burns' point was that the language in this draft leaves some leverage for a smart defense lawyer to argue to an appellate court.

In response to a question by Mr. Chandler, Mr. Paillette said a person could be charged under section 12 if he helped a bank robber, for example, to escape. He explained that the robber has committed a felony and it is immaterial whether he has been formally charged or not. He doubted that the subcommittee would want to insert a requirement that a person must be charged with a felony before it would be a crime to hinder prosecution by helping him because, he said, the kind of aid this section prohibits is most likely to be that which takes place immediately after the crime has been committed.

Chairman Burns asked what would happen in the event the defendant was acquitted on the felony charge. Mr. Paillette explained that the accessories could still be prosecuted. There are several Oregon cases cited in the Parties to Crime draft with respect to accessories and accomplices. He noted that ORS 161.250 says, "An accessory may be indicted, tried and punished though the principal is not indicted or tried." The issue of the guilt or innocence of the principal is irrelevant, he said.

Mr. Chandler requested clarification on whether a person could be prosecuted for hindering prosecution even if the person accused of the felony or crime had been acquitted. Mr. Paillette replied that there would certainly be nothing to prevent prosecution.

Chairman Burns emphasized that when a judge instructs a jury he points to the material elements of the crime. These material elements are also utilized by a good prosecutor if he has a strong case and by the good defense attorney if he has a weak case. He stated that if he were the defense attorney in such a trial, he would recite the material elements and say to the jury: "The judge will instruct you that one of the material elements of this crime is that my client has rendered assistance to the person who has committed a felony. If you find from the evidence in this case that the person who my client allegedly assisted did not commit a felony, will you be willing to acquit him." He would then bring in the judgment record showing that the person charged with the felony had been acquitted.

Mr. Paillette said he would object to this immediately because it is not the law. Chairman Burns pointed out however, that the present "accessory" statute would be repealed by these "hindering" statutes.

In an effort to clarify this point, Mr. Paillette said that although it was surprising that Oregon has no similar statute with respect to accomplices, case law has shown that it is the same as that applied to accessories. That case law was the background for a section of the draft on Parties to Crime and he thought perhaps a similar specific statute was needed in this draft for clarification. He continued by reading section 3 of P.D. No. 2 of Parties to Crime:

> "In any prosecution for a crime in which criminal liability is based upon the conduct of another person...it is no defense that...such other person has not been prosecuted for or convicted of any crime based upon the conduct in question or has been convicted of a different crime or degree of crime...."

In the commentary on that section, he cited two Oregon cases:

> "A principal may be convicted of murder in the second degree and an accessory before the fact of the crime of manslaughter." State v. Steeves, 29 Or 85, 43 P 947 (1896).

> "The fact that a codefendant was acquitted does not prevent the conviction of the accused." State v. Casey, 108 Or 386, 217 P 632 (1923).

Chairman Burns asked if there was any basic inconsistency between the language in sections 12 and 13 and the language in section 3 of Parties to Crime. Mr. Paillette replied that there may be an inconsistency if sections 12 and 13 are interpreted to imply that there must first be a conviction of the principal before there could be a conviction of the person charged with hindering prosecution.

Mr. Chandler agreed with Mr. Paillette that perhaps language similar to section 3 of Parties to Crime should be inserted in this section. His fear was that someone might use the argument Senator Burns had just submitted.

Mr. Wallingford said it seemed to him that a literal interpretation of the statute would support that argument because if one of the elements of this crime under section 12 is that a person renders criminal assistance to a person who has committed a felony, the prosecution must prove that a felony has been committed.

Rep. Young said there was no question in his mind that he would use that defense.

Mr. Chandler moved that section 12 be redrafted using language similar to that in section 3 of Parties to Crime. Mr. Paillette was of the opinion that it would not need to be as technical but that language similar to that in ORS 161.250 would accomplish the same purpose. It was generally agreed that the subcommittee concurred in Mr. Chandler's motion.

Mr. Wallingford suggested that in redrafting these sections, it might be wise to include in section 12 the same language as in section 13 so that it would say, "...a person who has committed a crime punishable as a felony", thus eliminating the question that might possibly be raised if the judge chose to punish the crime as an indictable misdemeanor rather than a felony. Rep. Young thought that was a valid observation and the subcommittee indicated it had no objection.

Mr. Chandler called attention to an inconsistency in the two sections by use of the language "known to him" in section 13, while section 12 does not have that requirement.

