Tapes #23 and 24

#23 - 1 to 950 of Side 2
#24 - Both sides

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

November 15, 1968

A G E N D A

# # #

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

Eleventh Meeting, November 15, 1968

Minutes

Members Present: Senator John D. Burns, Chairman
Mr. Robert Chandler
Representative Edward W. Elder
Mr. Bruce Spaulding

Also Present: Mr. Donald L. Paillette, Project Director

The meeting was called to order by Chairman John D. Burns at 9:45 a.m. in Room 309 Capitol Building, Salem.

Minutes of Meeting of October 18, 1968

At the Chairman's request, Mr. Paillette reviewed the minutes of the meeting of October 18, 1968. There being no objection, Chairman Burns ordered that the minutes be approved as submitted.

Forgery and Related Offenses; Preliminary Draft No. 1

Chairman Burns asked Mr. Paillette if the forgery draft would conclude the committee's consideration of subjects falling within the category of Crimes Against Property and was told that the Model Penal Code carried forgery and all of the fraudulent type offenses under the broad heading of "Offenses Against Property" whereas New York and Michigan did not classify forgery and fraud under "Crimes Against Property." As a matter of classification, he said, the subcommittee was now at the point where they could say that the category of "Crimes Against Property" was concluded when consideration of the forgery draft was completed, and the fraudulent crimes yet to be drafted could logically be placed separately in the organizational format under business and commercial offenses.

Section 9. Unlawfully using slugs. Mr. Paillette read the commentary to section 9 and indicated that the problem of slugs did not appear to be of major concern in Oregon and he was of the opinion that a single degree of the offense was all that was necessary.

Chairman Burns asked if the provisions of T.D. #1 on Theft of Services would be broad enough to cover the type of activity outlined in section 9 and Mr. Paillette replied that there was some overlap in the two sections but section 9 was more specific. The Theft of Services draft would cover the type of activity proscribed in ORS 165.530 with respect to coin telephones while section 9 was aimed particularly at all types of vending machines or devices designed to receive bills or tokens. Mr. Paillette explained that under section 9 the district

attorney would not be required to prove that the actor obtained property from the machine; the mere fact that he intended to defraud the supplier of property or a service by inserting a slug in the machine would constitute the crime.

In reply to a question by Chairman Burns, Mr. Paillette indicated it was contemplated that unlawfully using slugs would be a misdemeanor. The Chairman asked if section 9 was intended to embrace the provisions of ORS 164.635 which made it an indictable misdemeanor to tamper with parking meters and Mr. Paillette replied that offense would fall under the proposed Criminal Mischief statute.

Chairman Burns pointed out that some of the larger cities now had machines which dispensed money when the required credit card was inserted and asked if use of a forged or false credit card in such a machine would be covered under section 9 or section 10. Mr. Paillette said he had not considered that particular problem when he was drafting either section.

Chairman Burns asked if subsection (1) (b) conflicted with the counterfeiting provisions in section 3 of the forgery draft and was told by Mr. Paillette that counterfeiting was concerned with a bogus coin devised to look like the genuine article whereas a slug did not purport to be a genuine coin so far as its appearance was concerned. He commented, and Mr. Spaulding agreed, that it was impossible to avoid having some overlap in the proposed sections just as overlap existed in the present law.

Chairman Burns questioned the necessity of including "otherwise uses" in subsection (1) (a) and asked if this phrase could prompt a constitutional objection because of vagueness. Mr. Paillette explained that the phrase had been employed to cover a possible situation where question might arise as to whether the actor actually inserted the slug into the machine. In his opinion "otherwise uses" would not be fatal to the statute from a vagueness standpoint because it was clear that the statute was intended to prevent the fraudulent use of a slug in a vending machine.

Representative Elder inquired concerning the meaning of "genuine coin, bill or token" in subsection (2) (b) and Mr. Paillette explained that it was meant to refer to the true and real item. A genuine token, he said, would not necessarily be something printed by the government but would be distributed, for example, by a bus company or would be made for a specific purpose and use. The committee agreed that "token made for such purpose" in subsection (2) (a) made the meaning sufficiently clear.

