Tape No. 81

Both sides

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 2

Eighth Meeting, September 16, 1969

Minutes

Members Present: Representative Wallace P. Carson, Jr., Chairman
Senator Kenneth A. Jernstedt
Representative Harl H. Haas
Mr. Thomas D. O'Dell, Chief Trial Counsel, Attorney General's Office (Representing Attorney General Lee Johnson)

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

		Page
Agenda:	Perjury & Related Offenses; P.D. No. 1. (Art 22)	1
	Bribery & Corrupt Influences; P.D. No. 2.(Art 21)	22

The meeting was called to order at 1:30 p.m. by Chairman Carson in Room 319, Capitol Building, Salem.

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

Chairman Carson recalled that the first seven sections of the draft had been considered by the subcommittee at its meeting on July 18, 1969. At Mr. Paillette's suggestion, the members refreshed their memory of the previous discussion on the draft by scanning the minutes of the July 18th meeting. Chairman Carson requested Mr. Wallingford to quickly review the draft sections and changes previously approved.

Section 1. Perjury and related offenses; definitions.

Mr. Wallingford advised that some changes had been made in the definition of "sworn statement" and that the amended definition reads: "'Sworn statement' means any statement knowingly given under oath or affirmation attesting to the truth of what is stated."

The definition of "statement" remains about the same, he said, with just the addition of the phrase "of fact and" following the word "representation" so that the subsection now reads: "'Statement' means any representation of fact and includes a representation of opinion...."

The definition of "material" was changed to read: "'Material' means that which could have affected the course or outcome of the proceedings or transaction."

Subsection (4) of section 1, the definition of "official proceeding", was deleted by subcommittee action.

Section 2. Perjury in the second degree. Section 3. Perjury in the first degree.

Mr. Wallingford stated that these two sections had been combined so that there will be but one degree of perjury. This does away with the distinction that had been made between perjury in an official proceeding and perjury under oath in situations other than official proceedings.

Section 4. False swearing.

Mr. Wallingford pointed out that no change had been made in this subsection other than to delete the colon following the word "if" so that the section will contain but one sentence.

Section 5. Unsworn falsification.

Chairman Carson asked the difference now between "perjury" and "false swearing".

Mr. Wallingford replied that it is materiality.

Mr. Paillette noted that the definition is the same as present law.

Mr. Wallingford recalled that Mr. Johnson had suggested an amendment to section 5 and referred the members to page 11 of the minutes of July 18, 1969, where the discussion on the subsection is set out. The amended section reads: "A person commits the crime of unsworn falsification if he knowingly makes any false written statement to a public servant in connection with an application for pecuniary or other benefit." The language "with intent to mislead" was deleted from the section.

Section 6. Punishable unsworn falsification.

Mr. Paillette understood that this section had been deleted and Mr. Wallingford agreed.

Section 7. Perjury and false swearing; irregularities no defense.

Mr. Wallingford advised that the only change made in this section by the subcommittee was the deletion of the word "equivalent" in subsection (3) so that the subsection now reads: "The oath or affirmation was taken or administered in an irregular manner; or".

Approval of Minutes of July 18, 1969

Representative Haas moved the adoption of the minutes of the subcommittee meeting of July 18, 1969. The motion carried unanimously.

Section 8. Perjury and false swearing; previous trial.

Representative Haas asked if this provision would get at the instance where a witness is asked if he has ever been convicted of a felony and he replies that he has not.

Mr. Wallingford replied that this would apply to a situation in a criminal trial where the answer went to the core issue of whether he was or was not guilty. He noted that Oregon presently has no such statute and added that the only case that is really in point is State v. Reynolds and the testimony in this case went to a collateral matter. It was held that this could be a basis for a later prosecution for perjury.

Mr. O'Dell asked how this section would apply to a person who does not make a statement as to guilt or innocence but give an alibi which is "whole cloth".

Mr. Wallingford thought determining whether or not the testimony in question was collateral or whether it went to the core issue of guilt or innocence could get to some very fine points. He added that the MPC does not include this provision but Michigan does.

Mr. Paillette recalled that he and Mr. Wallingford had discussed the section at the time it was being drafted and while he could not enthusiastically support the provision, both he and Mr. Wallingford felt the matter was one that should be brought before the subcommittee for consideration. Mr. Paillette did not think Oregon had the problem of a large number of criminal prosecutions based on someone's testifying that he was not guilty.

Mr. Wallingford agreed with Mr. Paillette's evaluation; adding that such situations would be rare and in those rare situations a statute like this might create more problems than it would solve.

Representative Haas understood that all the section's provisions would do would be to prevent a district attorney from relitigating an issue--on the issue of an alibi, for example, where he failed to get a defendant convicted on the crime charged but perhaps could get another jury to convict this defendant on a perjury charge. He asked what was wrong with a district attorney doing this.

Mr. Wallingford remarked that this type of situation does occur. He directed attention to page 31 of the draft which lists a number of Oregon statutes granting immunity to witnesses. Some of these statutes specifically exempt perjury.

Mr. O'Dell asked if a false statement made by a person on the stand to the effect that he "was not here, I was in Phoeniz, Arizona," did not run directly to the material issue and if this was not, in fact, a lie under oath.

Representative Haas observed that this would have been submitted to the jury which acquitted him.

