Tape #78

Side 2 only

OREGON CRIMINAL LAW REVISION COMMISSION
Subcommittee No. 2

Seventh Meeting, July 18, 1969

Minutes

Members Present: Representative Wallace P. Carson, Jr., Chairman
Attorney General Lee Johnson
Senator Anthony Yturri (delayed)

Excused: Senator Berkeley Lent

Absent: Representative Harl H. Haas

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

Subject: Perjury and Related Offenses, P.D. No. 1 (Article 22)

The meeting was called to order at 1:30 p.m. by Chairman Carson in Room 315, Capitol Building, Salem.

Perjury and Related Offenses, P.D. No. 1, May 1969

Section 1. Perjury and related offenses; definitions. Mr. Wallingford was asked what was meant by "equivalent affirmation" as used in subsection (1) which defines "sworn statement." He explained that because of religious beliefs, some people will not take an oath but will affirm their statement in other ways.

Chairman Carson asked Mr. Wallingford why the word "equivalent" was used before "affirmation" since the normal language would be "under legally authorized oath or affirmation."

Mr. Wallingford replied that the word "equivalent" was perhaps not necessary in this definition.

Chairman Carson thought "equivalent" weakened the word "affirmation", and was unnecessary in that the affirmation is clearly stated in the statute as an oath.

Mr. Wallingford explained that the problem of applying the term "sworn statement" in the statutes is that the law of perjury states that a person cannot commit perjury if he is under an oath that is not legally authorized. He noted that "oath" is defined in ORS 44.330 as, "An oath may be administered as follows: The person who swears holds up his hand, while the person administering the oath addresses him: 'You do solemnly swear that the evidence you shall give in the issue (or matter) now pending between _____ and _____ shall be the truth, the whole truth and nothing but the truth, so help you God.'" Mr. Wallingford added that ORS 44.340 is a variation of the form of oath which states, "When a person is sworn who believes in any other than the Christian religion, he may be sworn according to the peculiar ceremonies of his religion."

Mr. Johnson suggested that the definition refer to those two statutes.

Chairman Carson called attention to the definitions in the Michigan Revised Criminal Code which state that an oath is "required or authorized by law" when the use of the oath is specifically provided for by statute or appropriate regulatory provision.

Mr. Johnson said the thing that bothered him was that "sworn statement" refers only to testimony in a trial. He noted that there were other statutes which referred to unsworn statements.

Mr. Wallingford explained that the definition of "sworn statement" would not be limited to a trial. It would apply to any statement given under oath or affirmation.

Mr. Johnson noted that under the election laws, there is a section which makes even notarized statements subject to perjury charges.

Chairman Carson recalled that until this year the inheritance tax report required a certification by a notary. The concern was that this could constitute "false swearing." There are several different ways to reach "false swearing" under our statutes, he said. At one time a person could conceivably be guilty of several separate offenses. The "acknowledgment" element was taken out, making the crime simply "false swearing." His impression was that there was nothing in the present statute that he would depend on as a guide in resolving the problem. If perjury is to be confined only to court proceedings or litigation, the statute should say so, he added. The committee might not want to have a crime of perjury at all, but have a crime of false swearing.

Mr. Wallingford reminded the subcommittee that, in its original context, perjury was only applicable to judicial proceedings.

Chairman Carson referred to Mr. Johnson's proposal to include reference to the statutes in subsection (1). He cautioned the subcommittee to be certain that they are talking about the mechanics of giving and taking an oath as opposed to the necessity of taking an oath. He said that he would not want to refer to every statute where an oath is authorized. He thought Mr. Johnson's concern was with the vagueness of saying "legally authorized." One virtue, however, is that if a statute is ever amended, the criminal code section requires no changes. The use of "legally authorized" does perpetuate a vagueness, he admitted, that would continue to confuse. He thought it would be better to specify the applicable statutes.

Mr. Wallingford said that was exactly what was meant by "legally authorized", since those are the only statutes on our books that legally authorize the form of giving an oath or affirmation in this state.

Chairman Carson pointed out that it might take others some time, as it had him, to comprehend that "legally authorized" refers to the mechanics of administering an oath.

Subsection (1) was amended to read, "'Sworn statement' means any statement knowingly given under oath or affirmation attesting to the truth of what is stated as prescribed by ORS...."

Mr. Wallingford, in explaining his definition of "statement", said that it includes representations of opinion, belief or other state of mind only if they relate to state of mind as distinguished from the facts which are the subject of the representation.