Chairman Burns read aloud ORS 165.525 and noted that it proscribed the manufacture or sale of slugs whereas section 9 did not specifically do so. Mr. Paillette indicated that "disposes of" in subsection (1) (b) was intended to cover the manufacture or sale of slugs.

Representative Elder moved, seconded by Mr. Spaulding, that ", offers for sale" be inserted after "possesses" in subsection (1) (b). The motion carried. Representative Elder next moved, seconded by Mr. Spaulding, that section 9 as amended be adopted and this motion also carried without opposition.

Section 10. Fraudulent use of a credit card. Mr. Paillette pointed out that he had intended section 10, subsection (1) (a), to read "stolen or forged" and the last line of the commentary on page 28 should also read "forged or stolen credit card."

Representative Elder asked if the draft would cover a situation where a lost credit card was used by the finder and Mr. Paillette explained such act would be an unauthorized use of the card under subsection (1) (c).

Chairman Burns noted that ORS 165.300 referred to actual notice of revocation or cancellation of a credit card. Mr. Paillette commented that requirement of notice had not been retained in the proposed draft. He was of the opinion that the knowledge requirement in subsection (1) would accomplish the same purpose and in addition would ease enforcement problems which would only be complicated by requiring actual notice.

Mr. Chandler, who because of weather conditions had been detained in his flight from Bend, arrived at this point.

Chairman Burns commented that the situation with respect to credit cards was so unique and serious that the necessity for proper enforcement outweighed the advisability of requiring actual notice of revocation or cancellation. Mr. Paillette responded that the majority of credit card frauds that would come under subsection (1) (b) probably would be handled on a civil basis and it would be a rare instance where a credit card company would seek prosecution in the criminal courts against one of its card holders. He pointed out that the draft would require proof that the defendant had knowledge that the credit card was canceled. Mr. Spaulding was of the opinion that a certified letter accompanied by proof it was mailed to the address where the defendant lived would be prima facie proof of knowledge. Chairman Burns commented that such proof could be rebutted by the defendant's testimony that he had not received the letter. Mr. Spaulding commented that the difference between "knowledge," as used in the draft, and "actual notice," as used in ORS 165.300, was insignificant.

Mr. Spaulding questioned the use of the term "evidencing an undertaking to pay" in subsection (2). Mr. Paillette explained that the term was derived from the Model Penal Code and he interpreted "evidencing" to mean that possession of a credit card indicated the holder of that card had agreed to pay for merchandise or services charged against it. Chairman Burns remarked that use of an unsolicited credit card, such as one mailed by an oil company, would constitute a unilateral agreement. Mr. Chandler pointed out that oil companies, banks, etc. were careful to say that by the use of their card the holder agreed to pay for any charges incurred through its use. If the definition was not inclusive enough to encompass telephone credit cards, he said, an actor could be prosecuted for Theft of Services for fraudulent use of a telephone credit card. The committee agreed that the definition of "credit card" was satisfactory.

Mr. Paillette called attention to the fact that ORS 165.300 provided for a petty or grand larceny type of punishment and was cumulative in that the defendant was liable for a felony conviction if the total amount of the goods or services received exceeded $75. He advised that when section 10 was graded, the committee should consider inclusion of a similar provision so that goods and services fraudulently obtained from various sources could be added together.

Mr. Spaulding asked if "uses" in subsection (1) was sufficiently specific. Chairman Burns noted that "uses" was employed in the existing statute and was also in the Model Penal Code and the Michigan code. Mr. Paillette advised that "uses" was broad enough to cover the use of a telephone credit card whereas "presents" might cause some problems of proof. The committee agreed that subsection (1) was acceptable as drafted.

Representative Elder moved, seconded by Mr. Spaulding, that section 10 be adopted with the corrections noted by Mr. Paillette at the beginning of the discussion of section 10. The motion carried unanimously

Section 11. Negotiating a worthless negotiable instrument. Mr. Paillette pointed out that section 11 was a departure from existing Oregon law. The total result of the draft, he said, might not be a great deal different from the present statute except with respect to no account checks, but the language contained a completely new approach to check cases.