Mr. Wallingford explained that this was intended to put a higher burden of proof on the state because they would have to prove that the person was known by him to have committed a crime punishable by life imprisonment.

Chairman Burns wondered if the policy reason for making the differentiation between the two was that one was to be treated as a felony and the other a misdemeanor. Mr. Wallingford replied that that was the intent and he read from the commentary on page 69:

> "It is anticipated that the first degree offense will be graded a felony with misdemeanor sanctions applicable to the second degree."

Chairman Burns expressed the view that hindering prosecution should perhaps be presented as one crime, thus leaving it up to the discretion of the judge by giving him an option to punish the crime as a felony or a misdemeanor.

After further discussion about which crimes would be punishable by life imprisonment as well as anticipated sentencing proposals, Rep. Young stated he could see no reason why the proof should be more difficult in section 13 than in section 12. Chairman Burns indicated agreement with this. He suggested that the subcommittee ask that sections 12 and 13 be redrafted into one section in line with the discussions and offered suggestions.

Mr. Paillette defended the need for two separate sections by offering for consideration a subject which, he said, the subcommittee should not disregard completely. It is the sort of thing, he explained, that Sol Rubin, of the National Council on Crime and Delinquency, has objected to as what he calls the "proliferation of offenses". Mr. Paillette said he disagreed with him on this issue, however, because it seemed to him that in the day-to-day work of prosecution, it is desirable to have a "catch-all" section such as this. To have some way to negotiate a plea is good, he said, providing it can be included in a statute without doing any great violence to the code and without being unfair to potential defendants.

Chairman Burns was of the opinion that the "hindering" statutes fill a gap in the present law. Mr. Chandler said it seemed to him that if a person hinders prosecution, his guilt should not be based on the crime with which the principal is charged.

Chairman Burns concluded that to retain hindering prosecution in two degrees, one based upon a felony and the other upon a misdemeanor, would be to depart from the "indictable misdemeanor" theory which seems to be the direction that some of the codes have taken. Mr. Paillette replied that problem could be handled with a general provision as the other codes have done. They do not state that hindering prosecution in the second degree is an indictable misdemeanor. It is graded either as a felony or a misdemeanor. Then, in the sentencing and penalty section of the code, they have given the court option to treat any crime, with certain exceptions such as murder, on an individual basis. The judge has wide discretionary power so that even in the case of a felony, he may, if he thinks it is a suitable case, treat it as a misdemeanor. Therefore, he added, he did not think there was any need to insert in any of the statutes a specific indictable misdemeanor provision.

Chairman Burns directed Mr. Paillette to redraft sections 12 and 13 as he thought best although, he said, he probably would vote for only one when the time came to approve them.

Mr. Wallingford said that if there were to be only one degree of hindering prosecution, he would suggest combining section 11 in that offense. The main object for a separate section on rendering criminal assistance was that it would be too verbose to include all the separate circumstances in each section. If there were to be only one section, it could say, "A person commits the crime of hindering prosecution if with intent to hinder...."

Mr. Chandler supported the retention of two separate classes of the crime of "hindering" but reduction of degree of the proof necessary in section 13 to equal that of section 12.

Questioning by Mr. Chandler revealed that Rep. Young was inclined to agree with Chairman Burns' suggestion of only one degree so with the prospect of only a possible tie, depending on Mr. Spaulding's vote, Mr. Chandler withdrew his objection.

Chairman Burns then directed that all three sections be combined into section 11 according the the wishes of the majority.

Section 14. Compounding. Mr. Wallingford read the definition of "compounding a felony" from the commentary on page 72:

> "The offense committed by a person who, having been directly injured by a felony, agrees with the criminal that he will not prosecute him, on condition of the latter's making reparation, or on receipt of a reward or bribe not to prosecute." (Black's Law Dictionary 358 (4th ed 1951)).

Mr. Chandler observed that this section allows the potential defendant in the compounding prosecution to use the criminal law to enforce his civil remedies.

Chairman Burns wondered why the pecuniary benefits were limited in this section. Mr. Wallingford explained that the term "pecuniary benefit" had already been defined and he thought the definition was broad enough to cover almost any situation. He added that subsection (1) restates present Oregon law. With respect to subsection (2), he explained that there is presently a procedure whereby a person, with some exceptions, can compromise a misdemeanor with court approval. The exceptions are:

(1) By or upon an officer of justice while in the execution of the duties of his office;

(2) Riotously; or

(3) With an intent to commit a felony.