Mr. Johnson urged that subsection (2) be amended by adding "of fact" after "representation." Mr. Carson suggested that "and" be substituted for "but" so that it would read: "'Statement' means any representation of fact and includes a representation of opinion, belief or other state of mind where representation clearly relates to state of mind apart from or in addition to any facts which are the subject of the representation." The subcommittee agreed that this language was satisfactory.

During a discussion of subsection (3), which defined "material", Mr. Wallingford reported that the Oregon Supreme Court had recently handed down a decision containing a statement that caused him to question whether the materiality of a statement in a given fact situation is a question of law or fact. The Court stated, he said, that "no one has questioned but that the determination of materiality was for the court to decide", as though perhaps someone should have raised the issue.

Subsection (3) was amended to read: "'Material' means that which could have affected the course or outcome of the proceedings or transactions. Whether a false statement is 'material' in a given factual situation is a question of law."

Mr. Wallingford read the definition of "official proceeding" in subsection (4) and pointed out that this term is important in that it is used to distinguish perjury in the first degree.

Chairman Carson asked if it was necessary to have the word "heard" in the definition where it says, "a proceeding heard before...." It was determined that this not only refers to a proceeding but to a notarized statement as well.

Mr. Wallingford stated that the subcommittee should be specific on what an "official proceeding" really is. The subsection was then amended by taking out the word "heard."

Section 2. Perjury in the second degree. Mr. Johnson said he had a problem with this section in that he did not understand the different distinctions.

Mr. Wallingford explained that perjury in the first degree as defined in section 3 is exactly the same as section 2 except that the testimony must be given in an official proceeding.

Mr. Johnson maintained that the oath as defined in subsection (1) of section 1 is not going to be present in subsection (4) of that section, which defines "offical proceedings." He noted that the oath was not given in all official proceedings. Where else but in court trials or in depositions is that oath given,he asked. His point was that the definition of official proceeding was not needed because the definition of sworn statement has already limited it to official proceedings since that is the only place the oath is used.

Section 3. Perjury in the first degree. Mr. Johnson had a question about the language that a person makes a statement "knowing or having reason to know." "Having reason to know", he said, raises the issue of negligence.

Section 4. False swearing. Mr. Wallingford explained that this section is similar to the perjury section with the exception that "material" is not used here.

Mr. Johnson said he was still extremely troubled by perjury in the first degree being based on a person's merely having reason to know that the statement was not true.

Mr. Wallingford explained that the object of the language was to prevent people from testifying to a fact in situations where they have no knowledge one way or the other. If they really do not know, he said, they should so testify. The feeling among current authorities, he reported, was that one of the problems with the law of perjury is that the penalties have been far too severe. In 75% of all civil and criminal actions there is an element of perjury, but because the penalties are so severe, rarely is anyone ever charged with perjury.

Mr. Johnson's feeling was that there should be a form of perjury with severe penalties. He suggested taking "having reason to know" out of perjury in the first degree, and making it a more severe crime. He thought it should be regarded as a very serious crime when a person lies throughout a trial.

Mr. Wallingford pointed out that you would have the same culpability element if "knowingly" were inserted so that it would say "he knowingly makes a false sworn statement."

Chairman Carson wondered if perjury in the second degree would have the same penalty as false swearing.

Mr. Wallingford thought it would probably be fairly close, although the present false swearing statute has a much lower penalty than perjury. However, he added, Oregon has only one basic perjury statute now. He noted that Oregon has a rather interesting perjury penalty because the penalty is graded according to the proceeding in which the perjured testimony is given. Thus, if it were in a criminal proceeding where a man could be given death or imprisonment, the perjurer could get 20 years. In another case, he might get 10 years. He added that the reason "knowing or having reason to know" is used in perjury cases is that sometimes there is a great deal of evidence that the witness had reason to know that what he said was a lie. It is, however, difficult to convince a jury that he actually knew it was false.

Mr. Johnson did not think the type of proceeding was important in determining the element of perjury. Why, he wondered, do we make a distinction.

Mr. Carson said that if "sworn" means oath, then the only oath that is prescribed officially by statute is in the evidence section and deals clearly with witnesses and not with deeds, wills, etc. If oath applies only to official proceedings, then that must be used here, but if the statute really means oath on a deed, then perhaps there should be some amendment to make that clear.