The committee discussed the problem of bad checks generally and the best method of rehabilitating persons who wrote bad checks. Mr. Chandler pointed out that the courts around the state often placed first offenders on probation and required restitution. Chairman Burns commented that many bad check writers were involved in related offenses, such as theft of payroll checks, and he was of the opinion that the

biggest single deterrent to writing bad checks was strict enforcement of the habitual criminal statute. Mr. Paillette noted that many district attorneys favored abolition of the bad check statute completely while others felt the superficial distinction between an NSF check and a no account check should be eliminated. He also pointed out that if a specific section dealing with checks was not included in the criminal code, the crime would be covered under Theft by Deception in T.D. #1 of the Theft Article and the more serious check cases would probably be prosecuted under that statute. It was anticipated, he said, that section 10 would carry misdemeanor penalties leaving prosecution of felony offenses to be tried under Theft by Deception.

Mr. Chandler reviewed Mr. Sol Rubin's comments when he appeared before the Commission in January, 1968, wherein he was critical of the high percentage of inmates who were in Oregon's penitentiary because they had written bad checks and yet, he contended, these people were not really dangerous to society. Mr. Chandler suggested that there were several possible reasons why Oregon might have a higher percentage of bad check writers among its prison population--less crime of other types in comparison to the number of bad check writers or possibly because Oregon had stricter laws and stricter enforcement than other states. Mr. Paillette read some of the statistics comparing Oregon's crime rate to the national average and indicated that neither the state nor the FBI figures segregated check offenses specifically. He said he thought that the problem of check offenses was an administrative problem and boiled down to the manner in which the laws were administered by the courts and prosecutors.

Chairman Burns asked why it was necessary to enact a special section for negotiating a worthless negotiable instrument when "uttering" was included under the definition section of forgery. Mr. Paillette explained that section 11 was directed at the insufficient fund or no account check, where the actor had no bank account, whereas uttering was concerned with a forged check. In reply to a further question by the Chairman, Mr. Paillette said that while the crime of writing a bad check would be covered by Theft by Deception, he was of the opinion that the code would run into problems if it did not include some kind of specific provision relating to checks. It appeared necessary, he said, from the standpoint of sheer volume of check activities in any given county in the state, the security people place in negotiable instruments, and the importance of checks in the business world. He called particular attention to his commentary on page 33 of the draft:

> "As observed by the MPC reporters, special bad check legislation has two practical advantages that should be retained, even though a comprehensive theft statute is enacted: (1) No actual obtaining of property need be proven and (2) Prima facie evidence provisions take care of the intent or knowledge factors."

Mr. Paillette commented that by including section 11 in the forgery draft, he did not intend to give the impression that negotiating a worthless negotiable instrument was a form of forgery; it had been placed in that Article for purposes of a logical grouping of offenses.

Mr. Paillette explained that section 11 would change existing law in that the knowledge element under ORS 165.225 required that sufficient funds to cover the check be on deposit at the bank at the time the check was written. Section 11 would provide that the necessary funds must be in the bank by the time the check reached that institution for payment.

Representative Elder referred to subsection (2) (b) and objected to giving the check writer ten days to make his check good. He said the way he read this subsection, a person could come into Oregon from Washington and have ten days to write bad checks all over the state and return to Washington before prosecution was possible. Mr. Spaulding explained that he would be guilty the minute he cashed the first bad check and could be picked up by the police at that time, but after ten days had elapsed and if the check had not been made good, the district attorney would have an easier job of prosecution because the check would then be prima facie evidence of an intent to defraud. He pointed out that subsection (1) defined the crime and subsection (2) offered additional assistance in proving the crime. He added that failure to make the check good was not an element of the crime.