Chairman Burns stated his only objection to section 14 was that he could see no reason for including the defense since it only tends to complicate the issue. Mr. Paillette pointed out that there is a similar defense in subsection (3) of section 9 under Theft by Extortion:

> "It is a defense that the defendant reasonably believed the threatened charge to be true and that his sole purpose was to compel or induce the victim to take reasonable action to make good the wrong which was the subject of the threatened charge."

Chairman Burns was concerned about the defense under subsection (2) because it amounted to using the criminal law as a collection agency. It also presents a problem for the good district attorney who must determine which cases to prosecute while keeping in mind his responsibility not to use the taxpayers' money for private gain.

Mr. Paillette asked about the situation where a person who has been given a bad check threatens the writer of the check that if he does not make it good within 24 hours he will go to the district attorney. Assuming that a charge was brought against him for compounding the felony, he asked if the subcommittee did not feel that the defense should be allowed since all the defendant was trying to do was to get back what he felt he was reasonably entitled to have. This was the rationale applied to Theft by Extortion, he explained.

Rep. Young said he approved paragraph (a) under subsection (1) with the words "refrain from initiating prosecution" but he did not approve paragraph (b) which used the words "conceal from law enforcement authorities".

Mr. Chandler voiced objection to the language in subsection (2) which says "reasonably believed himself to be entitled" on grounds that it was too broad and left the door open for blackmail.

Mr. Paillette observed that one way to handle this problem might be to take the defense out of this section and draft another section along the lines of the present statute on civil compromise, which takes it out of the subjective hands of the individual and places it in the court to approve or disapprove.

Chairman Burns stated that he had used the compromise statute several times both as a prosecutor and a defense attorney. He thought it was desirable to have such a statute. He approved Mr. Paillette's suggestion to delete the defense in subsection (2).

In reply to a question by Rep. Young about the present compromise statute, Mr. Paillette referred to page 75. Under <u>ORS 134.010</u> it states:

> "When a defendant is held to answer on a charge of misdemeanor for which the person injured by the act constituting the crime has a remedy by a civil action, the crime may be compromised, as provided in <u>ORS 134.020</u>, except when it was committed:...." (See the three exceptions mentioned previously by Mr. Wallingford on page 17 of these minutes.)

He continued by reading from ORS 134.020:

> "If the party injured appears before the court at which the defendant is bound to appear, at any time before trial on an indictment for the crime, and acknowledges in writing that he has received satisfaction for the injury, the court may, in its discretion, on payment of the costs and expenses incurred, order all further proceedings to be stayed upon the prosecution and the defendant to be discharged therefrom; but the order and the reasons therefor must be entered in the journal."

It was noted that in the case of compromise, the crime must be a misdemeanor since a felony cannot be compromised. Mr. Wallingford explained that subsection (2) of section 14 would allow a defense in the compromise of a felony.

Chairman Burns moved to delete subsection (2). The motion carried unanimously. He then moved to approve section 14 as amended and that motion also carried without objection.

Section 15. Simulating legal process. Mr. Wallingford reported that section 15 restates ORS 165.265 which is aimed directly at creditors and collection agencies. He noted that it is a violation and provides for a fine only.

Rep. Young raised the question of whether "issues or delivers" would include mail. Mr. Wallingford said that in the case of mail, the post office is acting as an agent, so he thought that would fall within the definition of delivers.

Mr. Chandler moved to approve section 15. The motion carried unanimously.

Criminal Contempt. Mr. Wallingford called attention to the commentary on page 84. Although New York and Michigan have both enacted statutes of this type, he said, there is some question of whether Oregon should have such a statute. It is covered presently, not as a substantive crime, but under the powers of the court. Making this a substantive crime would not affect the powers of the court to punish this offense, he explained.

In reply to a question from Mr. Chandler on the reason for this kind of statute, Mr. Wallingford explained that at present, the court only has jurisdiction for conduct that occurs in its presence, whereas that jurisdiction could be extended to cover conduct outside the courtroom.

Chairman Burns said he could see no need to make a substantive crime out of criminal contempt and the other members concurred.

Other Business. Chairman Burns suggested discussing the pyramid sale of distributorships at the next meeting as an amendment to Business and Commercial Frauds. In addition, the subcommittee will consider the draft on Escape and Related Offenses, he said.

The meeting adjourned at 4:30 p.m.

Respectfully submitted,

Connie Wood, Secretary
Criminal Law Revision Commission