Mr. Johnson agreed. He said he thought it was wrong to have in the law a prescribed form of oath and then let a person dodge the law by saying he had sworn to tell the truth, but not the whole truth. Why not have oath mean all testimony to which he affirms to tell the truth, he wondered.

Mr. Wallingford replied that there is another statute to cover that problem, which says that an irregularity in an oath is not a defense so long as the oath is legally authorized.

Mr. Johnson agreed that that took care of the problem.

Chairman Carson was particularly interested in this explanation because, he said, it changed the definition of "legally authorized" from the mechanical side to the authorization, which was his argument in the beginning.

Mr. Wallingford stated that there must be some statutory language stipulating that the oath is legally authorized; otherwise it has no legal effect.

Chairman Carson asked if he referred to the way in which the oath was given or to the mechanics of the oath.

Mr. Wallingford replied that he was referring to the legal authority to give the oath, not to the form of the oath itself. He also stated that in regard to a sworn statement, he is referring to an oath given under legal authority.

Mr. Johnson questioned the need for more than two classifications. He suggested having only perjury in the first degree and false swearing. Perjury in the first degree would say, "A person commits the crime of perjury in the first degree if he makes a false sworn statement in regard to a material issue, knowing it to be false." False swearing would state, "A person commits the crime of false swearing if he makes a false sworn statement knowing or having reason to know it to be false."

Mr. Wallingford observed that the definition of official proceeding could then be eliminated because it would not be an issue. However, it was his opinion that there should be some recognition that the more damaging form of perjury is given in judicial settings.

Mr. Johnson disagreed. He thought that there was more understanding of the motives behind perjury in judicial proceedings. The witness was more innocent and there was less culpability on his part, he said.

Mr. Wallingford reminded Mr. Johnson that he was referring to the wilful perjurer. He noted that if there are to be only the two crimes -- perjury in the first degree and false swearing -- then the official proceeding definition could be deleted.

Mr. Johnson could see no distinction between the person who is under oath in an official proceeding and the one who signs a totally false document knowing it to be false.

In making the amendments Mr. Johnson suggested, Mr. Wallingford pointed out that it would not be necessary to specify perjury in the first degree. The section would state "A person commits the crime of perjury if he...." The burden will then be on the prosectuion to prove that the defendant knew the statement was false. He could not see any reason for making any variance for false swearing.

Mr. Johnson thought there should be a variation because he felt false swearing should be a misdemeanor.

Mr. Wallingford asked him if it was his intention that false swearing would be an alternative route to prosecution when actual knowledge as required in perjury could not be proved.

Mr. Johnson agreed that was his rationale on the matter.

Chairman Carson concluded the difference between false swearing and perjury would then be that the first would be a misdemeanor and the second a felony. Also, the false swearing would require knowing or having reason to know, whereas perjury would require actual knowledge. In addition, perjury would require the statement to be material where false swearing would not. However, he pointed out that it was still necessary to resolve what constitutes a sworn statement.

Mr. Johnson's opinion was that the definition probably was all right as written.

Mr. Wallingford thought the problem had been raised by the deletion of "legally authorized." He felt that term was still preferable since it would cover any legally authorized mode of giving an oath. Anyone who is required to give an oath is going to have to give it on the basis of legal authority, he said. If it can be shown that the oath was legally authorized by statute then it is a sworn statement. The draft referred not to the form or the mode of the oath, but only to the legal authority to give it, he explained.

Senator Yturri entered the meeting at this time and was asked his opinion of the problems which were being discussed. It was explained to him that the subcommittee had decided to have only the two crimes -- perjury and false swearing -- and the differences were pointed out. He was then asked if in his opinion there should be any distinction between official proceedings in the crime of perjury.

There was a discussion about falsely signing a deed, where the signer did not own the property or where he knew the description was wrong. Senator Yturri was rather shocked at the idea of making that act a felony. It seemed to him that it would be a civil matter, he said. The man actually has not sworn to anything in the execution of the deed. There is an acknowledgment only.

Chairman Carson thought that acknowledgment was made upon an oath.

Senator Yturri noted that the acknowledgment on a deed simply states that a certain person appeared before the notary on a certain day and acknowledged to him that the forgoing was true.

Chairman Carson wondered how this would apply to a corporate officer. The standard form of acknowledgment uses language such as "_____ who being first sworn, personally appeared before me on such a date and stated that he is the president...."

Senator Yturri explained that if that person were not the president, that would be the only thing he had sworn falsely to. He has not said anything about whether his corporation owned any property, etc.