Chairman Burns commented that under subsection (2) (a) the district attorney was given another alternative to charging the defendant with OMFP and asked if this would conflict with the Pirkey decision. He contended there was no criteria or guideline contained in section 11 to permit the district attorney to differentiate between charging the defendant with OMFP or negotiating a worthless instrument. Mr. Paillette replied that there was a guideline in that the Theft by Deception draft would, when finally completed, add the element of value and if the theft were over X dollars, the perpetrator could be prosecuted for a felony crime under Theft by Deception. Mr. Spaulding pointed out that another difference in the two proposed statutes was that under section 11 it was not necessary to obtain property to complete the crime, whereas, under Theft by Deception obtaining property was an element of the crime. If the defendant were not charged with a felony crime, both section 11 and the Theft by Deception section would make the defendant liable for a misdemeanor penalty so that there would be no argument that one crime was more serious than the other so far as the charge and punishment was concerned.

Chairman Burns questioned the use of the term "negotiates or delivers" in subsection (1) and inquired as to the meaning of "delivered." Mr. Paillette replied that the definition of "deliver" in the Uniform Commercial Code, ORS 71.2010, was "voluntary transfer of possession." Chairman Burns posed a situation in which the actor offered a check to

the cashier of a Safeway store in payment of merchandise and the cashier refused to accept the check. In that situation, he said, the act would be uttering but would not be delivering. Mr. Spaulding asked Mr. Paillette if it would do violence to subsection (2) (a) to insert "utters" after "negotiates" and was told that it would probably do no harm to the subsection because "utter" would refer back to the definition of that term in section 1.

Chairman Burns asked, in connection with subsection (2) (b), what would happen in a case where the district attorney was prosecuting a person for negotiating a worthless negotiable instrument and failed to show that there was an effort made to comply with the ten-day provision. The defendant then moved for a judgment of acquittal because the district attorney didn't comply with the requirement for statutory proof. Mr. Spaulding replied, and Mr. Paillette agreed, that the defendant could make the check good within the ten-day period and still be guilty of negotiating a worthless negotiable instrument, but if the check was not made good within that period, it was prima facie evidence of his guilt.

Representative Elder contended that in practice the district attorney would not move against the actor until the ten-day period had elapsed and by that time the professional check passer would be out of the state. Mr. Spaulding expressed disagreement with Representative Elder's statement and explained that the provision was included to protect a person such as a housewife who was a poor bookkeeper and whose husband was writing checks against the account without entering them in the checkbook. If she did not make the checks good within ten days, she would then be in a position where she would have to present some evidence to prove her innocence. Mr. Paillette remarked that the purpose of the prima facie provision was not to dilute section 11 but to make it more enforceable. Representative Elder was of the opinion that every defendant would avail himself of the ten-day provision and Mr. Spaulding explained that the section did not provide that he was innocent if he made the check good within ten days.

Chairman Burns called attention to the language in ORS 165.225 which said, "Any person who, for himself or as agent or representative of another, or as an officer, agent or employe of a corporation . . ." He noted that section 11 did not contain comparable language and asked if both the corporation and the employe could be found guilty of intent to defraud in a situation where the person in charge told the employe to draw a worthless check. Mr. Paillette replied that the language in ORS 165.225 was surplusage in his opinion because if the person had the requisite intent to defraud, it made no difference whether he was an employe or an agent of a corporation.

Mr. Chandler moved, seconded by Mr. Spaulding, that section 11 be approved with the insertion of ",utters" after "negotiates" in subsection (1) and ",uttered" after "negotiated" in subsection (2) (a).

Mr. Paillette explained that the definition of "written instrument" in section 1 was not intended to apply to section 11 but the definition of "negotiable instrument" in ORS 73.1040 was applicable. Mr. Spaulding suggested it might be preferable to say "check, draft or order" rather than "negotiable instrument." Mr. Paillette pointed out that the draft would then be inconsistent in that it would not refer to the Uniform Commercial Code definition as did the other definitions in the section. "Negotiable instrument," he said, was broad enough to encompass a situation that did not involve a bank check such as a promissory note, whereas Mr. Spaulding's suggested phrase would not. He called attention to the Michigan draft, section 4040 (1), and said he had not used that section because of the word "expectation" which was employed therein. The Michigan section said there was an "expectation" the check would not be good rather than an "intent" or "knowledge" on the part of the actor, and "expectation" was a word which the Commission had not used elsewhere in the code whereas the elements of intent and of knowledge had been employed.