Mr. O'Dell commented that the jury might acquit the person on an entirely different material allegation and Mr. Wallingford agreed that not knowing why an individual was acquitted would be one problem. It was Mr. O'Dell's off-hand opinion that this should be left to the sound discretion of the district attorney in any given case. He did not believe there was any history of abuse in this area.

Mr. Paillette had pretty much the same reaction. He did advise, however, that Michigan has this provision.

Mr. Wallingford added that the weight of authority in the United States would be contra to this; this is not a very common type of statute.

Chairman Carson had no strong feelings on this matter, one way or the other, nor did Senator Jernstedt or Representative Haas. Chairman Carson recalled that at the last subcommittee meeting Mr. Wallingford had raised the point that it would be difficult for the court to determine what is basically a collateral matter and what goes to the heart of the matter and to grant protection.

Representative Haas wondered if a problem might arise where the district attorney's office might be surprised and not have adequate opportunity to refute the testimony which led to the acquittal. Subsequently, enough evidence might be gathered to show the testimony was a complete fabrication.

Mr. O'Dell thought the district attorney would be protected because of recent legislation requiring five day's notice of alibi. He noted, however, that there are many issues other than alibi that might be testified to by the defendant.

Chairman Carson understood that Mr. O'Dell, for Mr. Johnson, favored deleting section 8 and Mr. O'Dell agreed. Since there were no objections, Chairman Carson announced that section 8 would be eliminated, leaving this discretion to the district attorneys.

Section 9. Perjury and false swearing; corroboration required.

Mr. Wallingford read section 9 and stated that this was, in effect, a reiteration of the existing corroboration rule in Oregon.

He advised that there is a good deal of conflict between the states on this rule. The Advisory Committee on the MPC recommended eliminating this rule.and this position was supported by their counsel but their reporters favored retention and in the end the provision was retained in the MPC. The Commissioners on Uniform State Law in the Model Act on Perjury eliminated the rule but the two witness rule has been retained by Michigan and New York.

Mr. O'Dell commented that the difficult problem with this is that there is some conflict as to what must be witnessed to--the perjured statement or the act. He felt this should be clarified.

Mr. Wallinford stated that it is usually spoken of as just an oath against an oath. If circumstantial evidence is to be used as evidence of falsity, then the rule does not apply. He advised that section 9 is worded a little differently from the present statute on perjury which says: "Perjury shall be proved by the testimony of two witnesses, or one witness and corroborating circumstances."

Chairman Carson wondered why the draft language was preferable to that in the present statute.

Mr. PaiLette drew attention to page 34 of the draft commentary and quoted from Perkins on Criminal Law, Foundation Press (1957) 393:

> "(The rule) should, however, be limited to the situation for which it was designed, namely to prevent a conviction of perjury when there is no evidence other than the word of one witness against that of defendant. It has no place in a case in which the falsity of defendant's testimony can be established by evidence of another kind."

Mr. Wallingford assumed that the rule evolved from situations involving unhappy litigants--people being unhappy about someone's testimony being adverse to theirs. He felt there would be a good deal of this in domestic relations cases.

Mr. Wallingford admitted that there is quite a split of authority regarding this matter, even now. The Michigan Revised Criminal Code, section 4920, adopted the provision and their Committee Commentary, pp. 402-3, reflects the rationale for its adoption:

> "The policy question to be decided is whether the protection of witnesses counter-balances the occasional inability to convict an apparent perjurer....The Committee feels that the policy issue...should be decided in favor of inducing free witness testimony."

Chairman Carson asked the derivation of the language in section 9. He had a great deal more difficulty, he said, understanding the section

as written, than he did understanding ORS 162.160, the MPC or the Michigan or New York sections.

Mr. Wallingford replied that the section was based, mainly, on the Michigan statute, section 4920.

Representative Haas noted the section is the same as the present ORS except that it includes the fact that with a sworn inconsistent statement, prosecution is not precluded.

Mr. Wallingford agreed--this was included because presently Oregon has no perjury provisions for inconsistent statements.

Mr. Paillette suggested the subcommittee might want to take a look at section 10 of the draft to see the provision for inconsistent statements before taking action on section 9. (See pp. 13-15 of these minutes for additional discussion on section 9.)

Section 10. Perjury and false swearing; inconsistent statements.

Mr. Paillette advised that he and Mr. Wallingford had discussed this section a good deal, also, during the drafting stage. It was felt that the committee members should examine the different approaches in this area before making a decision as it really involved a fairly fundamental policy decision.

Mr. Wallingford explained that this section would provide a means of bringing a prosecution where a person has made two sworn, inconsistent statements and it is not known which of the two statements is untrue. "The highest offense of which a person may be convicted is determined by hypothetically assuming each statement to be false"; in other words, there can be different degrees of falsity and the individual can only be convicted of the lesser degree.

Chairman Carson asked for an explanation of ORS 132.690.

Mr. Paillette read from the Criminal Code of Oregon, ORS 132.690:

> "In an indictment for perjury or subornation of perjury it is sufficient to set forth the substance of the controversy or matter in respect to which the crime was committed, in what court or before whom the oath alleged to be false was taken and that the court or person before whom it was taken had authority to administer it, with proper allegations of the falsity of the matter on which the perjury is assigned; but the indictment need set forth neither the pleadings, record or proceedings with which the oath is connected nor the commission or authority of the court or person before whom the perjury was committed."

Representative Haas referred to the draft commentary on page 46 and read: "By dicta, p. 232, the Court quoted 2 Wharton Criminal Law, 2275, to the effect that, 'and it is said, when a defendant has made two distinct statements under oath, one directly the reverse of the other, it is not enough to produce the one in evidence to prove the other to be false.'" He understood that this was the policy question the subcommittee was being asked to make and Mr. Paillette agreed.

Mr. Wallingford observed that there have been no Oregon cases in point; it has been discussed collaterally several times but reference is usually made to the common law which didn't provide for this sort of thing.

Chairman Carson asked if adoption of the section would run any risk in any civil matter where a litigant might be confused; i.e., a statement is made in a deposition regarding a relatively collateral matter but later at the trial, and perhaps upon reflection, the individual changes his statement regarding this matter.

Mr. Wallingford thought that the burden of proof, as far as perjury, would be the same. It would be necessary to prove that the defendant knew that one of his statements was false.

Mr. O'Dell thought it would be necessary to prove a felonious intent or knowing.

Chairman Carson was not sure that the provisions in section 10 did not remove this burden of proof--would not the mere presentation of the conflicting statements be sufficient for prosecution.

Mr. Paillette felt that the prosecutor would have to prove that not only was one of the statements false, as opposed to being simply an erroneous or mistaken statement, but also, that it was known to be false by the defendant.

Representative Haas suggested that perhaps the word "wilfully" or "knowingly" should be inserted in subsection (1) of section 10.

Mr. Paillette drew attention to the language "and known to be false by the defendant" contained in subsection (1) of section 10 and wondered if this did not take care of the problem.

Chairman Carson was not convinced, noting that the witness would always know that two conflicting statements could not both be right but he would not know the first statement to be wrong at the time he made it.

Mr. Paillette admitted there might be a better way of stating it. He felt the mens rea requirement was contained in the language

"known to be false" appearing in subsection (1); the question as to when the individual knew this, however, might be a valid one.

Mr. Wallingford felt that to be guilty the person must know his statement is false at the time he makes it, not at some later time. He was not certain, however, that the draft language made this clear.

Mr. Paillette referred to the draft commentary on page 43 and read:

> "The Arizona statute, for instance, simply provides that one who makes contradictory statements under oath is guilty of perjury, and the prosecution need not show which one was true or false. The accused is also permitted to assert as an affirmative defense that at the time he made each statement he believed it to be true...it appears to shift the burden of proof from the prosecution to the defendant, and may be objectionable on this ground...."

Mr. Paillette added that he thought the proposed statute would be a desirable one. He did not think it would be unfair to a defendant or destroy the discretion of the district attorney re which perjury cases to prosecute or which not to prosecute.

Chairman Carson felt it might be fine in a big criminal trial but he noted the statute, if adopted, would apply to all cases, civil and criminal.

Mr. Wallingford commented that one criticism of the rule is that it might encourage consistency rather than truth.

Representative Haas observed that it was a prima facie situation--the state by presenting conflicting statements does not have to go further.

Mr. O'Dell thought perhaps this should be qualified in some way.

Chairman Carson stated that he would go along with the provisions of the proposed section as long as it is clear that it is not intended to catch an individual in an inconsistency where he recognizes that his first statement was false and where he admits the falsity of his first statement because he was mistaken. He should not face a charge with a district attorney just proving an inconsistency--the district attorney should have to prove that at the time the individual made the statement, he knew it to be false.

Mr. Paillette suggested that the second sentence in subsection (1) of section 10 could be amended to read: "It shall be sufficient to set forth the inconsistent sworn statements and allege in the alternative that the defendant knowingly made the false statement."

Mr. O'Dell was of the opinion that such an amendment would put the prosecutor right back in perjury and more or less take out the effectiveness of the statute.

Representative Haas asked the meaning of the phrase "in the alternative".

Chairman Carson replied that it meant either one or the other of the statements made was false. He added that this was the crux of the matter in that a district attorney would not have to prove the falsity of either statement. After producing the fact that there were two inconsistent statements made, and that they were knowingly made, a district attorney could rest.

Mr. Wallingford stated that there is some protection provided for the innocent victim of the inconsistent statements. The prosecution cannot rely solely upon the introduction of two inconsistent statements; it must also prove that the defendant could not have honestly believed each statement to be true when made.

Chairman Carson asked where this protection was provided in the language set out in section 10.

Mr. O'Dell felt there had to be some reliance on the sound discretion of the grand juries and the district attorneys to bring charges only in cases where it is obvious that prosecution should ensue rather than to make charges on every false statement. He felt the only danger with the statute would be where there were two very antagonistic litigants and one is able to exert pressure of some sort.

Chairman Carson repeated his contention that the only time the proposed statute would be of help to a prosecutor was when he did not know the facts--did not know which statement was false. If he did know which statement was false and could prove this, he could proceed under the perjury statute. If the prosecutor could prove anything more than the inconsistency of the statements, he would not need the provisions set out in section 10.

Mr. O'Dell agreed that this was true but added that putting any amendment in the section would result in just putting in another perjury statute.

Chairman Carson noted that page 38 of the draft set out a discussion of retraction and that section 241.1 (4) of the MPC reads:

> "No person shall be guilty of an offense under this Section if he retracted the falsification in the course of the proceeding in which it was made before it became manifest that the falsification was or would be exposed...."

Mr. O'Dell commented that this type of language vagueness is the reason Oregon no longer has a "contributing" statute.

Mr. Paillette observed that Michigan does not use this kind of language. The Michigan Code, section 4920, states that: "No person shall be convicted of perjury if he retracted his false statement in the course of the same proceeding in which it was made."

Representative Haas moved to delete section 10 of the proposed draft, feeling that the adoption of the section would be putting pressure on the witness to be sure his statements were consistent rather than truthful. Without the section's provisions, it is necessary that the district attorney prove which conflicting statement is untrue. Representative Haas felt this burden should fall in the face of encouraging witnesses to tell the truth on the stand even though it means testifying directly opposite of previous testimony.

Mr. O'Dell thought the section would be a valuable statute if the problems could be worked out. He felt it was needed as the problem of inconsistent statements is a common one, particularly in criminal cases. He suggested that rather than striking the section that it be limited to criminal proceedings. It should not be overlooked that inconsistent statements made under oath are a serious business. He related that, as an example, he is presently working on a murder case where he has fourteen statements from one person, all under oath, all inconsistent.

Mr. Wallingford referred to the draft commentary on page 44 and read:

> "....Is there, then, a legitimate goal other than to compel witnesses to tell consistent stories? The minimum goal would appear to be that suggested by Judge Augustus Hand in the Buckner case, namely to make it possible to submit to the jury a case where declarant has made contradictory statements under circumstances strongly suggesting that one or the other was wilfully false. If each statement must be treated as an isolated possible offense, charged in separate counts, subject to judicial compulsion on the prosecutor to elect which count he will proceed on before the case goes to the jury, consideration of the case is unrealistically compartmentalized."

Chairman Carson tended to favor retention of the section for consideration by the full Commission if it could be amended so that a witness could not be prosecuted on inconsistent statements alone.

Mr. O'Dell suggested amending subsection (1) of section 10 by changing the second sentence to read: "It shall be sufficient to set forth the inconsistent sworn statements and allege in the alternative that the defendant knew one or the other to be false when given."

Mr. Paillette thought this suggested language might be desirable although he felt the draft language was actually more defense oriented than that used by Michigan or the MPC. The MPC requires that "it shall not be necessary for the prosecution to prove which statment was false but only that one or the other was false and not believed by the defendant to be true."

Chairman Carson referred to the text of the New Jersey Penal Code and read:

> "Proof that both statments were made under oath duly administered is prima facie evidence that one or the other is false; and if the jury are satisfied from all of the evidence beyond a reasonable doubt that one or the other is false and that such false statement was wilful...it shall be sufficient for a conviction."

Mr. O'Dell felt that at the trial of a civil case if a witness testified contrary to his deposition the opposing party would impeach him because of the contrary statement or his own lawyer would give him the chance to explain away the inconsistency so that he would thereby have a defense built in under oath explaining his mistake. He felt that perhaps the subcommittee was reading too much hazard into the section. It is really designed, he said, to take care of those people who have given a statement under oath and then when they see the consequences to someone they are close to, take the stand and lie. If the prosecutor, at the open trial, cannot really prove the falsity of one of the statements made, the problem arises.

Mr. Paillette stated that from the standpoint of alleging the requisite culpability on the part of the defendant, the definition of "knowingly" as defined in the Article on Culpability would get to this. He suggested that the second sentence in subsection (1) of section 10 be amended to read: "It shall be sufficient to set forth the inconsistent sworn statements and allege in the alternative that one or the other is false and that the defendant knowingly made the false statement."

Chairman Carson wondered how, if the prosecutor does not know which statement is false, he could prove the witness knowingly made a false statement.

Mr. O'Dell thought Chairman Carson was arguing with the concept of requiring someone to prove perjury under section 10 and the section is not designed to do this--it is designed to prove inconsistency.

Chairman Carson stated, then, that the prosecution must be able to show the conflicting statements; the fact that they are inconsistent proves one is false; it is also evidence for the jury to believe that one statement was wilfully false.

Mr. O'Dell said that it would be evidence on the issue of false statement but not conclusive.

Chairman Carson replied that it would be prima facie evidence. All a prosecutor would have to do would be to introduce the evidence of the inconsistent statements and rest. The defendant would then have to come forth to explain his conduct.

Mr. O'Dell did not feel this was necessarily true. He pointed out that there are other statutes where just proving the content of the statute makes it prima facie. The best example, he continued, is the statute on intoxication which requires only the showing of 1.5 alcohol content and the fact that the individual was driving on a public highway. In practice, however, other things must be proven in order to obtain a conviction.

Mr. Paillette read the definition of "knowingly" contained in the Culpability Draft, P.D. No. 4: "'Knowingly' or 'with knowledge', when used with respect to conduct 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." The use of the word "knowingly" in subsection (1) of section 10, then, would require that the defendant knew the statement was false when he made it.

Representative Haas withdrew his motion to delete section 10 and moved the approval of the amendment to subsection (1) of section 10 suggested by Mr. Paillette.

Mr. O'Dell suggested substituting the language "a false statement" for the words "the false statement" contained in the suggested amendment in that he thought the use of the language "the false statement" might require the state to identify the true and false statement, which is not the intent of the section.

After a discussion regarding the desirability of exchanging the word "the" for "a" or "such", the phrase "the false statement" was retained in the amendment. The amendment was unanimously adopted and subsection (1) of section 10 will read: "It shall be sufficient to set forth the inconsistent sworn statements and allege in the alternative that one or the other is false and that the defendant knowingly made the false statement."

Representative Haas moved the adoption of section 10, as amended, and the motion carried unanimously.

Chairman Carson asked the subcommittee members if they wished to give additional consideration to the subject of a section on Retraction.

Representative Haas made the comment that it was too bad a provision of this sort was not provided as it seemed to him that the approved approach was placing a premium on consistency.

Mr. O'Dell agreed that while it would take the emphasis off consistency, he wondered if a retraction section might not render section 10 ineffective by giving a witness the right to recant and then to tell an inconsistent or perhaps false story the second time.

Representative Haas asked if a retraction must be made in an open court and if a retraction statute would give a witness carte blanche immunity from prosecution for perjury.

Mr. Wallingford replied that it would if the retraction were in compliance with the retraction statute; for instance, the MPC states that: "No person shall be guilty of an offense under this Section [the law of perjury] if he retracted the falsification in the course of the proceeding in which it was made...." The Illinois Criminal Code, section 32-2 (c), says: "Where the contradictory statements are made in the same continuous trial, an admission by the offender in that same continuous trial of the falsity of a contradictory statement shall bar prosecution therefor under any provisions of this Code."

Since there apparently were no strong feelings one way or another about including a section on retraction in the draft, Chairman Carson moved on to additional consideration of section 9.

Section 9. Perjury and false swearing; corroboration required.

(Please see pages 4-6 of these minutes for additional discussion this section.)

Mr. Wallingford explained that this section, the corroboration rule, sets out the amount of proof required for conviction on perjury.

Chairman Carson was of the opinion that the section could be drafted in a more understandable manner and recommended that the wording in Michigan's section 4920 be followed so that the section would read: "In any prosecution for perjury or false swearing, except a prosecution based upon inconsistent statements pursuant to section 10, falsity of a statement may not be established solely through contradiction by the testimony of a single witness." Chairman Carson asked Mr. O'Dell if he were satisfied that the proof required by the proposed statute was not proof of the statement made but proof of the falsity of the statement made.

Mr. O'Dell replied that it would be proof of the falsity of the statement made based upon proof of the act to which it referred.

Senator Jernstedt moved the approval of the amendment to section 9 as suggested by Chairman Carson. The motion carried unanimously.

Senator Jernstedt then moved the adoption of section 9 as amended and this motion also carried unanimously.

Mr. Wallingford said that it was his understanding, now, that the subcommittee did not feel a section dealing with retraction was needed.

Chairman Carson indicated this was his feeling but Representative Haas said he would like to see something done in this respect.

Senator Jernstedt asked if under present law there is any way for an individual to retract a prior statement as he could understand how someone could make a statement under duress and later want to retract it.

Mr. O'Dell asked how a retraction section would work with respect to a deposition--could the individual retract his deposition at the trial?

Representative Haas replied that there are several statutes on this; one comments directly on this and states that it is the same proceeding so a witness could retract his deposition statement later and it would be considered the same proceeding.

Mr. O'Dell stated that if a deposition statement were retracted later in the deposition, he did not feel it would be too objectionable; however, allowing a retraction later on would, he thought, encourage false statements as much as it would protect against them.

Mr. Wallingford agreed that this was the other side of the coin--the individual is encouraged to lie in the hope that he will not be found out and if it looks as if he is going to be found out, he has the out of retraction.

Mr. Paillette answered Senator Jernstedt's question by stating there is nothing in Oregon's present law to prevent a person from retracting a perjured statement nor would there be if no specific provision were provided to prevent such a retraction. He admitted that there would be nothing to prevent a district attorney from prosecuting later although he felt a good deal of the "sting" would be taken out of a prosecutor's case it it could be shown that the defendant had voluntarily retracted his false statement.

Representative Haas was of the opinion that the subject of a retraction section should be brought up for Commission consideration.

Representative Haas will bring up the subject and explain his feelings in this regard when the Perjury Draft is considered by the Commission.

Section 11. Rendering a false report.

After some discussion it was decided that the comma appearing after the word "if" should be deleted and a comma inserted after the word "false" so that the first sentence of section 11 would read: "A person commits the crime of rendering a false report if knowing, or having reason to know, it to be false, he:".

Mr. Wallingford explained that subsection (1) of section 11 would deal with false fire alarms or other agencies dealing with emergencies and subsection (2) would deal with false reports to law enforcement agencies.

Representatative Haas understood that paragraph (a) of subsection (2) would apply where an actual offense or incident occurred and a person gives false information concerning it or falsely implicates some person in it. Mr. Wallingford agreed with this interpretation.

Chairman Carson inquired as to the meaning of the word "gratuitously" as employed in subsection (2).

Mr. Wallingford replied that it meant "voluntarily" and had no economic connotation; it refers to an unsolicitated report which originates with the person giving the report rather than resulting from an investigative question.

Chairman Carson questioned the use of the word "alleged" used in paragraph (a) of subsection (2). He felt the proscribed conduct was the giving of false information relating to an actual offense or incident or making a false implication for falsely accusing some person.

Mr. O'Dell felt the whole section could be condensed somewhat and still say the same thing. He wondered if there was not a federal statute regarding false reports, bomb scares, etc., that might be used as a model.

Chairman Carson noted the language "an official or volunteer fire department" appearing in subsection (1) and asked if a "volunteer" fire department was not an "official" department.

Mr. O'Dell understood that it would depend upon whether or not the department was under a Fire Control District.

Chairman Carson observed that the provisions of the section would cover a false alarm of fire or other emergency or the reporting of

false information to any law enforcement officer or agency and he wondered if it were desirable to have such broad coverage in the statute.

Representative Haas felt the offense to be false "alarms" rather than false "reports".

Mr. Wallingford thought this made more sense in relation to subsection (1), the giving of false fire alarms, than it would to subsection (2), reports to the police. The present Oregon statute on false alarms, he said, is ORS 476.740 and it reads: "No person shall wantonly or maliciously transmit or cause to be transmitted by any means a false alarm of any emergency to any municipal fire department or rural fire protection district within the State of Oregon."

Chairman Carson wondered if perhaps this was not better language than that used in the draft--he was not certain that the word "volunteer" was an official designation for a fire department.

Senator Jernstedt felt it would be just as important to cover false reports affecting the use of equipment belonging to logging operators, private ambulance operators, etc. Perhaps the section's provisions should proscribe turning in a false alarm to both public and private agencies.

Mr. Wallingford advised that there are two reasons given for this type of legislation: first, the waste of government resources and, second, the creation of situations where personnel and equipment is not available for real emergencies.

Representative Haas asked if broadening the statute's coverage to include false reports to private agencies would not be unique in criminal law. Usually there are civil remedies available where a person does something obviously malicious against the private sector.

Mr. O'Dell was concerned about the enforceability of such a provision--most such malicous acts are done anonymously. He wondered, also, if this conduct is a real threat to those in the private sector.

Mr. Wallingford advised that subsection (1) of section 11 was derived from Michigan and subsection (2) from New York. Section 11, then, combines into one section what the other revisions place in separate sections. He noted, also, that the Oregon statute on false fire alarms (ORS 476.740) is not in the Criminal Code.

Mr. Paillette referred to section 241.4 of the MPC and pointed out that it does not appear to limit its provisions to public agencies:

"A person who knowingly causes a false alarm of fire or other emergency to be transmitted to or within any organization, official or volunteer, for dealing with emergencies involving danger to life or property commits a misdemeanor."

MPC section 241.5 (1) covers "Falsely Incriminating Another" and section 241.5 (2) covers "Fictitious Reports".

Chairman Carson said he thought the House Judiciary Committee had passed out a bill during the last session having to do with false reports and suggested someone check to see what happened to the bill in the Senate.

Mr. O'Dell stated that the Portland Municipal Code has a good statement regarding fire and police reports as a municipal violation and suggested this might be a source to be looked at.

Chairman Carson suggested redrafting section 11, fitting it around the approach taken by the MPC as far as the false alarm situation is concerned. In regard to the area of false reports, he favored taking a look at the measure which passed the House.

Representative Haas pointed out that the Wisconsin Criminal Code, section 346.30 (a), provides up to six months imprisonment for giving false information to law enforcement officers, "regarding the commission of a crime or a fictitious crime with intent to induce the officer to act in reliance thereon." He questioned whether it was the subcommittee's desire to go this far with respect to oral statements. He asked if it is now possible to prosecute on an oral statement made to a police officer.

Mr. Wallingford replied that it is not now possible. He added that the Canadian Criminal Code is even more strict than that of Wisconsin in that it has a five year maximum penalty for giving false information to a public officer.

Mr. O'Dell believed it possible to prosecute presently in Portland under a municipal ordinance.

The subcommittee recessed at 3:50 p.m. to give Mr. Paillette an opportunity to check out the House Bill relating to false reports mentioned by Chairman Carson and to work on new language for section 11 of the draft. The subcommittee reconvened at 3:30 p.m.

Mr. Paillette explained that his proposed revision of section 11 was based on the MPC and read:

"A person commits the crime of rendering a false report if he knowingly causes a false alarm or report to be transmitted

to a fire department, law enforcement agency or other organization that deals with emergencies involving danger to life or property."

Mr. O'Dell wondered if the revised version should contain the language "having good reason to believe".

Mr. Paillette agreed that the language could be inserted but thought the use of the word "knowingly", as defined in the Culpability Draft, would raise the question of whether there was enough evidence to get to a jury, anyway.

Mr. O'Dell commented that the statutes on receiving and concealing have been up on this point and it has been held that "having good reason to know" is sufficient.

Mr. O'Dell had also worked on some revised language for section 11 and noted that it was very similar to that of Mr. Paillette's:

"Any person who knowingly, or having good reason to know, makes or causes to be made a false report or alarm to any... is guilty of a misdemeanor."

Mr. Wallingford asked if this could cover the situation where a person makes a response to a police officer investigating a crime.

Mr. Paillette replied that if a person makes a knowingly false report in response to questioning, this should not be excluded. He felt the culpability would be the same.

Representative Haas moved section 11 be amended as suggested by Mr. Paillette. The motion carried unanimously.

Representative Haas then moved the adoption of section 11 as amended although he admitted that the provisions still concerned him somewhat. He understood that the revised section would have the effect of enlarging the present situation to where an oral statement to a police officer, requested and solicited by the officer, could be the subject of prosecution.

Mr. Paillette agreed that he thought this could be so under the proposed section.

Representative Haas thought that the effect of the section would be that every time a person talked with a police officer, he would, in essence, be testifying under oath, subject to the penalty of being prosecuted for his statement if it were in error.

Mr. O'Dell wondered if this would be solved by qualifying the report or alarm--using the language "initial" or "initiating", for example.

Chairman Carson commented that he had no sympathy for the person who intentionally lies in the course of a police investigation. It should not be possible to verbally lie to a police officer when the same statement if put in writing could subject the maker to prosecution.

Mr. Wallingford observed that that is what the law of perjury says--a person may lie as long as he is not under oath. The provisions of section 11, as proposed, are a further extension of falsification by getting into the area of oral, unsworn falsification.

Representative Haas pointed out that there are safeguards in perjury; the individual is in a court of law and of record; he is under oath and his testimony is transcribed. He posed a situation where a police officer takes a written statement from a witness that turns out to be false and asked if the witness could be prosecuted for this. He felt this to be a different situation from that where a person makes a police report, initiating law enforcement action on his assertion.

Mr. O'Dell said that to his knowledge a witness could not now be prosecuted for the uninitiated police report later shown to be false.

Chairman Carson referred to section 5, Unsworn falsification, approved by the subcommittee, and made the point that there is an unsworn, written falsification crime.

Representative Haas contended that in these situations the individuals involved are a party to the situation; it is a fraud situation and they are involved for their own pecuniary benefit. He felt section 11, as amended, went beyond giving the law officer the same protection as that given the fire department.

Mr. Paillette agreed that this was so and thought Representative Haas had a legitimate objection.

Mr. O'Dell was of the opinion that the amendment to section 11 was directed to the emergency situation and suggested deleting the word "causes" after "knowingly" and inserting the word "initiates" so that the amended version of the section would read:

> "A person commits the crime of rendering a false report if he knowingly initiates a false alarm or report to be transmitted to a fire department, law enforcement agency or other organization that deals with emergencies involving danger to life or property."

Chairman Carson suggested, additionally, that the term "rendering" be changed to "initiates".

Representative Haas moved the adoption of the amendment as proposed by Mr. O'Dell and amended by Chairman Carson. The motion carried unanimously.

Representative Haas moved the adoption of section 11 as amended and this motion also passed unanimously.

Section 12. Criminal impersonation.

Mr. Wallingford advised that a "public servant" is defined in the Bribery Article. He noted there are a good many impersonation statutes, many of which do not involve public servants but do involve private organizations.

Mr. Paillette explained that the subject of criminal impersonation was discussed several months ago by subcommittee No. 1 in connection with Crimes Against Property. The possibility of having a general section like this in Forgery and Related Offenses was considered but it was felt that the crime would not necessarily be connected with an attempt to obtain property under false pretenses. It was thought that a statute prohibiting such things as the impersonation of a police officer should be retained, but in some Article other than that dealing with property crimes. He advised that the subcommittee felt all of the statutes dealing with impersonating a fraternal officer, etc., should be repealed as there are other means of redress available to these private organizations.

Representative Haas noted that the definition of the term "public servant" includes any public officer or employee of government and commented that this was very broad.

Chairman Carson inquired as to the kind of "act" the impersonator must do "in such assumed character".

Mr. Wallingford replied that he must act as a public servant but it would not necessarily have to be an act that the public servant is authorized to do.

Senator Jernstedt asked if there was a law preventing someone from impersonating a representative of a bank or utility company in order to obtain entrance onto private property.

Mr. Paillette replied that it would depend upon the intent for which the impersonation is done. He quoted from the draft on Burglary and Criminal Trespass, T.D. No. 1:

> "A person commits criminal trespass in the second degree if he enters or remains unlawfully in or upon premises.
>
> "A person commits criminal trespass in the first degree if he enters or remains unlawfully in a dwelling."

Subsection (4) of section 1 of the same draft reads:

> "'Enter or remain unlawfully' means to enter or remain in or upon premises when the premises, at the time of such entry or remaining, are not open to the public and when the actor is not otherwise licensed or privileged to do so."

Representative Haas again expressed concern about the broad definition of "public servant" and drew attention to draft commentary on page 56 which states: "The term 'public servant' has been defined in section ___, Bribery and Other Corrupt Influences, to include any public officer or employee of government. 'Government' was defined in the same section to include any branch, subdivision or agency of this state or any locality within it." It disturbed him that impersonating any employee of the government would be a crime. To be criminal, he maintained, conduct should be reprehensible to the public.

Mr. Wallingford noted that the rationale set out in the draft commentary for imposing criminal liability for this type of conduct is two-fold: "(1) It seeks to prevent an unwarranted imposition on people under the guise of proper authority, and (2) It seeks to maintain respect for genuine authority by discouraging discreditable impersonations." He noted, also, that some states restrict their impersonation statutes to impersonation of law enforcement officers.

Mr. Wallingford drew attention to the commentary on page 57 of the draft which discusses the criminal impersonation section as first proposed in the Forgery Article, P.D. No. 1. The section read:

> "A person commits the crime of criminal impersonation if he:
>
> "(1) Impersonates another and does an act in such assumed character with intent to obtain a benefit or injure or defraud another; or...."

The intent required, he said, would get rid of the problem relating to harmless impersonations.

Representative Haas moved section 12 be amended by the addition of the language "with the intent to obtain a benefit or injure or defraud another".

Mr. Paillette suggested that the definitions of "benefit" and "public servant" contained in the Bribery and Corrupt Influences Draft be incorporated by reference.

The motion, including the suggestion made by Mr. Paillette, carried unanimously.

Senator Jernstedt moved the adoption of section 12 as amended and this motion, also, passed unanimously.

Chairman Carson took note of the numerous Oregon statutes prohibiting impersonation and misrepresentation of membership in specified organizations and asked if were the plan to recommend that these statutes be repealed.

Mr. Paillette replied that this was the intent of the draft.

Bribery and Corrupt Influences; P.D. No. 2; August 1969

Mr. Wallingford explained that this draft incorporates the changes recommended by the subcommittee at its meeting of June 10, 1969.

Section 1. Bribery and corrupt influences; definitions.

Mr. Wallingford advised that the definition of "benefit" contained in subsection (1) had not been changed; however, the definition of "pecuniary benefit" in subsection (2) was amended to except political campaign contributions.

Mr. Paillette observed that Michigan got around placing this exception in the statute by inserting a lengthy commentary stating that it was not the intent that political campaign contributions be covered.

Mr. Paillette asked if a candidate reported a bribe as a political contribution, even though it is designated a bribe, if he then would be excluded from prosecution.

Mr. Wallingford thought this would be the case.

Chairman Carson thought this would be correct as he thought everyone, generally, felt that the route to take with corrupt practices was that of disclosure—to force the candidate to disclose all and then let public opinion be the judge.

Mr. Paillette read from the Committee Commentary to Michigan's Bribery Section, No. 4705:

> "On the other hand, a broad interpretation of the benefits described [as] 'any valuable thing' and 'any beneficial act,' could also be used to prohibit 'logrolling', i.e., the offer by a legislator or other official to vote in a particular way in exchange for some 'beneficial act' such as political assistance at the polls, etc. Obviously, bargaining of this nature should not be covered by the bribery statute."

Mr. Wallingford recalled that there were problems with the first draft's definitions of "public servant", "government" and "governmental function". Subsection (3) of section 1, P.D. No. 2, now includes all of this in the definition of "public servant".

Mr. Paillette added that this is really just a restatement of present statutory language.

Section 2. Bribe giving. Section 3. Bribe receiving.

Mr. Wallingford explained that in the first draft the crime of bribery had been put into one section whereas the present draft breaks it down into two sections, one for bribe giving and one for bribe receiving. The new section 2, bribe giving, is the same as the old section 2 (a), but there is a change in section 3, bribe receiving. As he recalled, the subcommittee's problem in relation to bribe receiving as it was first drafted was in relation to its relating back to the word "solicit". Under the revised provisions, he said, it is not necessary to prove an agreement or understanding occurred before a solicitation.

Mr. Paillette agreed, adding that under subsection (1) of section 3, the initial solicitation would be the prohibited act and this could take place before any initial agreement was reached; the person solicits the bribe with the intent that his "vote, opinion, judgment..." will be influenced. Under subsection (2) of section 3, involving an acceptance or an agreement, there would be an understanding, a bilateral agreement.

Section 4. Bribery defenses.

Mr. Wallingford advised that this section formerly was section 2 (c) and (d). Other than putting the provisions in a separate section, no changes were made.

Mr. Paillette, replying to a question by Chairman Carson, said that subsection (1) would get at a situation where a public servant attempts to extort money from an individual. The individual is not then guilty of bribe giving when he pays what is demanded.

Section 5. Rewarding past official misconduct. Section 6. Receiving reward for past official misconduct.

Mr. Wallingford noted that these sections are a restatement of section 4 of P.D. No. 1. The only change is that the offense has been separated into two sections--section 5 for the giving of and section 6 for the receiving of reward for past official misconduct.

Mr. Wallingford pointed out that P.D. No. 1 contained a section on "Intimidation in public and political matters". This

section was deleted because it was felt the conduct would be covered by the coercion statute. The section on "Official misconduct" contained in P.D. No. 1 was eliminated and this same statute is now in a new Article, Abuse of Public Office, and will be considered by subcommittee No. 2 at a later time.

Mr. Paillette pointed out, also, that the Commission had approved the section on coercion as a part of the Kidnapping Draft.

Representative Haas moved the adoption of the draft on Bribery and Corrupt Influences; P.D. No. 2, and the motion carried unanimously.

Sexual Offenses Draft

Chairman Carson asked the status of the draft on sex offenses.

Mr. Paillette replied that P.D. No. 2 on Sexual Offenses has been mailed to Commission members for study and is ready for Commission action. It is restructured somewhat and incorporates the amendments and changes desired by the Commission.

Chairman Carson reported that he had received numerous telephone calls and messages regarding the draft following the publication of a newspaper article on the proposal. One letter in particular, from Judge Felton, he will have copied so that the subcommittee members may have the opportunity to study it.

Mr. Paillette emphasized that it must be kept in mind that everything any subcommittee does or what the Commission does as far as tentatively approving early drafts is subject to further review. Hearings will be held before final approval of the Code by the Commission and the Legislature will have public hearings on what is submitted by the Commission. People will be given ample opportunity to express their opinions.

Future Subcommittee Meeting Date

Mr. Paillette reported that the main backlog now is subcommittee work and urged that as many subcommittee meetings as possible be held. The possibility of having a two day Commission meeting on October 17th and 18th has been discussed.

The date of October 2, 1969, 1:30 p.m., was tentatively set for the next subcommittee meeting, with October 9th to be considered as an alternative date.

The meeting was adjourned at 4:40 p.m.

Respectfully submitted,

Maxine Bartruff, Clerk
Criminal Law Revision Commission