Mr. Johnson noted that his not being president must be a material element. He must also have knowledge that his statement is not true. He felt that there was as much culpability involved here as in the case of a witness at a trial who gets into trouble and tries to lie his way out of it.

Senator Yturri agreed that there would be in the situation where a person said he was president, vice president or secretary. In the ordinary deed or bill of sale, however, this would not be the case. He asked about the situation of an attorney signing an affidavit and warned that this is reaching into a civil area that might involve some problems. There are many distinctions in various documents, he said.

Mr. Wallingford pointed out that many of these are not attested to under a sworn oath.

Senator Yturri asked how perjury in the second degree had differed. It was explained that the difference was that the second degree had required a material issue and the first degree had required a material issue in an official proceeding.

Mr. Johnson explained that "statement" as defined in section 1 meant any statement of fact, so that the signing of an affidavit under information and belief would not be covered unless the signer knew that it was not his information, which would be misrepresentation.

Senator Yturri compared the affidavit situation which deals with something in writing and the official proceeding which deals with either an oral statement under oath or a written statement under oath.

Mr. Johnson remarked that it was unrealistic to have perjury penalties so severe that witnesses were never prosecuted in spite of the fact that 75% commit perjury in trials. He repeated that he felt it should be a felony if a person deliberately lied in a trial. He could see no distinction between that person and the one who falsely signs a document in which he has sworn an oath and where the issue is material.

Senator Yturri related one more practical reason which, he said, might have some bearing on the matter. When a person is involved in an official proceeding, he either raises his hand and is placed under oath if his testimony is to be oral, or he files some document under oath. In either case, he realizes the seriousness of it. Affidavits normally involve many different things and what generally happens in those situations is that an attorney tells a client that he needs an affidavit to a certain effect. The attorney prepares it. The client then gets a friend to sign a statement, sometimes with just a quick glance at it before signing. The seriousness of the situation is not so apparent to that person as it is to the witness giving the sworn statement in an official proceeding. It is just as false, but the circumstances under which it was signed normally do not impress upon that individual the seriousness of the oath. He suggested that that might be a sufficient reason for making a distinction.

Senator Yturri called attention to another situation which happens quite frequently. Suppose a man is being prosecuted for having signed an affidavit with respect to a material fact. In spite of the fact that it states on the document "subscribed and sworn to before me", the man says he did not know he was under oath. Should he be treated the same as someone on the witness stand who absolutely knows that he is under oath. He was inclined to think there should be a distinction between those cases.

Mr. Wallingford commented that the problem could be solved by insertion of the word "knowingly", so that it says "knowingly makes a false sworn statement", which would mean that the person has to know that he is making a false sworn statement in addition to knowing the statement is false.

Senator Yturri gave his approval to that idea if something could be added to indicate that he knew he was making the statement under oath.

Mr. Wallingford summarized by saying that he could knowingly make a false sworn statement in regard to a material issue and that as far as the culpability element was concerned, knowingly would apply to false, sworn statement, and material. He would not have to know it was material, however, because material is defined to be an issue of law rather than of fact. The other question, he concluded, is whether we want only one degree of perjury and whether we want to make a distinction between the forum in which it is given.

Chairman Carson suggested sending the section to the full Commission without making a distinction.

Section 5. Unsworn Falsification. Mr. Wallingford explained that this section is directed to written statements with the intent to mislead a public servant. Public servant is defined in the Bribery Article, he said, so there will be a reference to that definition in this section.

Senator Yturri queried Mr. Wallingford about a veteran who might be making an application for a loan. Suppose he sent in his financial statement yet did not mention a particular debt, perhaps in an effort to keep his wife from knowing about it. It would be material and yet he failed to include it.

Mr. Wallingford said that would be an unsworn falsification. As distinguished from perjury, it does not have to be material, but does require an intent to mislead.

Chairman Carson asked about the difference between sections 5 and 6.

Mr. Wallingford replied that the only difference between the two is that section 6 gives authorities, particularly administrative agencies, permission to use penalty provisions on all their forms. He added that perhaps section 5 would not be needed if section 6 were used.

Mr. Johnson favored combining sections 5 and 6. He pointed out that section 6 makes it a crime if it is stated on the form; otherwise there is no punishment. He particularly did not like subsection (2) of section 5, he added.

Mr. Wallingford noted that subsection (2) was rather important, as for instance, on a bar application. The fact that a person left out a felony conviction, which he was fairly sure would not be discovered, would mean that he had failed to put something in with the express intent to mislead, even though he had not made any written false statement.

Senator Yturri reminded that this refers only to official forms. That is why he thought subsection (2) was important. Suppose an application is filed which results in a series of correspondence. Suppose Mr. Johnson writes to the applicant asking about a certain subject. The applicant violates this section if he omits something with the intent to mislead. This situation can arise in correspondence relating to applications as well as applications themselves, he noted. It was his feeling that it should be punishable.

Chairman Carson wondered about the advisability of dropping section 5 but retaining section 6.

Mr. Wallingford preferred to retain section 5 which could be shortened and then also used as a notice. All other unsworn falsification statutes could then be discarded, he said.

Mr. Johnson again objected to subsection (2), reasoning that if a person were filling out a job application but neglected to mention that he had been convicted of a felony, he could be guilty under this section. Unless there were a specific question regarding felony convictions on the form, he saw no reason why an applicant should include that information. He felt very strongly that it was not the business of the agency, but that it was personal. Even if the agency thought it would be relevant, even if the applicant himself thought it relevant, he still felt that it was not necessary to divulge that personal information.

Mr. Wallingford observed that one problem in this area is with the word "mislead." Sometimes we are talking about misleading and other times we are really talking about defrauding.

Mr. Johnson's feeling was that the word "mislead" implies a duty of full disclosure. That is a very difficult standard to apply, he said. For instance, it is unrealistic to ask someone to list all his good and bad qualities.

Mr. Wallingford remarked that this point could be qualified by saying "with intent to obtain a benefit to which he would not otherwise be entitled."

Chairman Carson wondered if by misleading someone in order to obtain a pecuniary benefit, a person would not be defrauding.

Mr. Wallingford replied that he would be. He added that this type of statute is aimed at conduct preparatory to such transactions.

Chairman Carson then asked why not say with intent to defraud.

Mr. Wallingford explained that if there were an intent to defraud, it would be covered under the Attempt and Theft sections of the code.

Mr. Johnson suggested the language, "A person commits the crime of unsworn falsification if he makes any false written statement in an application for pecuniary or other benefit to a public servant in the performance of his duty, knowing or having reason to know it be be false."

Chairman Carson was in favor of that language because, he said, this would force the burden on the agency taking the application. If they want to know about specific situations, let them ask the question, he reasoned.

Mr. Wallingford repeated the amendment, making slight changes: "A person commits the crime of unsworn falsification if he knowingly makes any false written statement to a public servant in the performance of his duty in an application for pecuniary or other benefit, knowing or having reason to know it to be false." He then pointed out that section 6 would not be needed since section 5 could be used instead. It was agreed to delete section 6.

Section 7. Perjury and false swearing; irregularities no defense. Chairman Carson asked that the word "equivalent" be deleted from subsection (3). This section was then approved as amended.

Section 8. Perjury and false swearing; previous trial. Mr. Wallingford explained that this section did not apply to collateral issues.

Mr. Johnson cited the recent anti-trust case in Portland where Judge Solomon ordered defendants charged with perjury after they had lied in a misdemeanor case.

Mr. Wallingford said it seemed to him that there was an element of double jeopardy where you are talking about a statement that goes only to a man's guilt or innocence. If a defendant pleads innocent and is acquitted, how can he be tried for perjury for denying that he committed the crime, he asked. It has already been determined once that he was innocent. Of

course, he said, some would argue that this was not necessarily determined by the first trial. It was only determined that the jury was not convinced beyond a reasonable doubt that he was guilty.

Chairman Carson visualized the defendant at trial with the additional problem of the DA threatening him by saying, "We may not be able to convict you on this charge, but if we don't, and you keep saying you are not guilty, then we will see to it that you are charged with perjury."

Mr. Johnson wondered if the anti-trust case he mentioned earlier would indicate that a perjury charge was justified.

Chairman Carson could understand it, he said, if it did not relate to the matter of his guilt or innocence. He could see how a perjury suit could grow out of a trial. But what of the "not guilty" plea, he asked.

Mr. Johnson reminded him that the defendant must have taken the stand and must have been under oath.

Mr. Wallingford called attention to the possibility that this statute might create problems for the court. In each case, they will have to determine whether the particular false statement was a denial of guilt, or related to a collateral issue.

It was decided to continue discussion of this section at the next meeting. The subcommittee adjourned at 4:50 p.m.

Respectfully submitted,

Connie Wood
Criminal Law Revision Commission