Mr. Spaulding indicated he had some question concerning the advisability of using the phrase "knowing that it will not be honored" instead of the phrase in the current law "knowing at the time of the making [he] has not sufficient funds in said bank." Mr. Paillette replied that he had purposely changed the element of knowledge that the actor had insufficient funds at the time the check was written to the element of knowledge that the funds would be in the bank by the time the check was presented for payment. Mr. Spaulding commented that the proposed revision might be a good reason for using the word "expectation" so the state would not have to prove what was in the defendant's mind with respect to something that had not yet occurred.

A brief recess was taken at this point and when the meeting resumed, Mr. Paillette suggested that the committee substitute section 4040 (1) of the Michigan draft for subsection (1) of the proposed section 11 with the addition of ",utters" after "negotiates." He also noted that the Michigan section was disjunctive rather than conjunctive in the intent elements.

Chairman Burns asked if it would be necessary to amend subsection (2) if the suggested amendment were adopted. Mr. Paillette answered that no change would be needed there and explained he had written subsection (2) as it appeared in the draft rather than adopting Michigan's language because the Michigan subsection (2) (b) incorporated therein some of the definitions of the Uniform Commercial Code and he felt it was more consistent to move all the definitions into one subsection. Chairman Burns pointed out that if subsection (1) of the Michigan draft were adopted, the intent to defraud would not then be in subsection (1) nor would subsection (2) use the term "expectation" so that the two subsections would be inconsistent.

Mr. Paillette proposed that subsection (2) read:

"It is prima facie evidence of intent, knowledge or expectation that the negotiable instrument would not be honored upon presentment if:"

Mr. Chandler withdrew his previous motion which had not been voted on and Mr. Spaulding withdrew his second.

Mr. Spaulding moved, seconded by Mr. Chandler, that section 11, subsections (1) and (2), be amended to read:

"(1) A person commits the crime of negotiating a worthless negotiable instrument if he negotiates, utters or delivers a negotiable instrument with the intent, knowledge or expectation that it will not be honored by the drawee.

"(2) It is prima facie evidence of intent, knowledge or expectation that the negotiable instrument would not be honored upon presentment if:"

The motion carried unanimously.

Mr. Spaulding next moved, seconded by Mr. Chandler, that section 11 as amended be adopted. This motion also carried with Representative Elder voting no.

Section 12. Criminal impersonation. Chairman Burns asked if criminal impersonation was a crime against property and Mr. Paillette explained that the crime could fit into this section as well as any other place in the code. It was, he said, a fraud type of offense although the actor would not necessarily have to obtain property to commit the offense. He outlined that section 12 was designed to replace several existing statutes (listed on pages 36 and 37 of the commentary) prohibiting impersonation of another or misrepresenting membership in certain organizations.

Representative Elder inquired as to the meaning of "benefit" and "injury" and was told by Mr. Paillette that "benefit" would apply to someone who gained from a pecuniary standpoint or in some way improved his situation by means of the impersonation. Representative Elder noted that a police officer who represented himself to be a private citizen would be guilty of criminal impersonation under section 12. Chairman Burns commented that many retail credit and insurance investigations were made by persons who represented themselves to be employed by someone other than their actual employer. He asked why it should be criminal for a person to represent himself to be someone else when no one was either injured or defrauded by his act. Mr. Paillette replied that the representation might enable him to obtain something that he

wouldn't obtain otherwise which in itself might not injure the person supplying the information. He noted that the present Oregon statutes dealing with misrepresentation of affiliation didn't necessarily apply to obtaining money or property as a result of the misrepresentation. Michigan, he said, limited its criminal impersonation statute to an offender who obtained pecuniary benefit, but if this were the course adopted in Oregon and if the sections relating to affiliations were repealed, it would write off the books quite a body of Oregon law. He noted that there were no Oregon cases on any of the statutes so they were probably rarely used. The present laws, he said, did not contain an element of obtaining property for commission of the crime but were primarily special interest statutes designed to protect specific societies and their good names.

