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CRIMES AGAINST THE PUBLIC

ALAN G. KIMBRELL*

I. INTRODUCTION

Crimes against the person, crimes against property, and the so-called "victimless" crimes constitute the vast majority of criminal prosecutions. Although prosecutions for crimes involving corruption or other misconduct in public office and for crimes affecting the judicial system are rare, a comprehensive criminal code must include provisions in these areas. The chapters of the Proposed Code included under "Crimes Against the Public" are Chapters 19 ("Offenses Against Public Order"), 20 ("Offenses Against the Administration of Justice"), and 21 ("Offenses Affecting Government"). Public awareness of this area of the law has been greatly heightened of late by allegations of official misdeeds on both the national and local level, the most familiar being those associated with "Watergate." Because the efficacy of any code must be measured by its practical applicability, this article will attempt to determine whether various factual situations of recent notoriety would, if proven, be covered by the Proposed Code.

Nothing in this article is intended to be, or should be considered as, a comment on the guilt or innocence of any individual or on any pending litigation. The *only* question presented here is whether the Proposed Code would, if adopted as drafted, cover conduct similar to the allegations set forth.

II. THE FACTUAL BACKGROUND

Three indictments in federal court will be examined to determine whether the acts alleged therein would, if committed in Missouri, be crimes under the Proposed Code: *United States v. LaRue*,[1] *United States v. Magruder*,[2] and *United States v. Mitchell*.[3] LaRue was charged with conspiracy "to commit offenses against the United States," "to-wit, . . . that they did corruptly endeavor to influence, obstruct and impede the due administration of justice"[4] by "concealing evidence," preparing false testi-

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1. Crim. No. 556-73 (D.D.C. filed June 27, 1973).
2. Crim. No. 715-73 (D.D.C. filed Aug. 16, 1973).
3. Crim. No. 73-439 (S.D.N.Y. filed May 10, 1973). Other named defendants are Harry L. Sears, Maurice Stans, and Robert L. Vesco.
4. The conspiracy statute is 18 U.S.C. § 371 (1964):

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined . . . or imprisoned . . . .

The "offense against the United States" which was the alleged object of the conspiracy is violation of 18 U.S.C. § 1503 (1964):

> Whoever . . . corruptly or by threats or force, or by any threatening letter

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mony, and paying money "for the purpose of concealing the identities of other participants in the violations charged in said indictment."[5]

Magruder was charged with conspiracy "to commit offenses against the United States." The specific misconduct was the same as that charged against LaRue, with two additions: "influencing" witnesses to give false testimony, and giving false testimony.[6]

John Mitchell, Maurice Stans, Robert L. Vesco, and Harry L. Sears are charged in a 46 page, 16 count, indictment. This article will deal with some of the misconduct personally charged to these individuals.

The specific misconduct personally attributed to Mitchell is that: (1) He arranged for defendant Sears to meet with SEC chairman William Casey "to discuss the SEC's investigation of VESCO, ICC, IOS and others without advising Casey of the fact that such a secret cash contribution [of $200,000] had been made"[7] for the use of the Committee for the Re-election of the President; and (2) he caused John W. Dean III "to communicate with" Casey "to seek postponement of the return date of SEC subpoenas served on employees of ICC in order to prevent or delay disclosure by them of facts relating to the secret VESCO contribution."[8]

Defendant Stans is charged with personally: (1) concealing "the origin of the VESCO contribution from members of the Finance Committee staff," causing "incomplete records to be made," causing "such records to be destroyed," and causing "false and fraudulent reports to be filed with GAO in order to conceal the VESCO cash contribution and the uses to which it was put;"[9] and (2) causing "G. Bradford Cook, Counsel to the SEC to delete all specific references to the $250,000 in cash delivered to VESCO's office on April 6, out of which the secret VESCO contribution was made,[10]

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or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined . . . or imprisoned . . . .

5. Information, United States v. LaRue, Crim. No. 556-73 (D.D.C. filed June 27, 1973) at 2, 3.

6. Information, United States v. Magruder, Crim. No. 715-73 (D.D.C. filed Aug. 16, 1973) at 4, 5.

7. Indictment, United States v. Mitchell, Crim. No. 73-439 (S.D.N.Y. filed May 10, 1973) at 5.

8. *Id.* at 6.

9. *Id.* at 5. These allegations will not be separately discussed. With the possible exception of Missouri election laws, which are outside the scope of this article, the allegations of concealing the origin of the contribution from the staff, causing incomplete records to be made, and causing records to be destroyed are not covered under either present Missouri law or the Proposed Code. However, causing "false and fraudulent reports to be filed with GAO" would be covered as False Declarations if they were submitted on forms "bearing notice, authorized by law, that false statements therein are punishable." PROP. NEW MO. CRIM. CODE § 20.060 (1) (1973).

10. Apparently, according to the allegations in the indictment, $250,000 was delivered to defendant Vesco, and $250,000 was promised to the Committee, but only $200,000 of that amount was actually delivered to the Committee. It is impossible by reading the indictment to determine what happened to the other $50,000.

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from the draft of the proposed SEC civil complaint to be filed against VESCO, ICC, IOS and others"[11] in federal court; and (3) causing Cook "to request the SEC staff not to file transcripts of testimony relating to the said $250,000 with the"[12] federal court.

Both Mitchell and Stans are charged with perjury before the grand jury.

The allegations against Vesco and Sears that will be discussed are that: Vesco offered to give $250,000 "to the Committee for the Re-election of the President with the intent of having MAURICE STANS, JOHN N. MITCHELL and others exert their influence on the SEC on behalf of VESCO, ICC, IOS and others;"[13] Vesco threatened "to disclose the facts surrounding the secret $200,000 cash contribution . . . unless an SEC subpoena issued to VESCO was withdrawn" and Sears relayed the threat to Mitchell;[14] Vesco submitted a memorandum to Donald Nixon threatening "disclosure of the secret cash contribution and other adverse consequences unless the SEC was directed to drop all legal proceedings against VESCO."[15]

The misconduct alleged in these three cases is discussed in the following sections. Section III, entitled "Concealing Evidence," will cover concealing evidence, false statements to investigators, preventing the communication of information to investigators, bribes to conceal the identity of co-conspirators, and false reports to agencies. Sections IV, V, and VI will discuss "Perjury," "False Affidavits," and "Subornation," respectively. Section VII deals with "Preparing False Testimony." "Bribery of and threats to a Public Servant" are discussed in section VIII. Other allegations of misconduct—delaying a witness's testimony, causing an agency head to delete an allegation from a civil complaint, accepting guilty pleas outside the courtroom, and a prosecuting attorney accepting bribes—will be treated as "Miscellaneous Misconduct" in section IX. The latter two, relating to guilty pleas and prosecuting attorneys, are, of course, unrelated to Watergate.

III. Concealing Evidence

A. *Concealing Physical Evidence*

One of the "overt acts" of "concealing evidence" attributed to LaRue was agreement "to destroy or cause to be destroyed certain incriminating records relating to the break-in at the Watergate offices of the Democratic National Committee."[16] Maurice Stans is charged with causing "records" concerning "the origin of the VESCO contribution" to "be destroyed."

Missouri has no statute dealing with the destruction of physical evi-

11. Indictment, United States v. Mitchell, Crim. No. 73-439 (S.D.N.Y. filed May 10, 1973) at 6.
12. *Id.*
13. *Id.* at 8.
14. *Id.* at 10.
15. *Id.*
16. Information, United States v. LaRue, Crim. No. 556-73 (D.D.C. filed June 27, 1973) at 3.

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dence.[17] The sections on "compounding" felonies and misdemeanors are inapplicable unless bribery is involved.[18] There is no general statute governing the destruction of personal property.[19] The statute on accessories "after the fact" applies only to the concealment of wanted persons.[20] Of course, theft provisions would be applicable if the evidence was in the possession of the police or prosecuting attorney, or is taken from another without consent. If the evidence has already been introduced into evidence in court, sanctions for contempt of court could be applied.

The Proposed Code remedies this deficiency in Missouri law by making it a crime to tamper with physical evidence.[21] Other codes and proposed codes contain similar provisions, but require the state to prove that the defendant believed an investigation was "pending or about to be instituted."[22] A person who tampers with evidence for the purpose of thwarting a possible future investigation is just as culpable as one who tampers with evidence after a prosecution has begun. The necessity of a "guilty mind" is satisfied by the requirement that the state prove the act was done "with purpose" to impair an investigation.

B. *False Statements to Investigators*

One of the "overt acts" charged to LaRue was that he "attended meetings . . . where Jeb S. Magruder's false, misleading and deceptive statement, previously made to the Federal Bureau of Investigation, was further discussed."[23] Magruder was charged with participating "in meetings to compose, develop and prepare the false, deceptive and misleading statements and testimony to be given to"[24] the FBI, the United State's Attorney's office, the grand jury, and the district court. Among the "overt acts" alleged were the following: Magruder "met with Herbert Lloyd Porter to review

17. Conspiracy laws may be applicable.
18. §§ 557.170-.190, RSMo 1969.
19. *See* Ch. 560, RSMo 1969.
20. § 556.180, RSMo 1969.
21. PROP. NEW MO. CRIM. CODE § 20.100 (1973) provides:
(1) A person commits the crime of tampering with physical evidence if he
(a) alters, destroys, suppresses or conceals any record, document or thing with purpose to impair its verity, legibility or availability in any official proceeding or investigation; or
(b) makes, presents or uses any record, document or thing knowing it to be false with purpose to mislead a public servant who is or may be engaged in any official proceeding or investigation.
(2) Tampering with physical evidence is a Class D Felony if the actor impairs or obstructs the prosecution or defense of a felony; otherwise, tampering with physical evidence is a Class A Misdemeanor.
22. MODEL PENAL CODE § 241.7 (Prop. Off. Draft 1962); PROP. ALAS. CRIM. CODE § 11.27.160 (1970); COLO. REV. STAT. ANN. § 40-8-610 (1971); MICH. REV. CRIM. CODE § 5045 (Final Draft 1971); MONT. CRIM. CODE § 94-7-208 (1973); PROP. N.J. CRIM. CODE § 2C:28-6 (1971); N.Y. PENAL LAW §§ 215.35-.40 (McKinney 1967); PROP. S.C. CRIM. CODE § 20.35 (1971); TEX. PENAL CODE § 37.09 (1973).
23. Information, United States v. LaRue, Crim. No. 556-73 (D.D.C. filed June 27, 1973) at 3.
24. Information, United States v. Magruder, Crim. No. 715-13 (D.D.C. filed Aug. 16, 1973) at 5.

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Porter's proposed statement to agents of" the FBI; and he "gave a false, deceptive and misleading statement to agents of"[25] the FBI.

Apparently, lying to the FBI (for example) is not, in and of itself, a crime.[26] But, one who "corruptly" persuades another to do so may be guilty of obstructing the "due administration of justice" under U.S.C. § 1503 (1966).[27]

The conduct attributed to Magruder and LaRue would not be a crime under present Missouri law or the Proposed Code insofar as it alleges either that they personally lied to investigators or that they persuaded others (without using threats, bribes or deceit) to do so. The crime most resembling this conduct is that of making false police reports.[28] It applies, however, only where someone reports that a crime has been committed, or is about to be committed, when in fact no crime has been, or is about to be, committed.

C. *Preventing the Communication of Information to Criminal Investigators*

LaRue and Magruder was charged with paying cash to the Watergate defendants "for the purpose of concealing the identities of other participants in the violations charged in said indictment and the scope of these and related activities."[29] It is apparent that bribery is charged, but it is unclear what the recipients were to do. There are four possibilities: (1) withhold information from investigators; (2) lie to investigators; (3) withhold information from the grand jury and/or court (*e.g.,* by asserting their fifth amendment rights, not taking the witness stand in their

25. *Id.* at 6.

26. Mr. Samuel Dash, chief counsel for the Senate Watergate Committee, has been quoted as saying, "It's not perjury, . . . [b]ut it is a felony to make false statements to any government investigator." U.S. NEWS & WORLD REPORT, Sept. 10, 1973, at 15, 17. Acknowledging that exhaustive research was not done on this point in preparing this article, and, with all due respect to the learned Mr. Dash, no statutes or cases were found supporting this allegation except where the statements were made under oath.

27. *See* Wilder v. United States, 143 F. 433 (4th Cir. 1906). "Corruptly" means for an evil or wicked purpose. United States v. Ryan, 455 F.2d 728 (9th Cir. 1972).

28. § 562.285 (2), RSMo 1969, provides:

> 2. Any person who (1) Knowingly and willfully makes or causes to be made any false report to any peace officer or other official in the State of Missouri whose duty it is to enforce the criminal laws of the state, concerning an alleged crime, or an alleged attempt made or to be made, to do any act which would be a crime prohibited by the statutes of this state, knowing at the time that no crime, or attempt to commit a crime, had been made or would be made . . . is guilty of a misdemeanor . . . .

The Proposed Code, § 20.080, provides:

> A person commits the crime of making a false report if he knowingly (a) gives false information to a law enforcement officer for the purpose of implicating another person in a crime; or (b) makes a false report to a law enforcement officer that a crime has occurred or is about to occur.

29. Information, United States v. LaRue, Crim. No. 556-73 (D.D.C. filed June 27, 1973) at 3; Information, United States v. Magruder, Crim. No. 715-13 (D.D.C. filed Aug. 16, 1973) at 5.

own defense, or by pleading guilty instead of going to trial); (4) commit perjury before the grand jury and/or the court. The first three possibilities will be covered in this section; the last will be discussed in the section on perjury.

With regard to the recipients of the bribes, their conduct as to possibilities (1) and (2) clearly falls within the present statutes on "compounding" crimes.[30] There are no Missouri cases deciding whether the person *conferring* money would be guilty as an "accessory before the fact," and thus as a principal, but the mere *offering* of money does not violate the present section. The Proposed Code covers both recipients and offerors of money or other consideration who withhold information from or lie to investigators.[31]

Possibility (3) (bribery of a person to withhold evidence from a grand jury or court) is presently a crime[32] and would be under the Proposed Code.[33] The crime is limited to tampering with a witness in a trial or before a grand jury that is actively investigating the subject matter in which the witness will testify.[34] A witness other than a defendant could accomplish this only by asserting his privilege against self-incrimination. But where, as in Watergate, the witnesses are themselves defendants, they

30. § 557.170, RSMo 1969 provides:

> Every person having a knowledge of the actual commission of any offense . . . who shall take any money or property of another, or any gratuity or reward, or any promise, undertaking or engagement therefor, upon agreement or understanding, express or implied, to . . . withhold any evidence [of such crime] . . . shall, . . . be punished by imprisonment.

See § 557.180, RSMo 1969 (misdemeanors).

31. PROP. NEW MO. CRIM. CODE § 20.020 (1973) provides:

> A person commits the crime of concealing an offense if (a) he confers or agrees to confer any pecuniary benefit or other consideration to any person in consideration of that person's concealing of any offense, refraining from initiating or aiding in the prosecution of an offense, or withholding any evidence thereof; or (b) he accepts or agrees to accept any pecuniary benefit or other consideration in consideration of his concealing any offense, refraining from initiating or aiding in the prosecution of an offense, or withholding any evidence thereof.

Addition of the person offering the benefit to the class of offenders is based on ILL. ANN. STAT. ch. 38, § 32-1 (Smith-Hurd 1973 Supp.); PROP. N.J. PENAL CODE § 2C:29-4 (1971); N.Y. PENAL LAW § 215.45 (McKinney 1967).

32. § 557.090, RSMo 1969, provides:

> Every person who shall, by bribery . . . induce any witness, or person who may be a competent witness . . . to withhold his evidence . . . in any cause, matter or proceeding . . . shall be deemed guilty . . . .

See note 229 and accompanying text *infra*.

33. PROP. NEW MO. CRIM. CODE § 20.270 (1973) provides:

> A person commits the crime of tampering with a witness if, with purpose to induce a witness or a prospective witness in an official proceeding . . . to withhold evidence . . . he . . . offers, confers or agrees to confer any benefit, direct or indirect, upon such witness.

34. State v. Ballard, 294 S.W.2d 666 (St. L. Mo. App. 1956):

> A charge under the statute, however, is not complete simply because the person intimidated might be a competent witness . . . . [T]he grand jury inquiry into the charge . . . must be pending at the time the alleged attempt to intimidate was made.

Id. at 671.

could conceivably be bribed to plead guilty instead of going to trial, or to decline to take the witness stand in their own behalfs. The present statute and the Proposed Code cover all of these situations.

If bribery is not involved, neither the Proposed Code or present law are applicable. In the Vesco indictment, it is alleged that Mitchell, Stans, Sears, and Vesco "unlawfully, wilfully and knowingly, did endeavor, by means of misrepresentations and intimidation, to obstruct, delay and prevent" Vesco, Sears, and other named persons, "from communicating information relating to criminal violations of the federal securities laws to attorneys and investigators"[35] of the SEC. Under present law, "compounding" crimes is limited to bribery. The statute on tampering with witnesses includes threats and "other means," but is limited to testimony and does not apply to withholding information from investigators.[36] The Proposed Code provisions on concealing evidence and tampering with witnesses are similarly limited.[37] Omission of provisions against threatening witnesses into withholding evidence from law enforcement personnel is an oversight that could be remedied by the legislature when it considers the Code.

IV. PERJURY

A. *The Elements of Perjury*

Magruder was charged with testifying falsely before a grand jury and in the trial of *United States v. Liddy*.[38] Mitchell and Stans are accused of giving false testimony to the grand jury.[39] The Proposed Code[40] defines perjury similarly to the present statute.[41]

1. Oral or Written Statements

Missouri courts have apparently always assumed, without specifically deciding, that the present perjury statute applies to affidavits as well as to oral testimony.[42] A separate statute classifies as a misdemeanor the mak-

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35. Indictment, United States v. Mitchell, Crim. No. 73-439 (S.D.N.Y. filed May 10, 1973) at 13.

36. § 557.090, RSMo 1969. *See* note 26 and accompanying text *supra*.

37. PROP. NEW MO. CRIM. CODE §§ 20.020, .270 (1973). *See* notes 185, 231, 232 and accompanying text *infra*.

38. Crim. No. 1827-72 (D.D.C. filed ——, 1973).

39. Indictment, United States v. Mitchell, Crim. No. 73-439 (S.D.N.Y. filed May 10, 1973) at 14, 37.

40. PROP. NEW MO. CRIM. CODE § 20.040 (1) (1973) provides:

> A person commits the crime of perjury if, with the purpose to deceive, he knowingly testifies falsely to any material fact upon oath or affirmation legally administered, in any official proceeding before any court, public body, notary public or other officer authorized to administer oaths.

41. § 557.010, RSMo 1969, provides:

> Every person who shall willfully and corruptly swear, testify or affirm falsely to any material matter, upon any oath or affirmation, or declaration, legally administered, in any cause, matter or proceeding, before any court, tribunal or public body or officer . . . shall be deemed guilty of perjury.

42. *See* State v. Koslowesky, 128 S.W. 741 (Mo. 1910); State v. Cannon, 79 Mo. 343 (1883); State v. Shanks, 66 Mo. 560 (1877).

ing of a false affidavit.[43] The cases imply that the misdemeanor offense is a lesser-included offense of perjury.[44] When the perjury statute is applied to false affidavits, however, the only discernible distinction between the two is the grade of the offense. Although it is true that, in order to charge a felony, the state must allege in the indictment or information that the acts were done "feloniously," "feloniously"[45] is not itself an element of a crime.[46] Thus, we presently have the legal paradox of a "lesser included offense" that is factually indistinguishable from the "greater offense."[47] The Proposed Code avoids this dilemma by limiting "perjury" to oral testimony[48] and proscribing false written statements as either "false affidavits" (sworn) or "false declarations" (unsworn).[49]

43. § 557.070, RSMo 1969. *See* text accompanying note 150 *infra.*

44. *See* State v. Cannon, 79 Mo. 343 (1883); State v. Shanks, 66 Mo. 560 (1877).

45. *See, e.g.,* State v. Vonderau, 438 S.W.2d 291 (Mo. En Banc 1969), and cases therein cited.

46. *See, e.g.,* State v. Smart, 485 S.W.2d 90 (Mo. 1972).

47. A similar situation exists elsewhere in the statutes. Section 557.215 makes it a felony to "willfully strike, beat or wound any police officer, sheriff, highway patrol officer or other peace officer while such officer is actively engaged in the performance of duties imposed on him by law." Section 557.220 makes it a misdemeanor to "knowingly and willfully assault, beat or wound any such officer . . . while in the discharge of any other official duty." "Any such officer" apparently refers back to the phrase "any sheriff or other ministerial officer" in §§ 557.200, .210. This phrase includes police officers. State *ex rel.* Cole v. Nigro, 471 S.W.2d 933, 936-37 (Mo. En Banc 1971). It has been utilized for many years by prosecuting attorneys in cases involving minor assaults on police officers, yet its elements are indistinguishable from those of the felony provision. The Missouri courts have never decided if § 557.220 is a lesser-included offense of § 557.215. Apparently, as with false affidavits, the question of which charge to issue is left to the whim of the prosecutor. This dilemma does not arise under the Proposed Code because the offense of assaulting a police officer has been merged with all other assaults and no longer exists as a separate offense.

48. PROP. NEW MO. CRIM. CODE § 20.010 (8) (1973): "'Testimony' means any oral statement under oath or affirmation."

49. PROP. NEW MO. CRIM. CODE §§ 20.050, .060 (1973). *See* pt. V of this article. Neither the present law, nor the proposed code of any other state examined except Oklahoma (PROP. OKLA. CRIM. CODE § 2-605 (1973)) treats all false statements under oath, oral and written, as one degree of offense, nor is it desirable to do so because of the variety of situations in which false written statements may be made under oath. If the desirability of grading offenses in this area is accepted, then a line must be drawn. The simplest place to draw it is between oral and written statements. To attempt to include some false written statements under oath as perjury and exclude others would cause needless confusion. Other codes examined have solved the problem by creating degrees of perjury, and differentiating thereby between statements made in official proceedings and statements made otherwise. COLO. REV. STAT. ANN. §§ 40-8-502 to -504 (1971); MICH. REV. CRIM. CODE §§ 4905, 4906, 4910 (Final Draft 1971); PROP. N.J. PENAL CODE §§ 2C:28-1,-2 (1971); TEX. PENAL CODE §§ 37.02, .03 (1973). Three states draw the line at "materiality." PROP. ALAS. CRIM. CODE §§ 11.27.100, .110 (1970); MONT. CRIM. CODE §§ 94-7-202, -203 (1973); PROP. S.C. CRIM. CODE §§ 20.23, .24 (1971).

The approach taken in the Proposed Code is most like that of New York, which divides oral and written statements into degrees of perjury. N.Y. PENAL LAWS § 210.30 (McKinney 1967). Because the term "perjury" carries great opprobrium, there is no compelling reason for so labeling lesser instances of false swearing.

2. False Statements and Assignments of Perjury

The state must allege and prove the specific testimony that it alleges to be false, and must further allege "assignments of perjury" that are "specific and distinct, in order that the defendant may have notice of what he is to come prepared to defend."[50] "The assignment of the perjury is that part of [an indictment] which expressly alleges the falsity of the testimony . . . . [T]he general averment that the defendant swore falsely . . . is not sufficient . . . ."[51] These elements are unchanged in the Proposed Code.

3. "Willfully and Corruptly"

Under the present statute, the perjury must be committed "willfully[52] and corruptly."[53] *State v. Higgins*[54] said the terms "willfully and corruptly" mean "knowingly and intentionally."[55] Another opinion said to act corruptly means "to do an act for unlawful gain."[56] Other definitions abound.[57] The Proposed Code requires that a person must "knowingly testify falsely" "with the purpose to deceive."[58]

4. The Oath

The oath must be taken before a person authorized to administer oaths.[59] Although it is necessary to allege the specific person who administered the oath, and his competency to do so, it is not necessary to show that he was authorized to administer the specific oath in question.[60] Whether the person who administered the oath was authorized to do so is a question of law for the court.[61] This element is unchanged in the Proposed Code.

50. State v. Coyne, 214 Mo. 344, 359, 114 S.W. 8, 12 (1908), *quoting from* 2. J. CHITTY, CRIMINAL LAW 312 (1832).
51. State v. Faulkner, 175 Mo. 546, 601, 75 S.W. 116, 133-34 (1903).
52. State v. Day, 100 Mo. 242, 247, 12 S.W. 365, 366 (1889).
53. State v. Ruddy, 287 Mo. 52, 228 S.W. 760 (1921); State v. Burnett, 253 Mo. 341, 161 S.W. 680 (1913); State v. Coyne, 214 Mo. 344, 114 S.W. 8 (1908); State v. Higgins, 124 Mo. 640, 28 S.W. 178 (1894); State v. Morse, 90 Mo. 91, 2 S.W. 137 (1886).
54. 124 Mo. 640, 28 S.W. 178 (1894).
55. *Id.* at 651, 28 S.W. at 180. State v. Hunter, 181 Mo. 316, 80 S.W. 955 (1904), quotes an instruction bearing the same definition, but the propriety thereof was neither raised nor discussed.
56. State v. Ragsdale, 59 Mo. App. 590, 603 (K.C. Ct. App. 1894) (dictum) (involved oppression in office).
57. *Ragsdale* defined corrupt as "dishonest, without integrity, guilty of dishonesty involving bribery, or a disposition to bribe or be bribed." *Id.* State v. Lehman, 182 Mo. 424, 81 S.W. 1118 (1904), involving a bribery statute, quoted an instruction (without commenting on its propriety) that stated, "corruptly means wrongfully, that is, it means the doing of an act with the intent to obtain an improper advantage . . . ." *Id.* at 440, 81 S.W. at 1122.
58. The definitions of culpable mental states are in PROP. NEW MO. CRIM. CODE § 7.020 (2) (1973).
59. State v. Burtchett, 475 S.W.2d 14 (Mo. 1972); State v. Biederman, 342 Mo. 957, 119 S.W.2d 270 (1938); State v. Richardson, 248 Mo. 563, 154 S.W. 735 (1913); State v. Owen, 73 Mo. 440 (1881); State v. Keel, 54 Mo. 182 (1873).
60. Cases cited note 59 *supra*.
61. State v. Richardson, 248 Mo. 563, 154 S.W. 735 (1913).

Both the present statute and the Proposed Code require that the oath be legally administered. The codes and proposed codes of a number of states provide that "it is no defense that the oath or affirmation was administered or taken in an irregular manner."[62] The oath is the very essence of perjury; without it, false statements are not perjury. The theory of the excision of this element from other codes is that the subjective intent of the actor to commit perjury is important, not the commission of perjury itself. The Proposed Code properly takes the position that where an oath is not "legally administered," the actor may be guilty of *attempted* perjury; he is not guilty of perjury.

5. The Required Proceeding

The false statement must be made in an official proceeding.[63] It is unnecessary that the perjury occur in the trial itself; it is sufficient that it occur at any stage of the proceedings.[64] The jurisdiction of the court to hear the matter in which the perjury occurred is a question of law for the court,[65] and it need not be specifically alleged.[66] The Proposed Code uses the phrase "in any official proceeding before any court, public body, notary public or other officer authorized to administer oaths." "Notary public" ensures that depositions are included. The Proposed Code defines an official proceeding as "any cause, matter or proceeding wherein the laws of this State require that evidence considered therein be under oath or affirmation."[67] This section is intended to be at least as broad as the language of the present statute.

6. Materiality

In order to constitute perjury, the false testimony must be material to the case.[68] The degree of materiality required varies. Some courts require that the false testimony be directly pertinent to the issue in question,[69]

62. MODEL PENAL CODE § 241.1 (3) (Prop. Off. Draft 1962); PROP. ALAS. CRIM. CODE § 11.27.100 (c) (1970); COLO. REV. STAT. ANN. § 40-8-509 (3) (1971); MICH. REV. CRIM. CODE § 4935 (c) (Final Draft 1971); MONT. CRIM. CODE § 94-7-202 (4) (1973); PROP. N.J. PENAL CODE § 2C:28-1 (c) (1971); N.Y. PENAL LAW § 210.30 (McKinney 1967); PROP. OKLA. CRIM. CODE § 2-605 (c) (1973); PROP. S.C. CRIM. CODE § 20.29 (1971); TEX. PENAL CODE § 37.07 (a) (1973).

63. Griggs v. Venerable Sister Mary Help of Christians, 238 S.W.2d 8, 16 (St. L. Mo. App. 1951). Apparently, this is a matter of defense, since it need not be specifically alleged. *See* State v. Keel, 54 Mo. 182, 187 (1873).

64. In State v. Lavalley, 9 Mo. 834 (1846), concerning false testimony by surety as to assets, the court said:

> [A]ny false oath is punishable as perjury which tends to mislead the court in any of their proceedings relative to a matter judicially before them.

Id. at 837, *quoting from* 1 W. HAWKINS, PLEAS OF THE CROWN 320 (6th ed. 1787).

65. State v. Richardson, 248 Mo. 563, 154 S.W. 735 (1913).

66. State v. Keel, 54 Mo. 182, 187 (1873).

67. PROP. NEW MO. CRIM. CODE § 20.010 (6) (1973).

68. State v. Cannon, 79 Mo. 343, 345 (1883); State v. Lavalley, 9 Mo. 834, 837 (1846).

69. State v. Ruddy, 287 Mo. 52, 228 S.W. 760 (1921); *accord,* State v. Stegall, 318 Mo. 643, 300 S.W. 714 (1927).

or at least be collateral, corroborative, or circumstantial evidence[70] having a tendency to prove or disprove any pertinent material fact.[71] Others state that the testimony is material if it influences the court or jury's process of weighing the evidence[72] or if its relation to other evidence is such that it is a necessary part of a chain of evidence.[73] Still others broadly interpret material facts as any which enable a jury to reach a correct conclusion,[74] or indicate that they are material although they don't directly prove the issue.[75] The outcome of the proceeding is of no consequence.[76] Materiality is a question of law for the court,[77] but "must be established by evidence, and cannot be left to presumption or inference."[78]

The Proposed Code provides that

> A fact is material, regardless of its admissibility under rules of evidence, if it could substantially affect, or did substantially affect, the course or outcome of the cause, matter or proceeding.[79]

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70. State v. Ruddy, 287 Mo. 52, 228 S.W. 760 (1921), *quoting from* 3 S. GREENLEAF, EVIDENCE § 195 (16th ed. 1899).

71. State v. Brinkley, 354 Mo. 337, 189 S.W.2d 314 (1945); *accord,* State v. Stegall, 318 Mo. 643, 300 S.W. 714 (1927); State v. Day, 100 Mo. 242, 249, 12 S.W. 365, 366 (1889).

72. State v. Moran, 216 Mo. 550, 561, 115 S.W. 1126, 1130 (1909).

73. State v. Wakefield, 9 Mo. App. 326, 331-32 (St. L. Ct. App. 1880), *aff'd,* 73 Mo. 549 (1881). *See* the supreme court opinion at 554.

74. State v. Moran, 216 Mo. 550, 115 S.W. 1126 (1909).

75. State v. Hardiman, 277 Mo. 229, 233, 209 S.W. 878, 880 (1919); *accord,* State v. Ruddy, 287 Mo. 52, 228 S.W. 760 (1921); State v. Day, 100 Mo. 242, 12 S.W. 365 (1889).

76. State v. Wakefield, 9 Mo. App. 326, 332 (St. L. Ct. App. 1880), *aff'd,* 73 Mo. 549, 554 (1881).

Examples of false testimony that have been held to be material include false testimony as to previous testimony, or as to a prior statement, if the subject matter is material (State v. Mooney, 65 Mo. 494 (1877)), and a false denial of a prior conviction by a defendant made while testifying in his own behalf regarding his good character in a prosecution for petty larceny (State v. Swisher, 364 Mo. 157, 260 S.W.2d 6 (En Banc 1953)). In a very questionable decision, the court held that a defendant's testimony on his own motion to produce a written statement attributed to him, *denying* that he had signed the statement, was material because he had stated that the ground for the motion was that he had not signed the statement (State v. Vidauri, 305 S.W.2d 437, 440 (Mo. 1957)).

In State v. Shanks, 66 Mo. 560 (1877), an unusual example of immateriality arose when an indictment charged that the defendant had been a defendant in a civil suit on a promissory note and had sworn to a false affidavit that he did not sign the note. By statute the signing of the note was deemed confessed unless denied by answer. The indictment did not allege that an answer had been filed. Thus, the signing was confessed, a false denial thereof was immaterial, and the indictment was properly quashed.

77. State v. Swisher, 364 Mo. 157, 260 S.W.2d 6 (En Banc 1953); State v. Sloan, 309 Mo. 498, 274 S.W. 734 (1925); State v. Richardson, 248 Mo. 563, 154 S.W. 735 (1913); State v. Moran, 216 Mo. 550, 115 S.W. 1126 (1909); State v. Faulkner, 175 Mo. 546, 75 S.W. 116 (1903); State v. Fannon, 158 Mo. 149, 59 S.W. 75 (1900); State v. Williams, 30 Mo. 364 (1860). *But see* State v. Dineen, 203 Mo. 628, 102 S.W. 480 (1907).

78. State v. Dineen, 203 Mo. 628, 102 S.W. 480 (1907).

79. PROP. NEW MO. CRIM. CODE § 20.040 (2) (1973). This definition is drawn from MODEL PENAL CODE § 241.1 (2) (Prop. Off. Draft 1962); PROP. ALAS. CRIM. CODE § 11.27.100 (b) (1970); COLO. REV. STAT. ANN. § 40-8-501 (1971); MICH. REV.

This appears to narrow the definition of "materiality." It would limit frivolous prosecutions over inconsequential matters without seriously affecting the trial of law suits.

B. *Defenses in Perjury Cases*

1. Former Jeopardy

When a defendant is tried for an offense and acquitted, may he then be tried for perjury based on his testimony denying the offense? There are two Missouri cases in point. In *State v. Tedder,*[80] a 1922 decision, defendant was originally charged with stealing chickens in the nighttime. The state's evidence showed that the defendant was found in possession of stolen chickens. The defendant testified that he had purchased the chickens from two boys. The boys did not testify and defendant was acquitted. Defendant was subsequently charged with perjury and the boys testified that they did not sell him the chickens. Defendant's plea of former jeopardy was overruled and he was convicted.[81]

In *State v. Clinkingbeard,*[82] decided the same year, defendant was originally charged with manufacturing, selling, and giving away a quart of whisky. At trial he denied the alleged acts. The verdict-directing instruction was limited to "manufacturing" whisky. The defendant was acquitted and the state charged him with perjury. His plea of former adjudication and former jeopardy was overruled and he was convicted.

As to former jeopardy, these two cases are probably still good law. The Federal Constitution is not violated because the original offenses and the perjury charges are clearly separate and distinct crimes. A plea of collateral estoppel based on *Ashe v. Swenson*[83] might produce a different result in the second case, however. The theory of *Ashe* is that if a jury, in order to acquit a defendant, necessarily found that there was reasonable doubt as to a given fact, then the state is not entitled to relitigate that issue against the same defendant before a different jury.[84] The paucity of

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CRIM. CODE § 4901 (Final Draft 1971); MONT. CRIM. CODE § 94-7-202(3) (1973); PROP. N.J. PENAL CODE § 2C:28-1 (b) (1971); and TEX. PENAL CODE § 37.04 (1973), with the term "substantially" added.

80. 294 Mo. 390, 242 S.W. 889 (1922).

81. *Id.* at 406, 242 S.W. at 893. The court reasoned:

> [T]he charge of larceny and that of perjury relate to entirely different offenses. It is true that defendant was acquitted of grand larceny, but if he committed perjury, in swearing that he bought the . . . chickens from [the boys] . . . he was liable to prosecution therefor . . . regardless of the larceny acquittal.

Id.

82. 296 Mo. 25, 247 S.W. 199 (1922).

83. 397 U.S. 436 (1970).

84. In *Ashe,* which originated in Missouri, six poker players were robbed simultaneously. The prosecutor filed six separate robbery charges. The robbery was not contested, and the only issue was the identification of the defendant as one of the robbers. Defendant was acquitted on the first charge, tried on the second, and convicted. The Supreme Court held that the first jury had necessarily found reasonable doubt that defendant was one of the robbers, and that this issue could

facts recited in *Clinkingbeard* makes it difficult to determine the applicability of the *Ashe* doctrine. It is clear that, if the only testimony in question was a denial of manufacturing the quart of whisky, defendant could not constitutionally have been prosecuted for perjury for that denial under *Ashe*.[85]

Former jeopardy and collateral estoppel aside, there is a feeling that it is unfair for a prosecutor who has lost a case to turn around and take a second shot at the defendant for perjury on the main issue. Not surprisingly, where this feeling exists there is law to support it. When the defendant can show "bad faith" on the part of the prosecutor, the prosecution may be enjoined as a violation of the 1871 Civil Rights Act, 42 U.S.C. § 1983.[86]

2. Perjury Before Grand Juries

A person voluntarily appearing before a grand jury may be prosecuted for perjury. A person compelled to appear before a grand jury, not himself the subject of a criminal investigation, may be prosecuted for perjury based on his testimony. Even a person compelled to appear who is the subject of the investigation may be prosecuted for perjury if he is warned of his right to refuse to testify and specifically waives that right. The unresolved issue arises when the defendant is the subject of the investigation, is compelled to appear, is not told that he has a right to remain silent, and does not specifically waive that right. Missouri courts have dealt with this issue in four opinions, three of which grew out of the same factual situation. In *State v. Faulkner*[87] and *State v. Lehman*[88] the issue was the refusal of the following instruction:

> [I]f you believe . . . that . . . the grand jury . . . were investigating a charge against this defendant and he was summoned to appear before them, and that upon said hearing he was not notified that he could not be compelled to testify against himself, and that said grand jury compelled him to so testify . . . it is your duty to acquit the defendant.[89]

The court decided that this instruction was properly refused. In both cases, the defendant had been compelled to appear before the grand jury.

not be relitigated against the defendant. The equity of defendant's position was enhanced by the state's virtual admission that the prosecutor had used the first trial as a "dry run" and put on more evidence in the second trial. Ashe v. Swenson, 397 U.S. 436, 439-40, 447 (1970).

85. *See* United States v. Nash, 447 F.2d 1382 (4th Cir. 1971); United States v. Drevetzki, 338 F. Supp. 403 (N.D. Ill. 1972).

Collateral estoppel would not have helped the defendant in *Tedder*. Although the jury necessarily found that there was a reasonable doubt that Tedder stole the chickens, they did not necessarily find that he purchased them from the boys. The jury may have disbelieved this story, and yet had a reasonable doubt as to his guilt. Thus, there was no collateral estoppel as to the issue of the purchasing.

86. *See* Shaw v. Garrison, 467 F.2d 113 (5th Cir.), *cert. denied*, 409 U.S. 1024 (1972).

87. 175 Mo. 546, 75 S.W. 116 (1903).

88. 175 Mo. 619, 75 S.W. 139 (1903).

89. State v. Faulkner, 175 Mo. 546, 605, 75 S.W. 116, 135 (1903).

There was no indication in either case that he had been warned of his right not to testify, or that he had specifically waived such right. In the *Faulkner* case the evidence indicated that the defendant was not the subject of the investigation. The opinion is unclear whether the basis for refusing the instruction was that it was wrong as a matter of law, or that there was no evidence to support it.[90] In *Lehman,* there was strong evidence that the defendant was not the direct subject of the grand jury's inquiry. The court was clearer as to the basis for its ruling: "[Although] the record shows he was not being investigated . . . we are still of the opinion that if he had been, he was not justified in committing perjury."[91] A subsequent opinion in a second appeal of *Faulkner* indicates that a person may be prosecuted for perjury before a grand jury even though he is the subject of the investigation, is there under compulsory process, is not warned of his right to refuse to testify, and does not specifically waive such right.[92]

State v. Caperton,[93] decided 14 years later, is a strong indication to the contrary. In that case, defendant was summoned before a grand jury which "had under inquiry the question whether defendant and one Minnie King were living together in open . . . and notorious adultery."[94] Defendant was not warned of his right not to testify and did not specifically waive such right. He swore that he and Minnie King were married and perjury was charged thereon. The court reversed, indignant that the defendant had been compelled to either confess guilt or commit perjury.[95]

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90. At one point, the court stated:

> [T]he point which we are to determine is whether a witness, not under arrest for a crime, and summoned before a grand jury *in the investigation of the guilt of others,* can fail to claim his privilege or waive it, and testify *falsely,* and be absolutely exempt from a prosecution for perjury for such false swearing.

175 Mo. 546, 612, 75 S.W. 116, 137 (emphasis added). Much of the tenor of the lengthy discussion on this point tends toward a blanket rule that a witness who has not claimed his privilege to remain silent is responsible for any perjury which thereafter occurs. *Id.* at 605-15, 75 S.W. at 135-38. So, too, does the conclusion that "the instruction goes too far." *Id.* at 615, 75 S.W. at 138.

91. State v. Lehman, 175 Mo. 619, 629, 75 S.W. 139, 142 (1903).

92. State v. Faulkner, 185 Mo. 673, 84 S.W. 967 (1905). On the second appeal defense counsel tried a plea in abatement, before trial, that alleged that defendant "was summoned as a witness to appear before the grand jurors . . . to testify . . . in a certain case pending before said body . . . wherein he was charged with a violation . . . ." of a statute. *Id.* at 680, 84 S.W. 968. The court held that the plea was properly overruled. *Id.* at 700, 84 S.W. at 973. Because it appears that no evidence was heard on the plea and there is no discussion of whether Faulkner was in fact a "defendant" before the grand jury, it would appear that the court's ruling was that the plea was bad as a matter of law.

93. 276 Mo. 314, 207 S.W. 795 (1918).

94. *Id.* at 317, 207 S.W. at 795.

95. The court said:

> The least that may be said of the proceedings by which this defendant was induced to perjure himself is that the state in thus compelling either a sworn confession or perjury, was morally an aider and abettor in the perjury charged.
>
> The law which governs inquisitions before grand juries does not contem-

There was no objection that the statement made was inadmissible at trial unless shown to be voluntary, but the court said that, had one been made, it should have been sustained.[96]

There are no United States Supreme Court decisions directly in point.[97] Where the defendant is *clearly* the subject of the investigation (as in *Caperton*), and it is obvious that the purpose of calling him is to obtain evidence against him, *Caperton* is the fairer decision.[98] The Proposed Code does not resolve this issue.

3. Retraction

The Proposed Code provides that:

> It is a defense to a prosecution under Subsection (1) that the actor retracted the false statement in the course of the official proceeding in which it was made provided he did so before the falsity of the statement was exposed. Statements made in separate hearings at separate stages of the same proceeding, including but not limited to, statements made before a grand jury, at a preliminary hearing, at a deposition or at previous trial, are made in the course of the same proceeding.[99]

> plate that an accused person . . . the subject of inquiry, may be compelled to come before . . . and . . . be required either to confess his guilt or to commit perjury . . . .

Id at 319, 207 S.W. at 796.

96. *Id.* at 320, 207 S.W. at 796.

97. *Compare* Miranda v. Arizona, 384 U.S. 436 (1966), *with* Harris v. New York, 401 U.S. 222 (1971). There is one pre-*Miranda* court of appeals decision which clearly sides with *Faulkner.* United States v. Parker, 244 F.2d 943 (7th Cir.), *cert. denied,* 355 U.S. 836 (1957). There are several post-*Miranda* decisions which appear, by their language, to set forth a blanket rule of admissibility, but they are all distinguishable: Robinson v. United States, 401 F.2d 248, 250 (9th Cir. 1968) ("[t]he evidence does not indicate that the defendant was called before the grand jury for the purpose . . . of making a criminal case against him"); United States v. DiGiovanni, 397 F.2d 409 (7th Cir.), *cert. denied,* 393 U.S. 1060 (1968) (defendant was in fact advised of his right to remain silent and specifically waived said right); Cargill v. United States, 381 F.2d 849, 853 (10th Cir. 1967), *cert. denied,* 389 U.S. 1041 (1968) ("[a]ppellant is a practicing attorney of many, many years experience and was certainly well aware of his right to remain silent"); United States v. DiMichele, 375 F.2d 959 (3d Cir.), *cert. denied,* 389 U.S. 838 (1967) (defendant was advised by FBI agent of his right to remain silent immediately prior to the serving of the grand jury subpoena).

98. Part of the explanation of the different views in *Faulkner* and *Caperton* may be that *Faulkner* and *Lehman* involved an investigation into the solicitation of bribes by members of the "municipal assembly" of the City of St. Louis, whereas *Caperton* involved two people allegedly living together in "open and notorious cohabitation." The real problem is that it is rare that a defendant is as clearly the subject of the inquiry as he was in *Caperton.* The *Caperton* rule would place a heavy burden on prosecuting attorneys and grand jurors to determine who was a potential defendant before they had heard all of the evidence.

99. PROP. NEW MO. CRIM. CODE § 20.040 (4) (1973). Retraction is a defense in MODEL PENAL CODE § 241.1 (4) (Prop. Off. Draft 1962); PROP. ALAS. CRIM. CODE § 11.27.100 (d) (1970); COLO. REV. STAT. ANN. § 40-8-508 (1971); MICH. REV. CRIM. CODE 94-7-202 (5) (Final Draft 1971); MONT. CRIM. CODE § 94-7-202 (5) (1973); N.Y. PENAL LAW § 210.25 (McKinney 1967); PROP. S.C. CRIM. CODE § 20.28 (1971); and TEX. PENAL CODE § 37.05 (1973).

There are no Missouri cases indicating whether this defense is presently available in Missouri.[100] The strict viewpoint was set forth in *United States v. Norris,*[101] wherein it was said that defendant's argument

> ignores the fact that the oath administered to the witness calls on him freely to disclose the truth in the first instance and not to put the court and the parties to the disadvantage, hindrance, and delay of ultimately extracting the truth by cross-examination, by extraneous investigation or other collateral means.[102]

The defense is limited in that the retraction must occur before the falsity of the statement is exposed.[103] The issue presents a policy question. The drafters of the Proposed Code favored encouraging recantation over punishing potentially penitent perjurers.

4. Lack of Competency and Mistake as to Materiality are not Defenses

The Proposed Code provides that:

> Knowledge of the materiality of the statement is not an element of this crime, and it is no defense that (a) the defendant mistakenly believed the fact to be immaterial; or (b) the defendant was not competent, for reasons other than mental disability or immaturity, to make the statement.[104]

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100. In *State v. Brinkley,* 354 Mo. 337, 189 S.W.2d 314 (1945), the defendant was charged with perjury before a grand jury. He sought dismissal of the charge on the ground that the grand jury had been discharged prematurely, and he had thus been denied an opportunity to retract his original testimony. The court held that the trial court had properly denied the motion because the defendant had no right to have a proceeding last any particular length of time. The court left open the question whether retraction is a defense in Missouri.

MICH. REV. CRIM. CODE § 4930, Comment (Final Draft 1971) acknowledges that the common law rule is that perjury cannot be purged, but states that it is socially desirable to allow retraction.

101. 300 U.S. 564 (1937).

102. *Id.* at 574.

103. The limitations differ among those states that have adopted the defense of retraction. All of them, and the Model Penal Code, require that the retraction be made "in the course of the proceeding in which it [the perjury] was made." The Model Penal Code, Alaska, Montana, New Jersey, New York, South Carolina, and Texas do not enlarge on what is "in the course of the proceeding." Colorado and Michigan state that "statements made in separate hearings at separate stages of the same trial or administrative proceeding shall be deemed to have been made in the course of the same proceeding."

The Model Penal Code, Alaska, Montana, New Jersey, and Texas require the retraction to have taken place "before it became manifest that the falsification was or would be exposed." Colorado and Michigan have no such limitation. The phrase "would be exposed" is too speculative. The Proposed Code is limited to "was exposed."

104. PROP. NEW MO. CRIM. CODE § 20.040 (3) (1973). This subsection is based on MODEL PENAL CODE § 305.17 (Prop. Off. Draft 1962); PROP. ALAS. CRIM. CODE §§ 11.27.100 (b), .100 (c) (1970); COLO. REV. STAT. ANN. §§ 40-8-502, -509 (1971); MICH. REV. CRIM. CODE §§ 4905, 5935 (Final Draft 1971); MONT. CRIM. CODE §§ 94-7-202 (3), -202 (4) (1973); PROP. N.J. PENAL CODE §§ 2C:28-1 (b), -1 (c) (1971); PROP. S.C. CRIM. CODE § 20.23 (1971); N.Y. PENAL LAW § 210.30 (McKinney 1967); and TEX. PENAL CODE §§ 37.04, .07 (1973).

There are no Missouri cases indicating whether these defenses are available under present law.

C. *The Trial of Perjury Cases*

1. The "Quantum of Evidence" Rule

Proof of the falsity of the statement attributed to the defendant is, of course, the crucial element in a perjury case. At common law, the direct testimony of two witnesses to the falsity of the statement was required in order to make a submissible case.[105] Today, the proof required is the direct evidence of one witness plus proof of corroborating circumstances[106] (of course, the direct evidence of two witnesses would still suffice).[107] Missouri follows this rule;[108] the cases state that the corroboration can be proved circumstancially.[109] One case, however, indicates that the circumstantial evidence must be substantially equivalent to direct testimony by a witness.[110]

A defendant may be convicted on the testimony of one witness in the prosecution of any other crime, though defendant and a thousand angels swear to his innocence. Why, then, is a heavier burden placed on the prosecution in a perjury case? The traditional reason is that it encourages witnesses to testify.[111] If this is the true rationale, it is a poor one indeed.

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105. State v. Faulkner, 175 Mo. 546, 75 S.W. 116 (1903); State v. Heed, 57 Mo. 252, 254 (1874).

106. State v. Burgess, 457 S.W.2d 680, 681 (Mo. En Banc 1970); State v. Lafferty, 416 S.W.2d 157, 162 (Mo. 1967); State v. Brinkley, 354 Mo. 337, 189 S.W.2d 314 (1945); State v. Kaempfer, 342 Mo. 1007, 119 S.W.2d 294 (1938); State v. McGee, 341 Mo. 151, 106 S.W.2d 480 (1937); State v. Tedder, 294 Mo. 390, 242 S.W. 889 (1922); State v. Caperton, 276 Mo. 314, 207 S.W. 795 (1918); *see* State v. Wakefield, 9 Mo. App. 326 (St. L. Ct. App. 1880), *aff'd*, 73 Mo. 549 (1881).

107. State v. Burgess, 457 S.W.2d 680, 681 (Mo. En Banc 1970).

108. In State v. Heed, 57 Mo. 252 (1874), the court said:

> [T]he evidence must be something more than sufficient to counter-balance the oath of the prisoner and the legal presumption of his innocence. The oath of the opposing witness therefore, will not avail, unless it be corroborated by other independent circumstances . . . . The same effect being given to the oath of the prisoner as though it were the oath of a credible witness, the scale of evidence is exactly balanced, and the equilibrium must be destroyed by material and independent circumstances, before the party can be convicted. The additional evidence need not be such as standing by itself, would justify a conviction in a case where the testimony of a single witness would suffice for that purpose; but it must be at least strongly corroborative of the testimony of the accusing witness . . . .

109. State v. McGee, 341 Mo. 151, 106 S.W.2d 480 (1937).

110. State v. Hardiman, 277 Mo. 229, 233, 209 S.W. 878, 880 (1919).

111. One court said that

> [I]t has a tendency to cause a witness to testify with less apprehension or fear, and that by reason of the rule "little difficulty, comparatively speaking, is found in obtaining voluntary evidence for the purpose of justice.

State v. Richardson, 248 Mo. 563, 571, 154 S.W. 735, 737 (1913), *quoting from* W. Best, Evidence §§ 605-06 (12th ed. 1972).

How many potential witnesses (or lawyers, for that matter) are aware of the existence of the "quantum of evidence" rule, and because of it are willing to testify when they would not otherwise for fear of ill-founded perjury prosecutions?[112] The true basis for the rule appears buried in the mists of history. At common law, a defendant was not allowed to testify in his own behalf.[113] The general rule was probably that an "oath against oath" could not overcome the presumption of innocence. Because the defendant could not testify, the accuser's oath was sufficient in most cases. In perjury cases, however, it was necessary for the prosecution to place the defendant's oath before the jury in proving the allegedly false statement. More than a countervailing oath was required to overcome the presumption of truth of the defendant's statement. By the time the law got around to allowing a defendant to testify for himself,[114] the general rule had apparently been forgotten, but by then it was firmly ensconced as the rule in perjury cases.

If this bit of speculation is accurate, there is little justification for requiring a higher quantum of proof in perjury cases than in other criminal cases. Moreover, the existence of the rule in its present form may account for the dearth of perjury prosecutions in Missouri in modern times. At least some liberalization is in order.[115] Assuming that the rule does encourage some witnesses to testify, the Proposed Code retains additional proof requirements:

> No person shall be convicted of a violation of Sections 20.040, 20.050[116] or 20.060[117] based upon the making of a false statement except upon proof of the falsity of the statement by
>
> (1) the direct evidence of two witnesses; or

112. It appears that witnesses have little to fear from perjury prosecutions today in Missouri anyway, judging by the decline in appellate opinions. From the first reported case in 1829 (State v. Hinch, 2 Mo. 158 (1829), wherein the defendant was "sentenced to receive 25 stripes, fined fifty dollars, and disqualified from being a witness") to 1879, there are 11 prosecutions for perjury reported, none for subornation of perjury, and 2 for the misdemeanor of filing a false affidavit, for a total of 13 prosecutions. From 1880 to 1927, there were 42 reported prosecutions for perjury, 3 for subornation, and 10 for false affidavits (a misdemeanor), for a total of 55 prosecutions. Since 1928, there have been only 12 reported cases on perjury, 1 on subornation, and 2 under the false affidavit statute. In these 83 cases, there has been only one case where the state has prosecuted a witness for committing perjury against a defendant. State v. Cave, 81 Mo. 450 (1884).

Regarding the related crime of tampering with a witness, there was one reported prosecution from 1829-1879, three from 1880-1929 (all bribery), and four from 1930 to the present (two bribery, one "menace", and one by "other means").

113. State v. Hutchinson, 458 S.W.2d 553, 554 (Mo. En Banc 1970).

114. "An accused was first given the right to testify in Missouri by statute in 1877. . . ." *Id. See* § 546.260, RSMo 1969.

115. Of course, consistency could also be regained by application of the "quantum of evidence" rule to all criminal cases. Though some might believe this desirable, the chances of this ever occurring are only slightly better than the sun rising in the west.

116. False affidavits.

117. False declarations.

(2) the direct evidence of one witness together with strongly corroborating circumstances; or

(3) demonstrative evidence which conclusively proves the falsity of the statement; or

(4) a directly contradictory statement by the defendant under oath together with

(a) the direct evidence of one witness; or

(b) strongly corroborating circumstances; or

(5) a judicial admission by the defendant that he made the statement knowing it was false. An admission, which is not a judicial admission, by the defendant that he made the statement knowing it was false may constitute strongly corroborating circumstances.[118]

Subsections (1) and (2) restate the existing "quantum of evidence" rule. Subsections (3) through (5) are new.

Subsection (3) allows the state to prove falsity solely on the basis of "demonstrative evidence which conclusively proves the falsity."[119] Fingerprint and firearms identification are two examples of demonstrative evidence which, though technically "circumstantial evidence," are far more reliable than the direct testimony of eyewitnesses to an event. It is unreasonable to say that the state cannot prove falsity by proving that a witness's fingerprints were found inside a vehicle the witness denies having been in. The term "conclusively proves" is used to emphasize, in the strongest possible language, that ordinary circumstantial evidence will not suffice.

Subsection (4) deals with defendant's prior inconsistent statements. Their use, whether under oath or not, to prove the falsity of the testimony in question is uncertain. One case seems to imply that prior inconsistent statements may not be used at all, requiring evidence *aliunde* tending to show the perjury independent of any declaration or admission of the defendant.[120] Another case indicates that contradictory statements *under oath* are admissible, but says nothing about such statements when they are not under oath.[121] And a third case states that such statements are admissible, whether under oath or not.[122]

Being hearsay, prior inconsistent statements of a *witness* are generally not admissible to prove the truth of their contents. Such statements by a *party* to the lawsuit are admissible under an exception to the hearsay

118. PROP. NEW MO. CRIM. CODE § 20.070 (1973).

119. This particular modernization of the "quantum of evidence" rule is not found in any of the other proposed codes.

120. State v. Rhoten, 259 Mo. 424, 168 S.W. 590 (1914).

121. State v. Blize, 111 Mo. 464, 20 S.W. 210 (1892); *cf.* State v. Thorton, 245 Mo. 436, 150 S.W. 1048 (1912).

122. State v. Hunter, 181 Mo. 316, 80 S.W. 955 (1904); *see* State v. Carter, 315 Mo. 215, 285 S.W. 971 (1926); *cf* State v. Taylor, 202 Mo. 1, 100 S.W. 41 (1907).

rule as "admissions of a party opponent."[123] There is no reason to apply a different rule to perjury cases.

The evidentiary weight to accord such statements is another question. It is uniformly held that prior inconsistent statements, under oath *vel non,* are not sufficient, by themselves, to prove falsity: "[W]hen the '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 others to be false.' "[124] The Model Penal Code and the codes and proposed codes of a number of states would change this rule by allowing the prosecution to allege in the alternative that one or the other was false without having to prove which one.[125] This proposal is probably unique in allowing the state to charge an either/or type of crime and forcing the defendant to defend against two inconsistent charges. For various reasons this change was not adopted in Missouri's Proposed Code. First, it violates the concepts that the defendant is entitled to be charged with specific acts violating the law, that he is entitled to notice of what he is charged with, and that the state must elect where it has alternative theories of prosecution. Second, the situations where the contradiction would be clear-cut would be rare, and the defendant in most instances would be placed in the position of having both to negate the inconsistency and to prove the truth of both statements. Third, because most perjury prosecutions arise out of criminal

123. *See, e.g.,* Reiling v. Russell, 345 Mo. 517, 134 S.W.2d 33 (1939); JD v. MD, 453 S.W.2d 661 (Spr. Mo. App. 1970). Does this exception apply to a defendant in a criminal case? It would seem obvious that "confessions" are a most obvious example of "admissions of a party opponent" and that the exception thus clearly applies. But, confessions are also "declarations against penal interest" and it could be argued that they are admitted on this theory. However, "declarations against penal interest" were not recognized as exceptions to the hearsay rule under common law, and were not accepted in Missouri until 1945. *Compare* Sutter v. Easterly, 354 Mo. 282, 189 S.W.2d 284 (1945), *with* State v. Duncan, 116 Mo. 288, 22 S.W. 699 (1893); *see* Osborne v. Purdome, 250 S.W.2d 159 (Mo. En Banc 1952). Since "confessions" have been admissible since the state began, they must have been admitted as "admissions of a party opponent." Further, the exception for declarations against interest usually requires that the declarant be dead or unavailable.

124. State v. Blize, 111 Mo. 464, 470, 20 S.W. 210, 212 (1892), *quoting from* 2 F. WHARTON, CRIMINAL LAW § 1317 (9th ed. 1885); *accord,* State v. Carter, 315 Mo. 215, 285 S.W. 971 (1926); State v. Hunter, 181 Mo. 316, 80 S.W. 955 (1904).

125. MODEL PENAL CODE § 241.1 (5) (Prop. Off. Draft 1962) provides:

> *Inconsistent Statements.* Where the defendant made inconsistent statements under oath or equivalent affirmation . . . the prosecution may proceed by setting forth the inconsistent statements in a single count alleging in the alternative that one or the other was false and not believed by the defendant. In such case it shall not be necessary for the prosecution to prove which statement was false . . . and not believed by the defendant to be true.

See PROP. ALAS. CRIM. CODE § 11.27.100 (e) (1970); COLO. REV. STAT. ANN. § 40-8-505 (1971); ILL. ANN. STAT. ch. 38, § 32-2 (b) (Smith-Hurd 1973 Supp.); MICH. REV. CRIM. CODE § 49.15 (Final Draft 1967); MONT. CRIM. CODE § 94-7-202 (6) (1973); PROP. N.J. PENAL CODE § 2C:28-1 (e) (1971); N.Y. PENAL LAW § 210.20 (McKinney 1967); PROP. OKLA. CRIM. CODE § 2-605 (2) (1970); PROP. S.C. CRIM. CODE § 20.25 (1971); TEX. PENAL CODE § 37.06 (1973).

cases, the state will have taken a position in most cases of urging the truth of one of the two statements in the prior prosecution. It is not just to allow the state to then urge conviction of a defendant for perjury without requiring that it show the statement inconsistent with the one they initially urged false. Finally, if one of the statements in fact contradicts the state's position in another case, as it usually will, the state should have little difficulty corroborating the other statement.

There are two Missouri cases in direct conflict on the issue of whether a prior contradictory statement under oath constitutes "strongly corroborating circumstances" and, together with the direct testimony of one witness, is sufficient to prove falsity. *State v. Hunter*[126] holds that prior inconsistent statements are not sufficient corroborative proof of falsity whether or not under oath. *State v. Blize*[127] is directly contrary: "[W]e think a statement of the accused under oath, directly contradicting the evidence . . . he is accused of falsely giving, very strongly corroborative of the evidence of a witness who testifies to its falsity, and amply sufficient to sustain a conviction."[128] The Proposed Code goes farther than *Blize* and provides that falsity may also be proved by a directly contradictory statement under oath and "strongly corroborating circumstances."[129]

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126. 181 Mo. 316, 80 S.W. 955 (1904).

127. 111 Mo. 464, 20 S.W. 210 (1892).

128. *Id.* at 470, 20 S.W. at 212. *See* PROP. NEW MO. CRIM. CODE § 20.070(4)(a) (1973), quoted p. 589 *supra.*

129. PROP. NEW MO. CRIM. CODE § 20.070(4)(b) (1973), quoted p. 589 *supra.*

The difficulties presented by the present rule are well-illustrated by *State v. Hackett* (No. 325377, St. Louis County Cir. Ct.), a recent perjury case in St. Louis County. Five youths were charged with robbery and murder in connection with a filling station holdup. The relevant facts are set forth in State v. (James) Granberry, 491 S.W.2d 528, 529-30 (Mo. En Banc 1973) and State v. (Darryl) Granberry, 484 S.W.2d 295, 297-98 (Mo. En Banc 1972). All transcript references hereinafter set forth are to the transcript in James Granberry's case. Hackett and the two Granberrys were charged in one indictment. Jerry Winters and Jeffrey Winters were certified by the St. Louis County Juvenile Court for trial as adults, and were jointly charged in another indictment. State v. Winters, (No. 309298, St. Louis County Cir. Ct. Feb. 22, 1971.)

Four of the defendants had been arrested on the scene, but the fifth got away. James Granberry was arrested the next day and charged with being the fifth person. After Kenneth Hackett, one of the four arrested at the station, had made a video-taped statement that James Granberry had ridden with them to the station, and had gone into the back room of the station with Darryl Granberry (also caught at the scene) and the attendant, the state *nolle prossed* Hackett's case and endorsed him as a witness. The state called him as a witness in State v. (James) Granberry, *supra.* He testified that he had not seen James Granberry that evening, that one Charles Burnley (who was not among the four arrested) had ridden with them to the station, and that Darryl Granberry and Charles Burnley had gone into the back room with the attendant.

Hackett was charged with perjury. To prove the falsity of this testimony, the state could show that: two men went into the backroom with the attendant; the attendant was allowed to leave the back room to "get rid of" a police car; the police arrived, and one officer went into the back room; shortly thereafter, two men came out of the back room shooting; Darryl Granberry was one of these men, and a police officer identified James Granberry as the other; James Granberry's fingerprint was on the "get-away car"; the officer struck the fleeing suspect on the head with his revolver, there was blood on the seat of the car matching

The few Missouri cases in point agree that prior contradictory statements *not* under oath are not, by themselves, sufficient corroboration.[130] This rule is unchanged in the Proposed Code.

Subsection (5) deals with the effect of admissions of guilt, also uncertain at present in Missouri. *State v. Thornton*[131] held that the jury "must be instructed that they cannot take into consideration confessions or admissions in determining whether or not there [is] sufficient corroboration of the falsity of defendant's evidence."[132] *State v. Hardimann*[133] also holds that such evidence may not be considered. A third case, *State v. Hunter*,[134] apparently agrees.

State v. Williams[135] is the only case to the contrary. It held that declarations of defendant "against himself" are admissible, "[b]ut of themselves they are not sufficient to convict one of the crime of perjury."[136] The cases against admissibility cite no reasons for such a rule and logic does not support treating perjury cases differently than other criminal cases. Under the Proposed Code, proof of the falsity of the statement may be made by "a judicial admission by the defendant that he made the statement knowing it was false. An admission, which is not a judicial admission, by the defendant that he made the statement knowing it was false may constitute strongly corroborating circumstances."[137]

James Granberry's blood type, and James Granberry had a laceration and blood on the back of his head when arrested the next day; the police officer's body was found in the back room; there was only one way in and out of the back room. Moreover, Hackett testified in a deposition in a companion case that James Granberry had gone with them to the station and had gone into the back room with Darryl Granberry, making no mention of Charles Burnley. State v. Winters, *supra.*.

Thus, there was direct evidence that James Granberry had come out of the back room. There was strong circumstantial evidence that only two people had gone into the back room. But, there was no *direct* evidence, other than Hackett's prior contradictory statements, that James Granberry had ridden to the station in the same car with Hackett and that Charles Burnley had not, or that Hackett had seen James Granberry enter the back room, or that Charles Burnley had not entered it. Thus, under present law, it is quite possible that the state could not have satisfied the "quantum of evidence" rule (Kenneth Hackett pled quilty and was sentenced to four years imprisonment. State v. Hackett, *supra).*

130. State v. Hunter, 181 Mo. 316, 80 S.W. 955 (1904).

131. 245 Mo. 436, 150 S.W. 1048 (1912).

132. *Id.*, at 444, 150 S.W. at 1050.

133. 277 Mo. 229, 209 S.W. 879 (1919).

134. 181 Mo. 316, 80 S.W. 955 (1904). In *Hunter* the court said: "[B]y corroborative evidence is not meant such as emanates from the mouth of the prisoner himself, but evidence aliunde; evidence which tends to show the perjury independent of his own admissions or statements." *Id.* at 334, 80 S.W. at 959.

135. 30 Mo. 364 (1860).

136. *Id.* at 368.

137. PROP. NEW MO. CRIM. CODE § 20.070(5) (1973). This provision is original compared to other codes. The general rule is that a judicial admission of a specific crime does away with the requirement that a corpus delicti be proved, and itself creates a submissible case. *See generally* State v. Eacret, 456 S.W.2d 324 (Mo. 1970). Those factors which distinguish perjury from other crimes do not justify a different standard of proof insofar as this rule is concerned.

In Missouri, admissions of perjury before a grand jury are not admissible unless shown to be voluntary: "[E]vidence involuntarily given before a grand jury should not be admitted to prove any crime . . . committed by the witness giving such testimony."[138]

2. Multiple Assignments of Perjury, Proof of One or More

Where there are multiple assignments of perjury, must the state prove all of them? If not, must there be sufficient proof of each assignment actually submitted to the jury? Again, the Missouri law is uncertain. One early case, *State v. Frisby*,[139] held that the state must prove the falsity of every statement set out in the indictment as perjury.[140] A number of later cases have announced a contrary rule: "[W]here there are several assignments of perjury in an information, substantial proof of any one of them will support a conviction."[141]

Assuming that these later cases are controlling, must the state prove everything it submits to the jury? *State v. Taylor*[142] appears to hold that the evidence need only support one or more of the assignments.[143] Other cases support this position.[144]

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138. State v. Thornton, 245 Mo. 436, 442, 150 S.W. 1048, 1049 (1912). *But see* State v. Taylor, 202 Mo. 1, 100 S.W. 41 (1907).

139. 90 Mo. 530, 2 S.W. 833 (1887).

140. The court stated:

> In a prosecution of perjury . . . it is necessary for the prosecution to prove in substance the whole of what has been set out in the indictment as having been sworn to by the defendant, and . . . it must be either literally or substantially as set out, and . . . any variance in substance between the indictment and evidence in this respect will be fatal.

Id. at 533, 2 S.W. at 833.

141. State v. Brinkley, 354 Mo. 337, 360, 189 S.W.2d 314, 325 (1945); *accord,* State v. McGee, 341 Mo. 148, 106 S.W.2d 480 (1937); State v. Jennings, 278 Mo. 544, 213 S.W. 421 (1919); State v. Taylor, 202 Mo. 1, 100 S.W. 41 (1907); State v. Gordon, 196 Mo. 185, 95 S.W. 420 (1906); State v. Blize, 111 Mo. 464, 20 S.W. 210 (1892); State v. Day, 100 Mo. 242, 12 S.W. 365 (1889).

142. 202 Mo. 1, 100 S.W. 41 (1907).

143. The court said:

> Some of the assignments of perjury were more clearly established than others, but there was ample testimony to establish the guilt of the defendant on a number of assignments, and on matters which were material to the issue on the trial of Kelleher, and where this is the case, it is proper to join the various assignments of perjury in one count where they all relate to the same transaction, and, if the evidence sustains one or more of the assignments, it is not necessary that the state should prove all of the charges.

Id. at 5, 100 S.W. at 42.

144. State v. Brinkley, 354 Mo. 337, 189 S.W.2d 314 (1945) (dictum). State v. Jennings, 278 Mo. 544, 554, 213 S.W. 421, 423 (1919), states the general rule that proof of one assignment is sufficient, but it is impossible to tell from the opinion if there were multiple assignments or multiple submissions. State v. Gordon, 196 Mo. 185, 95 S.W. 420 (1906), also states the general principle, but the assignment complained of had in fact been withdrawn from the jury. In State v. Day, 100 Mo. 242, 12 S.W. 365 (1889), the earliest of the cases to state this rule, defendant had requested an instruction that the state must prove all of the assignments. The court held that this instruction was properly refused.

There are two cases directly contrary to *Taylor*. In *State v. Blize*,[145] there were two assignments of perjury. Both were submitted to the jury, and the defendant was convicted. Because only one of the two assignments would sustain a conviction, the appellate court reversed; it was impossible to determine upon which charge the verdict was rendered. *State v. McGee*[146] is to the same effect.

The general rule in Missouri is that, where the state submits alternate methods or theories by which a crime was committed, there must be sufficient evidence to justify each submission.[147] The Proposed Code does not deal with this rule in regard to perjury. It is submitted that *State v. Blize*[148] states the correct rule in Missouri, viz., that the state must prove everything it submits.

V. FALSE AFFIDAVITS

The Proposed Code provides:

> A person commits the crime of making a false affidavit if, with purpose to mislead any person, he, in any affidavit, swears falsely to a fact which is material to the purpose for which said affidavit is made.[149]

Under the present statute,[150] the elements are as follows:

(a) The statement must be "in writing."[151] This requirement is maintained in the Proposed Code by the definition of "affidavit" as a "written statement."[152]

(b) The statement must be made before an "officer authorized to administer oaths."[153] This element is also retained under the definition

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145. 111 Mo. 464, 20 S.W. 210 (1892).

146. 341 Mo. 148, 106 S.W.2d 480 (1937). The defendant was charged with lying as to his brother's whereabouts in the afternoon and nighttime. The defendant conceded the evidence was sufficient as to the "afternoon" assignment. The court said that because the jury could have based their verdict on the "nighttime" assignment, the record must contain sufficient corroborative evidence to sustain the conviction. Because the court found that there was sufficient corroborative evidence on this assignment also, the language was technically dicta.

147. State v. Lusk, 452 S.W.2d 219 (Mo. 1970) (disjunctive submission of death from assault and from exposure); State v. Swiggart, 458 S.W.2d 251 (Mo. 1970) (companion case).

148. 111 Mo. 464, 20 S.W. 210 (1892).

149. PROP. NEW MO. CRIM. CODE § 20.050 (1) (1973).

150. § 557.070, RSMo 1969.

> Every person who shall willfully, corruptly and falsely, before any officer authorized to administer oaths, under oath or affirmation, voluntarily make any false certificate, affidavit or statement of any nature, for any purpose, shall be deemed guilty of a misdemeanor . . ."

151. State v. Carpenter, 164 Mo. 588, 594, 65 S.W. 255, 256 (1901). *See also* Lightfoot v. Jennings, 363 Mo. 878, 882, 254 S.W.2d 596, 598-99 (1953).

152. PROP. NEW MO. CRIM. CODE § 20.010 (1) (1973).

153. State v. Cannon, 79 Mo. 343 (1883); State v. Marshall, 47 Mo. 378 (1871); State v. Thothos, 147 Mo. App. 596, 126 S.W. 797 (St. L. Ct. App. 1910); State v. Boland, 12 Mo. App. 74 (St. L. Ct. App. 1882).

of "affidavit."[154] Note that it is not necessary to show that the officer was authorized to administer the specific oath in question; it is sufficient if the officer is authorized to administer any oath.[155]

(c) Missouri law is uncertain regarding the kind of false affidavits covered by the present statute. The statute itself says, "of any nature, for any purpose."[156] An 1878 Missouri Supreme Court case, *State v. Crumb,*[157] held an indictment defective for failing to allege, *inter alia,* that the affidavit was required by law.[158] In 1891, in *State v. Miller,*[159] the court of appeals implied that the test was whether the affidavit was "either required, or authorized, or allowed in any proceeding known to the law."[160] Ten years later, in *State v. Breitweiser,*[161] the same court stated that the statute was "exceedingly broad," and if the affidavit was "made for 'any purpose' it would come within the letter of the statute."[162] In the most recent case on the subject, *State v. Lynes*[163] in 1916, another court of appeals

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154. PROP. NEW MO. CRIM. CODE § 20.010 (1) (1973).

155.

> That a notary is authorized to administer oaths in some cases cannot be disputed. He is, therefore, an officer "authorized to administer oaths;" and whether he was authorized to administer this oath or not, he comes within the language of the law.

State v. Boland, 12 Mo. App. 74, 78-79 (St. L. Ct. App. 1882). Note also that it is necessary to allege the *specific* person who administered the oath. State v. Thothos, 147 Mo. App. 596, 126 S.W. 797 (St. L. Ct. App. 1910).

156. § 557.070, RSMo 1969.

157. 68 Mo. 206 (1878).

158. *Id.* at 207-08.

159. 44 Mo. App. 159 (St. L. Ct. App. 1891).

160. *Id.* at 164. The defendant, at the instance of the prosecuting witness, signed an affidavit denying that he had made a certain wager with the prosecuting witness. The court stated:

> The manifest purpose of the prosecution was either to use the machinery of the criminal law to enforce the payment of a gambling debt, or to punish its non-payment. . . . An oath falsely made for the purpose of influencing a stakeholder in the payment of a gambling wager is not . . . such a corrupt oath as the statute intends to reach and punish, for the reason that it is not an oath either required, or authorized, or allowed, in any proceeding known to the law, but is an oath taken in furtherance of a proceeding condemned and made criminal by the law.

Id. at 163-64.

161. 88 Mo. App. 648 (St. L. Ct. App. 1901). The defendant made an affidavit stating that a previous affidavit which he had made on behalf of a certain candidate for committeeman was induced by pressure and intoxication. This affidavit was used in a "contest" for "city central committeeman of the Republican Party for the twenty-eighth ward of the said City of St. Louis." The court stated:

> We see no reason why affidavits in such a contest may not be heard and considered as evidence by the persons whose duty it is to decide contests of this nature and have no hesitancy in saying, that the affidavit made by the defendant was made in a proceeding wherein affidavits might be made and used as evidence.

Id. at 659.

162. *Id.*

163. 194 Mo. App. 184, 185 S.W. 535 (Spr. Ct. App. 1916). The court went on to say:

> The material part of the offense consists in the falsity of the affidavit and the designation of the individuals and transactions in which it is used are

stated that "there must be facts connecting the use of the affidavit with some substantial and legitimate transactions. . . ."[164] Finally, some language in *State v. Boland*[165] indicates that the purpose of the statute was "to discourage unnecessary and voluntary affidavits" and "otiose, unnecessary and voluntary oaths."[166]

The proposed section applies to all written statements that are "authorized or required by law to be made under oath."[167] This is narrower than the language of the present statute. However, many false statements covered by present law but not by the proposed section might be picked up by the section on "False Declarations."[168]

(d) There must be a false statement regarding a fact material to the purposes for which the affidavit is made.[169] Here, the Proposed Code defines materiality the same as it does for perjury.[170] Also, as with perjury, "knowledge of the materiality" is not an element, "and it is no defense that the defendant mistakenly believed the fact to be immaterial" or that he was "not competent" to "make the statement."[171]

(e) The defendant must know that the statement was false.[172] The

> necessary only . . . as a means of connecting its use with some substantial transaction and the mere reference [in the indictment] to some substantial individual and transaction is sufficient.

Id. at 190-91, 185 S.W. at 538.

164. *Id.* at 190, 185 S.W. at 538.

165. 12 Mo. App. 74 (St. L. Ct. App. 1882).

166. *Id.* at 79.

167. PROP. NEW MO. CRIM. CODE §§ 20.010 (1), .050 (1973). This language includes certificates and other documents. It is based upon COLO. REV. STAT. ANN. §§ 40-8-503 to -504 (1971); MICH. REV. CRIM. CODE §§ 4906, 4907 (Final Draft 1967); PROP. OKLA. CRIM. CODE § 2-605 (A) (1) (1973); PROP. S.C. CRIM. CODE §§ 20.23, .24 (1971); TEX. PENAL CODE § 37.02 (1973).

168. PROP. NEW MO. CRIM. CODE § 20.060 (1) (1973):

> A person commits the crime of making a false declaration if, with the purpose to mislead a public servant in the performance of his duty, he (a) submits any written false statement, which he does not believe to be true, (i) in an application for any pecuniary benefit or other consideration; or (ii) on a form bearing notice, authorized by law, that false statements made therein are punishable . . . .

169. State v. Shanks, 66 Mo. 560 (1877) (*see* note 76 *supra*). State v. Marshall, 47 Mo. 378 (1871). *Cf.* State v. Sloan, 309 Mo. 498, 514, 274 S.W. 734, 739 (1925); State v. Fannon, 158 Mo. 149, 59 S.W. 75 (1900); State v. Cannon, 79 Mo. 343, 345 (1883).

As with perjury, the question of materiality is for the court and is not a jury question. State v. Sloan, *supra* at 514, 274 S.W. at 739. *See* text accompanying notes 77, 78 *supra*.

170. PROP. NEW MO. CRIM. CODE §§ 20.040 (2), .050 (2) (1973). *See* text accompanying note 79 *supra*.

171. PROP. NEW MO. CRIM. CODE §§ 20.040 (3), .050 (2) (1973). *See* text accompanying note 104 *supra*.

172. State v. Marshall, 47 Mo. 378 (1871); State v. Morgan, 225 S.W. 129 (K.C. Mo. App. 1920); State v. Allen, 94 Mo. App. 508, 69 S.W. 604 (St. L. Ct. App. 1902). In *Allen* it was said:

> It may have been very kind of the court to have thus relieved the jury of the task of finding that the defendant swore to what he knew to be false, but the law imposed that duty on the jury and will not accept the finding of the court on that issue in lieu of the finding of the jury.

Id. at 517, 69 S.W. at 606.

Proposed Code requires a "purpose to mislead."[173] An affiant could not have a "purpose to mislead" if he did not "know" that the statement was false.

(f) The false affidavit must be made "corruptly." This term generally connotes bribery.[174] One opinion, involving a bribery statute, quotes an instruction saying that corruptly means "wrongfully; that is, it means the doing of an act with the intent to obtain an improper advantage, inconsistent with official duty and the rights of others."[175] This is quite close to the Proposed Code's element of "purpose to mislead any person."

The so-called "quantum of evidence" rule applies to prosecutions for false affidavits.[176] The Proposed Code extends the liberalization of this rule to the false affidavits section also.[177]

VI. Subornation

A. *Influencing Witnesses to Give False Testimony*

Jeb Stuart Magruder was charged with, *inter alia*, "influencing witnesses to give false, deceptive, and misleading testimony . . . ."[178]

Under present Missouri law, such conduct could be prosecuted as "subornation of perjury."[179] In the history of the state there have been only four reported prosecutions under this statute. A few rules can be gleaned from these cases.

There are two basic elements: First, it is necessary to prove that the witness alleged to have been suborned actually committed perjury and, second, that the defendant procured or suborned the witness to do so.[180] Further, there must be a "cause, matter or proceeding" actually pending at the time the procurement occurs.[181]

One who suborns perjury is not an accessory to the perjury itself, but is guilty of a separate crime.[182] Therefore, where the perjurer testifies against the suborner, or vice versa, it is not necessary to give a cautionary instruction on his testimony.[183]

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173. Prop. New Mo. Crim. Code § 20.050 (1) (1973). The phrase "purpose to deceive" is found in Tex. Penal Code § 37.02 (1973).

174. *See* pt. IV, § A (3) of this article.

175. State v. Lehman, 182 Mo. 424, 440, 81 S.W. 1118, 1122 (1904).

176. State v. Sloan, 309 Mo. 498, 513, 274 S.W. 734, 738 (1925). *See* State v. Miller, 44 Mo. App. 159 (St. L. Ct. App. 1891). *See also* pt. IV, § C (1) of this article.

177. Prop. New Mo. Crim. Code § 20.474 (1973).

178. Information, United States v. Magruder, Crim. No. 715-73 (D.D.C. filed Aug. 16, 1973) at 4.

179. § 557.040, RSMo 1969, provides:

> Every person who shall procure any other person, by any means whatsoever, to commit any willful or corrupt perjury in any cause, matter or proceeding, in or concerning which such other persons shall be legally sworn or affirmed, shall be adjudged guilty of subornation of perjury.

180. State v. Richardson, 248 Mo. 563, 154 S.W. 735 (1913).

181. State v. Howard, 137 Mo. 289, 38 S.W. 908 (1897).

182. State v. White, 263 S.W. 192, 194 (Mo. 1924); *accord,* State v. Baldwin, 358 S.W.2d 18, 22 (Mo. 1962).

183. State v. Richardson, 248 Mo. 563, 154 S.W. 735 (1913).

In a subornation prosecution the "quantum of evidence" rule does not apply to proof of the perjury.[184] The rationale for the rule—that it induces witnesses to testify—should not be extended to protect those who induce a witness to testify falsely. Also, the rationale that the accuser's oath against the oath behind the alleged perjury cannot overcome the presumption of innocence loses part of whatever validity it may have in a subornation case because it is not the defendant's oath that is in evidence.

The Proposed Code eliminates subornation of perjury as a separate crime. Threats or bribes to induce perjury are specifically proscribed as "tampering with a witness," but "influencing" a witness to commit perjury is not.[185] Arguably, a person who "influences" a witness to commit perjury could be prosecuted for perjury as a principal because he was an accessory before the fact. Under present law, however, he apparently could not be so prosecuted successfully.[186] It does not appear that the Proposed Code's section on accessorial liability would change this result.[187]

VII. Preparing False Testimony

Magruder and LaRue were charged with participating in "meetings to compose, develop and prepare the false, deceptive and misleading statements" to be given to various agencies and to be used in court.[188] As noted before, there is nothing under present Missouri law, or in the Proposed Code, making criminal the giving of false statements to the police or prosecutors.[189] If the testimony prepared was later given in court by others, the principles of accessorial liability, under either the present law or the Proposed Code, would apply because "preparing" the perjured testimony is not the "separate and distinct crime" of subornation. If the prospective perjury did not in fact occur, one who prepared it probably would not be guilty of any crime under present law.[190] But under the Proposed Code, the mere act of preparing the testimony would probably be sufficient to constitute attempted perjury.[191]

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184. *Id.*
185. *See* proposed statute quoted note 232 *infra.*
186. *See* text accompanying notes 182, 183 *supra.*
187. Prop. New Mo. Crim. Code § 7.070 (1973). Ed. comment. Some believe it will.
188. Information, United States v. Magruder, Crim. No. 715-73 (D.D.C. filed Aug. 16, 1973) at 5; Information, United States v. LaRue, Crim. No. 556-73 (D.D.C. filed June 27, 1973) at 2.
189. *See* pt. III, § B of this article.
190. Unless a violation of the present misdemeanor conspiracy statute could be shown. § 556.120, RSMo 1969. *See* §§ 546.320, 556.130, RSMo 1969, stating that, except in certain cases, mere agreement does not constitute conspiracy.
191. Prop. New Mo. Crim. Code § 9.010 (1) (1973):

> A person is guilty of attempt to commit an offense when, with the purpose of committing the offense, he does any act which is a substantial step towards the commission of the offense.

VIII. Bribery of and Threats to a Public Servant

A. *Bribery Under Present Law*

The indictment charged Vesco with offering $250,000 to the Committee for the Re-election of the Present "with the intent" of having Stans and Mitchell "exert their influence on the SEC on behalf of" Vesco and others.[192]

At present, there are innumerable statutes in Missouri relating to bribery, but there are relatively few reported prosecutions thereunder.[193] As to public officials, section 558.010 bans the giving of a bribe, and section 558.020 forbids the acceptance of one. Attempting to bribe public officers is forbidden by section 558.080, and solicitation of bribes is criminalized by section 558.090.

At common law bribery is the voluntary giving or receiving of anything of value to a person in public office to influence his behavior in office.[194] Both giving a bribe and receiving a bribe are technically termed "bribery."[195]

Before there can be bribery of a public official, the proposed recipient must already be such an official.[196] Further, it is clear that the official must be authorized to perform the proposed conduct sought.[197] And,

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192. Indictment, United States v. Mitchell, Crim. No. 73-439 (S.D.N.Y. filed May 10, 1973) at 8.

193. As with perjury, the incidence of reported bribery prosecutions involving public officers has been significantly less in modern times. The first prosecution reported was in 1888. From 1902 through 1928, there are a total of 13 reported prosecutions involving bribery as follows: Bribery–2; attempted bribery–2; accepting a bribe–1; soliciting a bribe–2; agreement to accept a bribe–2; conspiracy to bribe–1; agreement to accept a bribe–2; conspiracy to bribe–1. Since 1928, there have been only six such prosecutions: attempted bribery–1; accepting a bribe–1; soliciting a bribe–3; accepting a gratuity for past official action–1.

There have also been six prosecutions involving bribery of witnesses: one from 1829-1879, three from 1880-1929, and two from 1930 to date. There are five reported prosecutions concerning bribery of jurors, four of them from 1880-1929, and one since then. There are three contempt of court proceedings, one in 1941, and the other two since 1929.

194. *See generally*, State v. Meysenburg, 171 Mo. 1, 71 S.W. 229 (1902); State v. Tummons, 225 Mo. App. 429, 37 S.W.2d 499 (Spr. Ct. App. 1931); State v. Farris, 229 S.W. 1100 (St. L. Mo. App. 1921), State v. Sullivan, 110 Mo. App. 75, 84 S.W. 105 (K.C. Ct. App. 1904).

195. State v. Meysenburg, 171 Mo. 1, 71 S.W. 229 (1902).

196. In State v. Farris, 229 S.W. 1100 (St. L. Mo. App. 1921), the offer was conditioned upon the recipient being elected to the state legislature. The court held that there was no bribery. However, it is not necessary that the officer be a *de jure* officer; it is sufficient if he is a *de facto* officer. State v. Butler, 178 Mo. 272, 77 S.W. 560 (1903).

197. In State v. Adcox, 312 Mo. 55, 278 S.W. 990 (1925), the defendant was charged with bribing the superintendent of public schools to falsely certify that he had examined certain persons who were seeking medical licenses regarding their high school education, and that they had passed such examinations. The court held that the official was not authorized to issue such certificates. Therefore, there was no bribery under the statute. *Accord,* State v. Lehman, 182 Mo. 424, 81 S.W. 1118 (1904) (dictum). *See also* State v. Graham, 96 Mo. 120, 8 S.W. 911 (1888).

In State v. Butler, 178 Mo. 272, 77 S.W. 560 (1903), it was alleged that de-

although the law is not quite as clear, it appears that the official must have the duty to act.[198] Finally, it is not necessary that the matter be actually pending before the officer.[199]

With regard to more specific instances of bribery involving public officials, the Missouri cases have set out some significant rules.

1. Bribery

Acceptance of a promise of money, under an agreement to perform an official act in a certain way, is bribery.[200] The offense is complete upon the acceptance of the promise, so it is immaterial whether the agreement is carried out.[201]

Where a person bribes a public official to appoint him to a certain office, it is not necessary that he be eligible to hold that office.[202]

2. Attempted Bribery

To constitute attempted bribery an offer must be made to a public officer with intent to influence his behavior in respect to some question which may be brought before him in his official capacity.[203] To constitute an offer, it is not necessary that there be a legal tender;[204] all that is

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fendant had attempted to bribe a member of the Board of Health of the City of St. Louis to accept a company's bid for garbage removal. It was further alleged that there was an ordinance authorizing the board to let such contracts. The court held that the ordinance was invalid because it violated the city charter, and therefore, that there was no bribery. It was not enough that it was thought the official had the power to act. *Id. See* State v. Taylor, 133 S.W.2d 336 (Mo. 1939), involving attempted corruption of a juror, where the defendant attempted to bribe a person who had already been excused from jury duty. The court held that the defendant could not be convicted merely because he "thought" the person "was a summoned juror." *Id.* at 340. Nor is there any such thing as an "attempt" to "attempt to corrupt." The state cannot "'pyramid' attempts." *Id.* at 341. The case contains an extended discussion of the Missouri law on "impossibility of performance." *Id.* at 340-41.

198. In State v. Adcox, 312 Mo. 55, 278 S.W. 990 (1925), the court stated:

> [T]here can be no bribery of any official to do a particular act unless the law requires or imposes upon him the duty of so acting. A moral duty is insufficient.

Id. at 60, 278 S.W. at 991; *accord,* State v. Adams, 274 S.W. 21 (Mo. 1925), State v. Butler, 178 Mo. 272, 77 S.W. 560 (1903).

199. State v. Wilbur, 462 S.W.2d 653, 655 (Mo. 1971). *See also* State v. Lehman, 182 Mo. 424, 81 S.W. 1118 (1904).

200. State v. Lehman, 182 Mo. 424, 81 S.W. 1118 (1904).

201. *Id.* at 456, 81 S.W. 1128. *Accord,* State v. Butler, 178 Mo. 272, 77 S.W. 560 (1903).

202. State v. Butler, 178 Mo. 272, 77 S.W. 560 (1903). On a charge of bribery of a witness, it is not necessary to prove whether the witness's testimony was material, or whether he had been summoned. State v. Biebusch, 32 Mo. 276, 279 (1862). Nor is it necessary, in such a case, to allege or prove that the bribery was done "with intent to impede and obstruct the due course of justice." *Id.* The nature of the case in which the witness was to testify is not an element of or material to the offense; neither is the guilt or innocence of any of the parties to the case.

203. State v. Butler, 178 Mo. 272, 77 S.W. 560 (1903).

204. State v. Woodward, 182 Mo. 391, 81 S.W. 857 (1904) (bribery of a juror); State v. Miller, 182 Mo. 370, 81 S.W. 867 (1904) (accessory after the fact to the bribery in *Woodward*).

necessary is "a corrupt proposal or declaration of a willingness to give such bribe."[205]

3. Receiving a Bribe

A legislator may be bribed to vote for some particular person, or in some particular manner, or for some particular side, or more favorably to one side; or to neglect to perform some official duty; or to perform some duty with partiality, or otherwise than according to law.[206]

4. Soliciting a Bribe

At common law, solicitation of a bribe was a misdemeanor.[207] The crime is complete when the bribe is sought. It is no defense that the solicitor did not perform as offered or that the giving of the bribe was not seriously considered.[208]

5. Gratuity After Act Performed

The offense committed by an official receiving a gratuity "in consideration that he has given his vote . . . in any question" does not require "a corrupt agreement prior to the official's act."[209]

B. *Bribery Under the Proposed Code*

The Proposed Code amalgamates all of the present statutes relating to bribery of public servants[210] into two brief sections. Bribery of a Public Servant"[211] and Public Servant Acceding to Corruption."[212] These sec-

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205. State v. Woodward, 182 Mo. 391, 407, 81 S.W. 857, 861 (1904). *See* State v. Miller, 182 Mo. 370, 81 S.W. 867 (1904). *See also* State v. Davidson, 172 Mo. App. 356, 157 S.W. 890 (K.C. Ct. App. 1913) (attempt to bribe a witness). In *Miller,* the court stated:

> No corruptionist flaunts his money in the face of the man he proposes to bribe. He moves in an insidious way to ascertain the moral strength of his victim, and it is only when he feels sure of his game that he produces the actual bribe.

Id. at 385-86, 81 S.W. at 872.

206. State v. Lehman, 182 Mo. 424, 81 S.W. 1118 (1904).

207. State v. Sullivan, 110 Mo. App. 75, 84 S.W. 105 (K.C. Ct. App. 1904).

208. State v. Byrnes, 238 Mo. App. 220, 177 S.W.2d 909 (K.C. Ct. App. 1944).

209. State v. Brown, 364 Mo. 759, 766, 267 S.W.2d 682, 686 (1954).

210. §§ 558.010-.100, RSMo 1969.

211. PROP. NEW MO. CRIM. CODE § 21.010 (1973) provides:

> Bribery of a Public Servant
>
> (1) A person commits the crime of bribery of a public servant if he knowingly offers, confers or agrees to confer upon any public servant any benefit, direct or indirect, in return for
>
> (a) the recipient's official vote, opinion, recommendation, judgment, decision, action or exercise of discretion of a public servant; or
>
> (b) the recipient's violation of a known legal duty as a public servant.
>
> (2) It is no defense that the recipient was not qualified to act in the desired way because he had not yet assumed office, or lacked jurisdiction, or for any other reason.
>
> (3) Bribery of a public servant is a Class D Felony.

This is substantially the same as MODEL PENAL CODE § 240.1 (Prop. Off. Draft 1962); PROP. ALAS. CRIM. CODE § 11.27.010 (1970); COLO. REV. STAT. ANN. § 40-7-6

tions make some fairly significant changes in Missouri law. The present element of "on any question, matter, election, appointment, cause or proceeding, which may be then pending, or may by law be brought before him in his official capacity"[213] has been omitted, and a subsection has been added to the bribery section eliminating the requirement that the recipient be "qualified to act in the desired way."[214] This reverses the present Missouri position.[215]

(1964); MICH. REV. CRIM. CODE § 4705 (Final Draft 1971); MONT. CRIM. CODE § 94-7-102 (1973); PROP. N.J. PENAL CODE § 2C:27-2 (1971); N.Y. PENAL LAW §§ 200.00, .10 (McKinney 1967); PROP. OKLA. CRIM. CODE § 2-801 (1973); PROP. S.C. CRIM. CODE § 20.18 (1971); and TEX. PENAL CODE § 36.02 (1973), except that all of the above provisions, except those of the Model Penal Code, Alaska, Montana, and New Jersey Codes, are written in terms of "influencing" official decisions. *See* note 218 *infra.*

Some of the above codes contain a provision that:

> It is a defense to prosecution under this section if a person conferred or agreed to confer a pecuniary benefit upon a public servant as a result of coercion or attempted coercion, or extortion or attempted extortion, by the latter.

MICH. REV. CRIM. CODE § 4705 (2) (Final Draft 1971); N.Y. PENAL LAW § 200.05 (McKinney 1967); PROP. S.C. CRIM. CODE § 20.19 (1971).

This defense is specifically negated in PROP. N.J. PENAL CODE § 2C:27-2 (1971), and is not mentioned in the Model Penal Code or the Alaska, Colorado, Illinois, Montana, or Texas codes. The rationale in favor of such a defense is twofold. First, a public servant with authority to deny permits and licenses may have such overwhelming power in a community as to leave a businessman no choice but to cooperate or go out of business. Second, a person who has been placed in such a position by a public servant would be more willing to report the matter to authorities and cooperate if he himself was not subject to prosecution. The arguments against the defense are that it rewards wrongdoing, and that the second rationale can be satisfactorily handled by prosecutorial discretion.

212. PROP. NEW MO. CRIM. CODE § 21.020 (1973) provides:

> Public Servant Acceding to Corruption
>
> (1) A public servant commits the crime of acceding to corruption if he knowingly solicits, accepts or agrees to accept any benefit, direct or indirect, in return for
>
> (a) his official vote, opinion, recommendation, judgment, decision, action or exercise of discretion as a public servant; or
>
> (b) his violation of a known legal duty as a public servant.
>
> (2) Acceding to corruption by a public servant is a Class D Felony.

213. § 558.010, RSMo 1969.

214. This addition is based on MODEL PENAL CODE § 240.1 (Prop. Off. Draft 1962); PROP. ALAS. CRIM. CODE § 11.27.010(b) (1970); COLO. REV. STAT. ANN. § 40-8-302 (2) (1971); MICH. REV. CRIM. CODE § 4705 (3) (Final Draft 1971); MONT. CRIM. CODE § 74-7-102(1) (1973); and PROP. N.J. PENAL CODE § 2C:27-2 (1971).

This provision is *not* found in the section on soliciting or receiving bribes. There does not seem to be any good reason for allowing the public servant to defend on the grounds that he had no jurisdiction to do the act for which he solicited or received a bribe when the person offering or giving a bribe has no such defense. Perhaps this is a mere drafting error which can be corrected by the legislature.

215. *See* note 197 *supra.*

By providing that "[i]t is no defense that the recipient was not qualified to act in the desired way because he had not yet assumed office," the section raises an interesting problem of interpretation in light of the requirement that the person bribed be "a public servant." "Public servant" is defined as "any person employed in any way by a government of this State who is compensated by the government by reason of his employment." PROP. NEW MO. CRIM. CODE § 1.120 (20) (1973). How can a person be a "public servant" if he has not yet assumed office?

One minor change does not appear to be substantive. The phrase "with intent to influence . . . ." presently found in sections 558.010 and 558.030[216] is not included in the Proposed Code. But, because all of the cases have required the state to allege and prove that a *specific* action or inaction was the subject of the bribe,[217] this vague phrase is superfluous under present law.[218]

Turning, then, to the charge in the Vesco indictment, it is very doubtful that this would be bribery under present law. Is the promise to give $250,000 to the Committee to Re-elect the President a "promise" to "directly or indirectly, give any money, goods, right in action or any other valuable consideration, gratuity or reward" to a "public officer or employee"?[219] Because no action by the Committee is sought, the issue is whether this is "indirectly" a gift of "valuable consideration" to Mitchell or Stans. It could be argued that, because Mitchell and Stans might benefit by the President's re-election by being reappointed to cabinet posts, the gift would indirectly inure to their benefit. This seems too speculative to pass muster under present law.[220]

Assuming sufficient benefit to Mitchell and Stans, the next question would be whether such promise was made "with intent to influence" a public officer within the criteria of section 558.010.[221] The allegation is that the promise was made "with the intent" of having Mitchell and Stans "exert their influence on the SEC on behalf of" Vesco and others. It does not matter whether the bribe was intended to influence a member of the SEC, for only the recipient must be influenced. Clearly, there was no "question, matter . . . cause or proceeding"[222] pending before Mitchell

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One possible result of this apparent conflict may be that the courts will throw out the "had not yet assumed office" proviso and hold that only those who are holding office are potential subjects of bribery. Another possibility would be to hold that the offer, conferring, or agreement was a continuing contract, and find bribery only if and when the recipient actually assumes office. This result would directly conflict with those cases that hold that "[t]he offense must be complete at the time of the offer" (State v. Butler, 178 Mo. 272, 319, 77 S.W. 560, 572 (1903)). *See* State v. Wilbur, 462 S.W.2d 653, 655 (Mo. 1971); State v. Byrnes, 238 Mo. App. 220, 177 S.W.2d 909 (K.C. Ct. App. 1944). A third possibility would be to hold that the statute included all candidates and applicants for public office, but that stretches the definition of "public servant" too far. The most likely result is that the statute will be held to apply to all those who have been elected or appointed to public office, regardless of whether they have yet taken office.

216. §§ 558.010, .030, RSMo 1969.

217. *See* pt. VIII, §§ A (1)-A (4) of this article.

218. A number of the codes are written in terms of "influencing" official decisions. *See* note 211 *supra*. The language of the Proposed Code is clearer and more specific. To constitute a violation of these sections, a benefit must be offered, conferred, solicited or received in the expectation that specific action or inaction will ensue, not in the hope that the official will in some vague, undefined way be "influenced" thereby.

219. § 558.010, RSMo 1969.

220. *Cf.* State v. Farris, 229 S.W. 1100 (St. L. Mo. App. 1921).

221. § 558.010, RSMo 1969.

222. *Id.*

or Stans. And, although the SEC investigation could have resulted in a criminal proceeding, which would have come under the aegis of the Attorney General, this would have been far too speculative to qualify under present Missouri law.

The only possible argument is that the Attorney General had the "authority" or the "duty" to counsel with and advise with the SEC. The distinction between "authority" and "duty" could be critical here. The language of the Missouri cases clearly indicates that the official must have the "duty" to act, but, in each of those cases the official also lacked the "authority" to act.[223] If the standard is "duty," then it would be necessary to plead and prove that the Attorney General had the "duty" to advise the SEC on each and every one of their investigations—a very unlikely possibility. If the standard is "authority," it may be that the Attorney General has such authority.

In sum, it seems very unlikely that the Vesco allegation would be sufficient to support a prosecution for bribery under present Missouri law. The same considerations would apply to a prosecution against Stans and Mitchell for receiving a bribe.

Would the result be different under the Proposed Code? The question is much closer. It requires only "any benefit, direct or indirect."[224] It would be easier to argue that the proposed contribution to the Committee would be an indirect benefit to Mitchell or Stans. But that is still quite speculative. It is likely the courts will limit "benefit" to legal consideration sufficient to support an ordinary contract, and thus the benefit here would not qualify.

If, for purposes of discussion, it is assumed that Mitchell or Stans were the "recipient" of the promise, the question would be whether it was given "in return for" their "official vote, opinion, recommendation, judgment, decision, action or exercise of discretion as a public servant."[225] The provision that "[i]t is no defense that the recipient was not qualified to act in the desired way because he . . . lacked jurisdiction, or for any other reason" may be critical.[226] The issue is whether they were being bribed to exert their "influence" as "public servants" or in a private capacity, and this may present a fact question for a jury.

C. *Threats*

In the Vesco indictment, it is alleged that Vesco threatened "to disclose the facts surrounding the secret $200,000 cash contribution delivered to defendant MAURICE STANS on April 10, 1972, unless an SEC subpoena issued to VESCO was withdrawn."[227] Sears allegedly relayed this

223. *See* note 198 and accompanying text *supra*.
224. PROP. NEW MO. CRIM. CODE § 21.010 (1) (1973).
225. *Id.*
226. *Id.* § 21.010 (2).
227. Indictment, United States v. Mitchell, Crim. No. 73-439 (S.D.N.Y. filed May 10, 1973) at 10.

threat to Mitchell.[228] It is also charged that Vesco attempted "to submit a written memorandum to Donald Nixon, the brother of the President of the United States," threatening "disclosure of the secret cash contribution and other adverse consequences unless the SEC was directed to drop all legal proceedings against VESCO." It is further claimed that "the memorandum came to the attention of" Mitchell and that he "turned it over to" Sears.

Present Missouri law covers threats to witnesses,[229] jurors, arbitrators, and referees.[230] There are no statutes dealing with threats to other public servants.

The Proposed Code also covers threats to witnesses,[231] and expands

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228. What the indictment really charges is that Vesco, Sears, Stans, and Mitchell conspired to threaten Stans and Mitchell with disclosure of the contribution unless they persuaded Casey to drop the subpoena to Vesco. This is quite similar to the charge in State v. Meysenburg, 171 Mo. 1, 71 S.W. 229, 237 (1902):

> [T]he idea that defendant conspired with Kratz and Stock to have himself bribed is as flagrantly absurd as would be the position that a woman had conspired with others for her own seduction.

229. § 557.090, RSMo 1969:

> Every person who shall, by . . . menace . . . directly or indirectly induce or attempt to induce any witness, or person who may be a competent witness, to absent himself or avoid a subpoena or other process, or to withhold his evidence, or shall deter or attempt to deter him from appearing or giving evidence in any cause, matter or proceeding, civil or criminal, . . . shall be deemed guilty of a misdemeanor.

There has been only one reported prosecution under this statute. State v. Ballard, 294 S.W.2d 666 (St. L. Mo. App. 1956). *See* text accompanying note 32 *supra.*

230. § 557.130, RSMo 1969:

> Every person who shall attempt improperly to influence any juror in any civil or criminal case, or anyone summoned as a juror, or anyone chosen an arbitrator or appointed a referee in relation to any matter pending in the court or before the officer before whom such juror shall have been summoned or sworn, or pending before such arbitrator or referee, shall, upon conviction, be adjudged guilty of a misdemeanor.

There have been no reported prosecutions alleging "threats" in Missouri under this statute. This statute has been equated with the common law crime of embracery (an attempt to corruptly influence a jury). This influence could be obtained by threats. State v. Davis, 112 Mo. App. 346, 87 S.W. 33 (St. L. Ct. App. 1905).

231. PROP. NEW MO. CRIM. CODE § 20.270 (1973):

> (1) A person commits the crime of tampering with a witness if, with purpose to induce a witness or a prospective witness in an official proceeding to disobey a subpoena or other legal process, or to absent himself or avoid subpoena or other legal process, or to withhold evidence, information or documents, or to testify falsely, he
>
> (a) threatens or causes harm to any person or property; or
>
> (b) engages in conduct reasonably calculated to harass or alarm such witness; or
>
> (c) offers, confers or agrees to confer any benefit, direct or indirect, upon such witness.

This is a rewrite of the first part of § 557.090, RSMo 1969. (PROP. NEW MO. CRIM. CODE § 20.280 (1973) covers the second part). In combination with the attempt provisions, it includes the conduct proscribed by § 557.080 (attempts to bribe a witness to commit perjury).

Present § 557.090 forbids inducing a witness not to testify "by bribery, menace

the present statute protecting jurors, arbitrators, and referees to include judges and special masters.[232] Again, there are no provisions on threats to other public servants.

Because Mitchell and Stans are not any of the specified public servants, the above allegations, standing alone, would not support any criminal charge in Missouri under either the present law or the Proposed Code.

IX. Miscellaneous Conduct

A. *Cancelling or Delaying Appearance of Witnesses*

It is charged that Sears discussed with Mitchell "having MITCHELL arrange to cancel or defer the appearances of ICC employees who had been subpoenaed to testify in connection with the SEC investigation of VESCO, ICC, IOS and others."[233] The indictment is silent as to how Mitchell was supposed to "arrange" this. There appear to be only three possibilities: (1) contacting the witnesses and persuading them to disobey the subpoenas; (2) cancelling or deferring the hearings themselves; and (3) cancelling or deferring the subpoenas.

If Mitchell had actually attempted to persuade witnesses to disobey the subpoenas, the conduct would probably be covered under present law.[234] Under the Proposed Code, it would be covered *only* if he resorted to

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or other means." The quoted proposal covers inducement by force, threat, harassment, or bribery.

Since subornation of perjury has been omitted from the Proposed Code, inducements to commit perjury without bribery or threats are not covered. But they might be punishable as contempt of court, along with inducements to disobey process. Most withholding of testimony would itself be perjury.

232. Prop. New Mo. Crim. Code § 20.260 (1973):

> (1) A person commits the crime of tampering with a judicial proceeding if, with purpose to influence the official action of a judge, juror, special master, referee or arbitrator in a judicial proceeding, he
>
> (a) threatens or causes harm to any person or property; or
>
> (b) engages in conduct reasonably calculated to harass or alarm such official or juror . . . .

233. Indictment, United States v. Mitchell, Crim. No. 73-439 (S.D.N.Y. filed May 10, 1973) at 10.

234. § 557.090, RSMo 1969 (emphasis added):

> Every person who shall, by bribery, menace or *other means*, directly or indirectly induce or attempt to induce any witness, or person who may be a competent witness, to absent himself or avoid a subpoena or other process . . . or shall deter or attempt to deter him from appearing or giving evidence in any cause, matter or proceeding, civil or criminal . . . shall be deemed guilty of a misdemeanor.

Out of eight reported prosecutions under this statute, six have involved bribery and one has involved threats ("menace"). There is one case when neither threats nor bribery were alleged. In State v. Hook, 433 S.W.2d 41 (K.C. Mo. App. 1968), defendant's husband had been charged with molestation of her daughter (his stepdaughter). Defendant was advised by highway patrol officers "that her daughter would be needed as a witness against her stepfather." Five days after the charge was filed in magistrate court, defendant took her daughter "by automobile to St. Louis and put her on a bus to go to the home of defendant's father in Marshall, Illinois, where she stayed." *Id.* at 43. Defendant's conviction was reversed because it charged defendant, in the alternative, with each and every act denounced by

threats, bribery, or "conduct reasonably calculated to harass or alarm such witness."[235]

The only way to "arrange" the other two possibilities would have been through the head of the SEC. If bribery of him, or another employee of the SEC were involved, the bribery statutes would apply.[236] Otherwise, neither the present law nor the Proposed Code would cover such conduct.[237]

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the statute. There was no discussion in the opinion as to the applicability of the statute in the absence of bribery or "menace."

Present Missouri law is unclear whether it is essential that either Mitchell or someone acting on his behalf actually contacted one or more of the witnesses. Although there are no cases in point under § 557.090, several cases involving attempts to influence jurors are analogous. In *In re* Elliston, 256 Mo. 378, 165 S.W. 987 (1914), petitioner on a writ of habeas corpus had been found guilty of contempt of court for attempting to influence a juror. Under the facts, petitioner had never personally contacted the juror, but had asked a third person to do so. The juror was never contacted. The court held that petitioner could not be guilty of contempt of court unless the juror was actually contacted, (*accord, Ex parte* Miles, 406 S.W.2d 107 (K.C. Mo. App. 1966)), but that he might have violated certain Missouri statutes. The court cited §§ 556.150 (attempts), 557.130 (attempt improperly to influence juror), and 557.140 (witness disqualifying juror).

235. PROP. NEW MO. CRIM. CODE § 20.270 (1973).

236. *See* pt. VIII, § A of this article.

237. It might be argued that § 558.110, RSMo 1969, ("oppression in office") would cover this conduct, as well as that discussed in pt. IX, § B of this article. It provides that:

> Every person exercising or holding any office of public trust who shall be guilty of willful and malicious oppression, partiality, misconduct or abuse of authority in his official capacity or under color of his office, shall, on conviction, be deemed guilty of a misdemeanor.

This section covers every person holding an office of public trust. State v. Grassle, 74 Mo. App. 313 (St. L. Ct. App. 1898).

The cases are greatly confused as to the elements of the offense. One supreme court decision requires that the acts be done "corruptly." State v. Hein, 50 Mo. 362, 364 (1872). A later supreme court case states that the misconduct must be "willful, corrupt, or fraudulent." State v. Boyd, 196 Mo. 56, 66-68, 94 S.W. 536, 540-43 (1906). The Kansas City Court of Appeals has held that "corruptly" is not a necessary element. State v. Latshaw, 63 Mo. App. 620, 624 (K.C. Ct. App. 1895); State v. Ragsdale, 59 Mo. App. 590, 603 (K.C. Ct. App. 1894). But the St. Louis Court of Appeals has indicated the contrary. State v. Grassle, *supra* at 316. The distinction is an important one, because "corruptly" is normally associated with "bribery."

As to the more specifically mental elements, two cases say that "willful" is a necessary element. State v. Hein, *supra* at 364; State v. Latshaw, *supra* at 624. Two cases hold the oppression must be done "knowingly." State v. Hein, *supra* at 364; State v. Grassle, *supra* at 316. One case holds that the acts must be done "maliciously" (State v. Latshaw, *supra* at 624), while another uses "fraudulently" as an alternative element. State v. Boyd, *supra* at 66.

There are two reported convictions under this statute which have stood up on appeal. In State v. Ragsdale, *supra,* the mayor of Moberly was convicted of oppression in office for wrongfully ordering the prosecuting attorney jailed. The other successful prosecution, State v. Allen, 22 Mo. 318 (1855), involved a justice of the peace, but the opinion gives no hint of the charges or the evidence.

The courts have reversed five convictions under this statute. In State v. Hasler, 449 S.W.2d 881 (St. L. Mo. App. 1969), a judge was charged with meeting with one of the parties to a divorce suit pending before him, without the presence or knowledge of the other side and discussing the litigation. The court held that the indictment, which was couched in the general terminology of the statute, was insufficient. In State v. Boyd, *supra,* a police officer was accused of failing to arrest

B. *Causing Agency Head to Delete Allegations from a Civil Complaint and to Refrain from Filing in Court*

It is alleged that Stans caused "G. Bradford Cook, Counsel to the SEC, to request the SEC staff not to file transcripts of testimony relating to the

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"keepers," "inmates," and "habitues" of bawdy houses in his district. The indictment was held insufficient for failing to charge that the misconduct was "willful, corrupt, or fraudulent." In State v. Grassle, *supra*, a judicial officer was prosecuted for refusing to allow an attorney to cross-examine a witness. The indictment was bad because it did not charge that the imputed misbehavior was corrupt or done from a wrong motive or criminal intent. In State v. Hein, *supra*, a demurrer was properly sustained because the indictment failed to allege that the acts were done "willfully, knowingly and corruptly." And in State v. Lawrence, 45 Mo. 492 (1870), a justice of the peace was charged in the St. Louis Court of Criminal Corrections with illegally issuing an execution. The court held that the court of criminal corrections had no jurisdiction because of the forfeiture provisions. *Contra*, State *ex rel.* Stinger v. Krueger, 280 Mo. 293, 217 S.W. 310 (En Banc 1919) (prohibition denied). In one other case, State v. Cook, 31 Mo. App. 57 (St. L. Ct. App. 1888), the circuit court had dismissed the appeal of the mayor of New Madrid from his conviction by a justice of the peace. The court of appeals set aside the dismissal and reinstated the appeal.

More recently, the practice has been to bring quo warranto proceedings for ouster, charging violation of § 558.110, RSMo 1969. State v. Orton, 465 S.W.2d 618 (Mo. En Banc 1971); State *ex rel.* Stephens v. Fletchall, 412 S.W.2d 423 (Mo. En Banc 1967); State *ex rel.* Connett v. Madget, 297 S.W.2d 416 (Mo. En Banc 1956).

In drafting the Proposed Code, a choice had to be made between a general section prohibiting oppression or misconduct in office and sections spelling out specific acts of misconduct to be punished criminally. Present Missouri law jumbles these alternatives together. All of the codes examined except the Model Penal Code purport to resolve the question with general prohibitions against misconduct in office. *See* COLO. REV. STAT. ANN. §§ 40-8-403 to -405 (1971); ILL. ANN. STAT. ch. 38, § 33-3 (Smith-Hurd 1973 Supp.); MICH. REV. CRIM. CODE §§ 4805-06 (Final Draft 1971); N.Y. PENAL LAW § 195.00 (McKinney 1967); TEX. PENAL CODE § 39.01 (1973).

The choice made in the Proposed Code is to atempt to spell out the prohibited conduct. In addition to the section on soliciting and receiving bribes (*see* part VIII, § A of this article), a number of specific acts are set forth in PROP. NEW MO. CRIM. CODE §§ 20.320 (misconduct in administration of justice) and § 21.040 (official misconduct) (1973). Other specific prohibitions are found in PROP. NEW MO. CRIM. CODE §§ 20.180 (failure to execute an arrest warrant), 20.240 (permitting escape), 20.300 (misconduct by a juror), 20.310 (misconduct in selecting or summoning a juror) and 21.050 (misuse of official information) (1973). There is no catch-all "misconduct" or "oppression" section such as present § 558.110, RSMo 1969. "The acts of a public officer which might support a charge" under that statute "are almost limitless." State v. Hasler, *supra* at 885. Quo warranto proceedings for ouster will be unaffected by repeal of § 558.110 because the state will still be able to charge the specific acts of misconduct as grounds for ouster.

Another statute arguably applicable to this conduct is that of fraud in office:

> Every officer or public agent of this state, or of any county, who shall commit any fraud in his official capacity or under color of his office, shall be adjudged guilty of a misdemeanor.

§ 558.120, RSMo 1969. There are only two reported prosecutions under this statute. State v. Green, 24 Mo. App. 227 (K.C. Ct. App. 1887); State v. O'Gorman, 68 Mo. 179, 190 (1878). The cases indicate that this statute is aimed at embezzlement and attempted embezzlement. It has been omitted from the Proposed Code because the larceny provisions cover such conduct. Moreover, violation of § 558.120 is a misdemeanor, and the existence of this specific statute might be held to bar a felony larceny prosecution in a given case. *See* State v. Green, *supra*, and note 247 and accompanying text *infra*; *but see* State v. Rosenheim, 303 Mo. 553, 261 S.W. 95 (Mo. 1924).

said $250,000 with the United States District Court for the Southern District of New York."[238] Again, if bribery were alleged, the bribery statutes would apply. There are no statutes under present law which would clearly cover such conduct.[239] Under the Proposed Code, the new offense of "Tampering With a Public Record" might apply:

> A person commits the crime of tampering with a public record if . . . knowing he lacks authority to do so, he . . . suppresses or conceals any public record with the purpose to impair the . . . availability of such record.[240]

A "public record" is defined as "any document which a public servant is required by law to keep."[241] It is unclear if a deposition or transcript is a public record.

C. *Accepting Guilty Pleas Outside the Courtroom*

Section 558.380, RSMo 1969, provides:

> Any judge, magistrate or police judge who shall accept a plea of guilty from any person charged with the violation of any statute or ordinance at any place other than at the place provided by law for holding court by said judge, magistrate or policy judge . . . shall be deemed guilty of a misdemeanor. . . .

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238. Indictment, United States v. Mitchell, Crim. No. 73-439 (S.D.N.Y. filed May 10, 1973) at 6.

239. Again, the present statute on oppression in office is so vague and general that it might be held to cover it. *See* note 237 *supra*.

240. PROP. NEW MO. CRIM. CODE § 20.110 (1973). This section is new. It is based on MODEL PENAL CODE § 241.8 (Prop. Off. Draft 1962); COLO. REV. STAT. ANN. § 40-8-114 (1971); ILL. ANN. STAT. ch. 38, § 32-8 (Smith-Hurd 1973 Supp.); MICH. REV. CRIM. CODE § 4555 (Final Draft 1971); MONT. CRIM. CODE § 94-7-209 (1973); PROP. N.J. PENAL CODE § 2C:28-7 (1971); PROP. OKLA. CRIM. CODE § 2-624 (1973); and TEX. PENAL CODE § 37.10 (1973). The primary differences between the proposed section and the above codes is in the definition of "public record." *See* note 241 and accompanying text *infra*.

Further, none of the above codes require that the act be done with any particular intent. The proposed section requires an intent to impair the usefulness of the record in some way. There is no sound policy reason for making the defacing of a public record in anger or in jest criminal where there is no intent to interfere with governmental operations or to mislead anyone. Scrawling an obscene phrase across the top of a public record may offend someone's sensibilities, but it does not interfere with the usefulness of that record. Neither present Missouri law nor New York law provide any special protection for public records, and in a sense the section as submitted may be considered a compromise between this position and that taken in Colorado, Illinois, Michigan, and Texas.

241. PROP. NEW MO. CRIM. CODE § 20.010 (11). Any less restrictive definition would be so broad as to be meaningless. Many codes and proposed codes cover any documents used for information whether required by law or not. *See, e.g.*, MODEL PENAL CODE § 241.8 (Prop. Off. Draft 1962); PROP. ALAS. CRIM. CODE § 11.27.170 (1970); COLO. REV. STAT. ANN. § 40-8-114 (1971); ILL. ANN. STAT. ch. 38, § 32-8 (Smith-Hurd 1973 Supp.); MICH. REV. CRIM. CODE § 4555 (Final Draft 1971); MONT. CRIM. CODE § 94-7-209 (1973); PROP. N.J. PENAL CODE § 2C.28-7 (1971); TEX. PENAL CODE § 37.10 (1973). The difficulty with this approach is that it allows almost any public servant to decide *ex post facto* which of his papers are protected. Though the proposed definition may not protect all records which some might desire to be protected, it at least gives fair notice of the conduct prohibited.

Not surprisingly, there are no reported prosecutions under this section.

One case raises the constitutionality of this provision: Is there too much control by the legislature of judicial discretion?[242] The primary issue is whether its language requires all pleas to be accepted in open court. Another is whether a plea accepted in chambers would avoid its sanctions. These questions are presently unanswered.

The portion noted above is retained in the Proposed Code as a subsection of the "Misconduct in Administration of Justice" section.[243]

D. *Prosecuting Attorney Accepting Bribes*

Under present law, a prosecuting attorney could arguably be prosecuted under any of three separate sections for accepting bribes to reduce or dismiss cases or recommending lower sentences: acceptance of a bribe by a public officer;[244] oppression in office;[245] or corrupt agreement by a prosecuting attorney.[246] The first provision is a felony; the latter two are misdemeanors.

The statute on "oppression in office" is quite vague and thus of dubious constitutionality. The existence of a *specific* statute covering prosecuting attorneys raises a serious question of the applicability of a more general statute on bribery of public officers.[247] The statute provides that:

> Every prosecuting attorney or assistant prosecuting attorney . . . who shall, in pursuance of any corrupt agreement with any defendant or defendants, or other person or persons, enter a

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242. State v. Sublett, 318 Mo. 1142, 4 S.W.2d 463 (1928) (dictum).

243. PROP. NEW MO. CRIM. CODE § 20.320 (1) (c) (1973).

> A public servant, in his public capacity or under color of his office or employment, commits the crime of misconduct in administration of justice if . . . He is a judge and knowingly accepts a plea of guilty from any person charged with a violation of a statute or ordinance at any place other than at the place provided by law for holding court by such judge.

With regard to misconduct by public servants see note 237 *supra.*

244. *See* text accompanying note 206 *supra.*

245. § 558.110, RSMo 1969. For a discussion of this offense, see note 237 *supra.*

246. § 558.170, RSMo 1969.

247. *See, e.g.,* State v. Wright, 409 S.W.2d 797 (K.C. Ct. App. 1966), where the issue was whether a person who had obtained an airline ticket by fraudulent use of a credit card could be prosecuted under the general statute on obtaining money, etc., by fraud (§ 561.450, RSMo 1969), rather than the specific statute on fraudulent use of credit devices (§ 561.415, RSMo 1969). The court held that the prosecution must be under the specific statute:

> "Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior or general one . . . ."

Id. at 800, *quoting from* State v. Richman, 347 Mo. 595, 601, 148 S.W.2d 796, 799 (Mo. 1941), *quoting from* State *ex rel.* Buchanan County v. Fulks, 296 Mo. 614, 626, 247 S.W. 129, 132 (En Banc 1922).

> *nolle prosequi* as to any indictment or dismiss or fail to prosecute, as provided by law, any indictment . . . shall be deemed guilty of a misdemeanor . . .[248]

On its face, the phrase "corrupt agreement" is vague. However, in other statutes, this phrase has been equated with bribery.[249] If it is so limited, it raises the prospect that prosecuting attorneys who accept bribes may only be prosecuted for misdemeanors, whereas other public servants who so err are guilty of felonies. If it means more than that, it poses a constant risk to any prosecutor who negotiates a case in his own sound discretion. But if interpreted thusly it is probably void for vagueness. To avoid this problem the section is excluded in the Proposed Code, and errant prosecuting attorneys are treated therein in the same manner as all other public servants.

X. Conclusion

The Proposed Code provisions for crimes against the public do not, for the most part, represent an abrupt departure from current law. They do represent a much needed consolidation and restatement of this area, however, and are an important part of the new Proposed Code.

248. § 558.170, RSMo 1969. Needless to say, there are no reported prosecutions under this section.

249. *See* pt. IV, § A (3) of this article.