Mr. Spaulding remarked that it was a common practice to give false identification to obtain all kinds of information. He was of the opinion that as a matter of policy the Commission should not give cognizance to the special interest type statutes that had grown up through the years that fell into the category of criminal impersonation. A criminal remedy existed, he said, in the proposed Theft by Deception statute. Mr. Chandler advised that the Commission's policy was to draw crimes broad enough to protect people from acts that were reprehensible in themselves and not to deal in special interest legislation. Inasmuch as there were no reported cases on this category of crimes, he said, it was obvious that the statutes were rarely used and he expressed doubt that they fulfilled a useful purpose.

Chairman Burns said there should be a law making it a crime to impersonate a police officer and Mr. Paillette replied that such a crime could logically be placed under Crimes Against Public Administration. He noted that the Michigan commentary said impersonation of membership in organizations could be controlled through civil relief and that was the reason Michigan limited its comparable statute to the actor who obtained pecuniary benefits. Mr. Paillette said he had drafted section 12 to give the committee an opportunity to consider the subject and to make a policy decision as to whether or not it should be included in the code. Civil remedies, he said, were available to private organizations against persons or groups misrepresenting affiliation.

Mr. Spaulding moved, seconded by Mr. Chandler, that section 12 be eliminated. The motion carried unanimously. Mr. Paillette indicated the policy decision of the committee would be included in the commentary to the Forgery Article when it went to the Commission together with the statement that existing statutes such as impersonating a peace officer would be included elsewhere in the code.

Next Subject to be Considered by Subcommittee No. 1

Inasmuch as Subcommittee No. 1 had now completed the chapter on Crimes Against Property, the members discussed what portion of the criminal code should be considered next, recognizing that their decision would be subject to the approval of Senator Yturri, Chairman of the Commission.

Mr. Paillette said business and commercial crimes was an area which could be considered next and encompassed fraudulent conduct for the most part. He noted that the Model Penal Code contained a section on deceptive business practices which was comparable to Oregon's deceptive trade practices. This latter subject, he noted, was not contained in the criminal code but did contain penal sanctions and he did not think it could be completely ignored by the Commission. He suggested one method of handling the problem would be to recommend to the legislature that ORS chapter 646 be transferred into the criminal code without alteration and said this was a matter which the Commission should probably consider at a later time. New York, in his view, had approached the problem logically by including an Article entitled "Offenses Involving False Written Statements" and in that Article had included sections such as Falsifying Business Records, Tampering with Public Records, Issuing a False Financial Statement, etc.

Chairman Burns listed some of the Articles on which the committee could work: Firearms and Other Weapons; Crimes Against the State and Public Justice; Crimes Against Morality and Decency; and Crimes Against Peace and Safety. Mr. Paillette commented that Subcommittee No. 2 had begun work on Crimes Against Persons and was currently working on kidnaping but this, he said, did not preclude Subcommittee No. 1 from working on other phases of that Article.

Mr. Paillette pointed out that Articles I and II of the Model Penal Code containing the Preliminary Provisions and General Principles of Liability were extremely important Articles and needed to be completed as soon as possible inasmuch as they were tied in so closely with the entire code. The section on Purposes and Principles of Construction had been drafted, he said, but the remainder of the Preliminary Provisions had not. He suggested that Subcommittee No. 1 might want to begin work in that area. Subcommittee No. 3, he said, could continue work on the Articles being drafted by Professor Platt--namely, Responsibility and Inchoate Crimes--and their work would not be interrupted by transferring Articles I and II to Subcommittee No. 1.

The members indicated their approval of this suggestion and Chairman Burns commented that Subcommittee No. 1 was in a better position to grade the offenses than one of the other committees inasmuch as they were more intimately acquainted with the Crimes Against Property Article which they had just completed.

The meeting was adjourned at 3:30 p. m.

Respectfully submitted,

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission