

CRIMINAL LAW REVISION COMMISSION
311 State Capitol
Salem, Oregon

CRIMINAL PROCEDURE

PART III. ARRAIGNMENT AND PRE-TRIAL PROVISIONS

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES

Arraignment Proceedings

Preliminary Draft No. 2; September 1972

Reporter: Donald L. Paillette

Subcommittee No. 1

PART III. ARRAIGNMENT AND PRE-TRIAL PROVISIONS

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES

Arraignment Proceedings

Preliminary Draft No. 2; September 1972

Section 1. Section 11 of this Article is added to and made a part of ORS chapter 135.

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES
Arraignment Proceedings
Preliminary Draft No. 2

Section 2. ORS 135.010 is amended to read:

135.010. (Time and place.) When the [indictment] accusatory instrument has been filed, the defendant, if he has been arrested, or as soon thereafter as he may be, shall be arraigned thereon before the court in which it is found. Except for good cause shown or at the request of the defendant, if the defendant is in custody, the arraignment shall be held during the first 36 hours of custody, excluding holidays, Saturdays and Sundays. In all other cases, the arraignment shall be held within 96 hours after the arrest.

COMMENTARY

The proposed amendments will accomplish the following:
(1) Substitute the term, "accusatory instrument" (indictment, information or complaint), for the present limitation of the section to an indictment. (2) Require the arraignment of a defendant, who is in custody, within 36 hours, not including days when the court is not open for business. (3) Even though a defendant may not be in custody, require arraignment within 96 hours after his arrest.

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES

Arraignment Proceedings

Preliminary Draft No. 2

Section 3. ORS 135.020 is amended to read:

135.020. (Scope of proceedings.) The arraignment shall be made by the court, or by the clerk or the district attorney under its direction, and consists of reading the [indictment] accusatory instrument to the defendant, delivering to him a copy thereof and the indorsements thereon, including the list of witnesses indorsed on it or appended thereto if the accusatory instrument is an indictment, and asking him [whether he pleads guilty or not guilty] how he pleads to the [indictment] charge.

COMMENTARY

ORS 135.020 is amended to conform the language to the tentative drafts on Plea Discussions and Arrests. The term "accusatory instrument" is defined in the Arrests draft, section 2, as: ". . . a grand jury indictment, an information or a complaint."

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES

Arraignment Proceedings

Preliminary Draft No. 2

Section 4. ORS 135.110 is amended to read:

135.110. (When presence of defendant is required; appearance by counsel.) When the [indictment is for] accusatory instrument charges a crime punishable as a felony, the defendant shall be personally present at the arraignment; but when it is for a misdemeanor, [and the defendant has been held to answer to the charge] his personal appearance is unnecessary and he may appear by counsel.

COMMENTARY

This section contains conforming amendments.

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES

Arraignment Proceedings

Preliminary Draft No. 2

(ORS 135.130 would be repealed by Release of Defendants draft)

135.130 Bringing in defendant admitted to bail; forfeiture of bail. If the defendant has given bail, or has deposited money in lieu thereof, and does not appear to be arraigned when his personal appearance is necessary therefor, the court, in addition to the forfeiture of the undertaking of bail or of the money deposited in lieu thereof, may order the clerk to issue a bench warrant for his arrest.

COMMENTARY

The provisions of ORS 135.130 are redundant with the provisions of section 4 of the Release of Defendants, Preliminary Draft No. 1.

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES

Arraignment Proceedings

Preliminary Draft No. 2

Section 5. ORS 135.140 is amended to read:

135.140. (Bringing in defendant not yet arrested or held to answer.) When an [indictment] accusatory instrument is filed in court, if the defendant has not been arrested and held to answer the charge, unless he voluntarily appears for arraignment, the court shall [order the clerk to issue a bench warrant for his arrest] issue an arrest warrant as provided in ORS chapter 133.

COMMENTARY

The section contains a conforming amendment with respect to accusatory instrument and incorporates by reference the warrant issuance provisions of ORS chapter 133.

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES

Arraignment Proceedings

Preliminary Draft No. 2

(ORS 135.150 to 135.180 would be repealed.)

135.150 Indorsing amount of bail on bench warrant. If the crime charged in the indictment isailable, the court, upon directing the bench warrant to issue, shall fix the amount of bail, and the clerk shall indorse the same upon the warrant and sign it, substantially as follows: "The defendant is to be admitted to bail in the sum of _____ dollars."

135.160 Issuance of bench warrant by clerk when court is not sitting. At any time after the making of the order for the bench warrant, the clerk, on the application of the district attorney, shall issue the warrant as by the order directed, whether the court is sitting or not.

135.180 Issuance to one or more counties; service in another county. If the district attorney so directs, a warrant shall issue to one or more counties and such warrants may be served in any county in the state in the same manner as a warrant of arrest, except that when served in another county, it need not be indorsed by a magistrate of that county.

135.170 Form of bench warrant. The bench warrant upon the indictment shall be substantially in the following form:

CIRCUIT COURT FOR THE COUNTY OF _____, STATE OF OREGON.
IN THE NAME OF THE STATE OF OREGON

To any sheriff or his deputy of this state, greeting:

An indictment having been found on the _____ day of _____, 19____, in the circuit court for the county aforesaid, charging A. B. with the crime of (designating it generally), this is to command you forthwith to arrest the defendant and bring him before such court to answer the indictment or, if the court has adjourned for the term, that you deliver him into the custody of the jailor of the county aforesaid. By order of the court.

Witness my hand and seal of said circuit court, affixed at _____ in said county, this _____ day of _____, 19____.

[L. S.]

C. D., County Clerk.

COMMENTARY

The amendment to ORS 135.140 that incorporates the issuance of an arrest warrant authority contained in ORS chapter 133 will make these sections redundant and unnecessary.

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES

Arraignment Proceedings

Preliminary Draft No. 2

(ORS 135.190 to 135.210 would be repealed.)

135.190 Admission of defendant to bail.

When the crime is bailable and the defendant requires it, the officer making the arrest shall take him before a magistrate of the county wherein the arrest is made or the action is pending for the purpose of putting in bail, and thereupon the magistrate shall proceed in respect thereto according to the provisions of ORS chapter 140.

135.200 Order on taking of bail; discharge of defendant; return of warrant and order. If bail is taken, the magistrate shall make the order prescribed by subsection (1) of ORS 140.160 and deliver it to the officer, who shall thereupon discharge the defendant and without delay return the warrant and order to the clerk of the court at which the defendant is required to appear.

135.210 Denial of bail; disposal of defendant by officer. If the bail is not allowed, the officer shall take the defendant before the court or commit him to the custody of the jailor, according to the command of the warrant.

COMMENTARY

ORS 135.190 is redundant with section 4, Release of Defendants, Preliminary Draft No. 1, which provides for the release decision to be made within a certain time limit. ORS 135.200 is redundant with section 10, Release of Defendants, which gives the peace officer specific authority to release the defendant and accept the security that the defendant deposits.

ORS 135.210 is also redundant with section 10, Release of Defendants. Also, sections 6 and 8 provide that a defendant will not be released from custody until the terms of the release agreement are fulfilled. For example, section 8 provides that the defendant will not be released unless he deposits the security required by the magistrate.

Page 9

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES

Arraignment Proceedings

Preliminary Draft No. 2

(ORS 135.310 is not affected by this draft.)

135.310 Right of counsel. If the defendant appears for arraignment without counsel, he shall be informed by the court that it is his right to have counsel before being arraigned and shall be asked if he desires the aid of counsel.

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES

Arraignment Proceedings

Preliminary Draft No. 2

Section 6. ORS 135.320 is amended to read:

135.320 Court appointment of counsel; waiver. If upon arraignment of a person accused ~~in the circuit court~~ of a crime against the laws of this state, the person being arraigned appears without counsel, the court having jurisdiction of the case, in accordance with ORS 133.625, shall appoint suitable counsel to represent him unless the person waives counsel and the court approves the waiver.

[Amended by 1961 c.696 §2; 1967 c.475 §2]

COMMENTARY

See commentary to section 7.

Section 7. ORS 133.625 is amended to read:

133.625. (Court appointment of counsel.) (1) Suitable counsel for a defendant shall be appointed by a [circuit court] magistrate if:

- (a) The defendant is before a court or magistrate on a matter described in subsection (3) of this section; and
- (b) The defendant requests aid of counsel; and
- (c) The defendant makes a verified financial statement and provides other information in writing under oath showing his lack of financial ability to obtain counsel and provide any other information required by the court [as] that reasonably relates to his inability to obtain counsel; and
- (d) It appears to the court that the defendant is without means and is unable to obtain counsel.

[2] If the defendant is before a justice or district court in any proceeding described in subsection (3) of this section, and complies with the provisions of subsection (1) of this section, the magistrate shall forward to the circuit court in his judicial district all information obtained under subsection (1) of this section, along with his recommendations as to whether or not the defendant is without means and is unable to obtain counsel. The circuit court may thereupon appoint suitable counsel for the defendant.]

(2) Appointed counsel shall not be denied to any person merely because his friends or relatives have resources adequate to retain counsel or because he has deposited or is capable of depositing security for his release.

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES

Arraignment Proceedings

Preliminary Draft No. 2

(3) Counsel must be appointed for a defendant who meets the requirements of subsection (1) of this section and who is before the court or magistrate on any of the following matters:

(a) Charged with a crime ~~for~~ for which a felony sentence could be imposed.

(b) For a hearing to determine whether an enhanced sentence should be imposed when such proceedings may result in the imposition of a felony sentence.

(c) For extradition proceedings under the provisions of the Uniform Criminal Extradition Act.

(d) For any proceeding concerning an order of probation, including but not limited to the revoking or amending thereof.

(4) Unless otherwise ordered by the court, the appointment of counsel under this section shall continue during all criminal proceedings resulting from the defendant's arrest through acquittal or the imposition of punishment. The court having jurisdiction of the case may substitute one appointed counsel for another at any stage of the proceedings when the interests of justice require such substitution.

(5) If, at any time after the appointment of counsel, the court having jurisdiction of the case finds that the defendant is financially able to obtain counsel ~~or to make partial payment for the services of counsel~~, the court may terminate the appointment of counsel ~~or require such partial payment or enter an order against the defendant in favor of the county for such fees as the county has paid and for which the defendant is liable under ORS 137.205~~. If, at any time during criminal proceedings, the court having jurisdiction of the case finds that the defendant is financially unable to pay counsel whom he has retained, the court may appoint counsel as provided in this section.

(6) A civil proceeding may be initiated by any public body which has expended monies for the defendant's legal assistance within two years of judgment if:

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES
Arraignment Proceedings
Preliminary Draft No. 2

(a) The defendant was not qualified in accordance with subsection (1) of this section for legal assistance; or

(b) The defendant is financially able, according to subsection (1) of this section, to reimburse the county for monies expended for legal assistance.

(7) The civil proceeding shall be subject to the exemptions from execution as provided for by law.

COMMENTARY

A. Summary

Section 7 amends the current appointment of counsel statute by providing for a more specific test of indigency, a civil proceeding for recovery of counsel fees paid for criminal defense, and authorizing any magistrate to appoint counsel when the defendant is accused of a crime.

B. Derivation

The amendments to ORS 133.625 are derived from ABA Standards on Providing Defense Services s. 6.1 and the Uniform Law Commissioners' Model Defense of Needy Persons Act s. 8. (See Appendix E of ABA Standards on Providing Defense Services.)

C. Relationship to Existing Law

The appointment of counsel is constitutionally necessary when a person is accused of a crime that can result in imprisonment. The Supreme Court of Oregon in Stevenson v. Holzman, 254 Or 94, 458 P2d 414 (1969), held that:

" . . . no person may be deprived of his liberty who has been denied the assistance of counsel as guaranteed by the Sixth Amendment. This holding is applicable to all criminal prosecutions, including prosecutions for violations of municipal ordinances. The denial of assistance of counsel will preclude the imposition of a jail sentence." 254 Or at 102

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES
Arraignment Proceedings
Preliminary Draft No. 2

The Criminal Code of 1971 defines "crime" as any offense for which a sentence of imprisonment is authorized (ORS 161.515). The amendments contained in sections 6 and 7 use the word "crime" to delineate the scope of appointment of counsel. Since the holding in Stevenson applies to any deprivation of liberty, the use of the definition for "crime" will properly determine the scope of appointment without further definition in ORS 135.320 or 133.625.

The United States Supreme Court recently held in Argersinger v. Hamlin, 11 Cr L 3089, ___ US ___ (June 12, 1972) that counsel must be given to all persons accused of an offense that carries a penalty of imprisonment. The Court, speaking through Justice Douglas, quoted with approval from Stevenson v. Holzman in holding that a person accused of a misdemeanor or felony must be afforded the opportunity for counsel.

Section 7 deletes the present subsection (2) because of the unnecessary paper work and transmittal time under the current provision for exclusive appointment of counsel by the circuit court. The appointment of counsel by any magistrate will eliminate the unnecessary paperwork of the lower court judge in requesting appointment of counsel through the circuit court. This particular amendment was suggested to the Commission by a District Judge who stated that: "The odds for abuse of discretion by a district judge or J.P. in those cases don't justify such additional time and paper consumed and delay."

The recovery of counsel fees from the defendant by the county or state has recently been discussed by the United States Supreme Court in James V. Strange, 11 Cr L 3109, ___ US ___ (June 12, 1972). The Court held a Kansas recoupment of appointed counsel fees statute unconstitutional as a denial of equal protection of the laws. The civil exemptions from execution, except homestead, of a judgment debtor did not apply to a judgment based on fees paid on behalf of a criminal defendant. The state perfected a lien on the assets of the defendant after payment to the appointed counsel in the amount of the fees. The statute was unconstitutional because the exemptions from execution that a civil debtor has did not apply to a criminal defendant. The Court held that this disparity, between civil debtors and criminal defendant-debtors, contravened the equal protection of the laws embodied in the Fourteenth Amendment.

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES

Arraignment Proceedings

Preliminary Draft No. 2

Subsection (5) is amended and subsections (6) and (7) are added to provide a clear method of recoupment of appointed counsel fees. The use of a civil proceeding will insure due process is followed and that the civil exemptions, generally contained in ORS chapter 23, will apply to the criminal defendant-debtor thus insuring equal protection of the laws.

Subsection (2) is derived from s. 6.1 of the ABA Standards on Providing Defense Services. The ABA commentary quotes from the American Bar Foundation survey of practice in American courts concerning the determination of eligibility:

" . . . resources of the defendant's parents are usually considered only when he is a minor, and even then some courts recognize that the parents have no legal obligation to provide a lawyer for him. For the most part, resources of the spouse are considered a disqualification only in community-property states and only if the resources are community property."

The ABA commentary also reasons that it is the constitutional right of the individual who needs counsel which is at stake and therefore the assets of relatives and friends should not impede the needy defendant's right to counsel.

Section 8. ORS 135.340 is amended to read:

135.340. (Communication to defendant as to use of name in accusatory instrument.) When the defendant is arraigned, he shall be informed that if the name by which he is [indicted] charged in the accusatory instrument is not his true name he must then declare his true name or be proceeded against by the name in the [indictment] accusatory instrument.

COMMENTARY

This section contains a conforming amendment regarding accusatory instruments.

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES
Arraignment Proceedings
Preliminary Draft No. 2

Section 9. ORS 135.350 is amended to read:

135.350. (Name used in further proceedings.) (1) If the defendant gives no other name, the court may proceed accordingly. If the defendant is charged by indictment or information and alleges that another name is his true name, the court shall direct an entry thereof to be made in its journal, and the subsequent proceedings on the [indictment] accusatory instrument may be had against him by that name, referring also to the name by which he is [indicted] charged.

(2) Upon motion of the defendant, all names, other than the true name of the defendant, shall be stricken from any accusatory instrument read or submitted to the jury.

COMMENTARY

The section contains a conforming amendment to accommodate charges brought by information as well as by indictment.

Subsection (2) is a new provision to provide the defendant a means of removing other names, such as aliases, from the accusatory instrument before trial. The purpose is to prevent prejudicing of the jury by naming the defendant by aliases. ORS 135.340 will still require the defendant to declare his true name or be proceeded against by the name used in the accusatory instrument.

(ORS 135.410 would be repealed)

135.410 Time allowed for answering.
If on the arraignment the defendant requires it, he shall be allowed until the next day, or until such further time as the court deems reasonable, to answer the indictment.

COMMENTARY

ORS 135.410 will be repealed by section 4 of the Plea Discussions and Agreements draft.

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES

Arraignment Proceedings

Preliminary Draft No. 2

Section 10. ORS 135.420 is amended to read:

135.420. (Types of answer.) If the defendant does not require time, as provided in [ORS 135.410] (section 4, Pleadings of Defendant; Plea Discussions and Agreements, Tentative Draft No. 1), or if he does, then on the next day or at such further day as the court may have allowed him, he may, in answer to the arraignment, move [the court to set aside] against the [indictment] accusatory instrument or demur or plead thereto.

COMMENTARY

The amendments are to make the section consistent with Plea Discussions and Agreements, Tentative Draft No. 1, and with other amendments relating to accusatory instruments.

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES

Arraignment Proceedings

Preliminary Draft No. 2

(ORS 135.430 is not affected by this draft.)

135.430. (Types of pleading.) The only pleadings on the part of the defendant are the demurrer and plea.

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES

Arraignment Proceedings

Preliminary Draft No. 2

(ORS 135.440 will be repealed.)

135.440 Refusal to demur or plead. If the defendant, within the time required, refuses to demur or plead to the indictment, the court shall direct that a plea of not guilty be entered for him.

COMMENTARY

ORS 135.440 will be repealed by section 4 of the Plea Discussions and Agreements draft.

(ORS 135.450 is not affected by this draft.)

135.450 Pleading a judgment. In pleading a judgment or other determination of or proceeding before a court or officer of special jurisdiction, it is not necessary for the defendant to state the facts conferring jurisdiction; but the judgment, determination, or proceeding may be stated to have been duly given or made. The facts conferring jurisdiction, however, must be established on the trial.

(ORS 135.460 is repealed by this draft.)

135.460 Pleading a private statute or statutory right. In pleading a private statute, or right derived therefrom, it is sufficient to refer to the statute by its title and the day of its passage.

Section 11. Motion to dismiss accusatory instrument on grounds of former jeopardy. (1) The court shall dismiss the accusatory instrument if, upon motion of the defendant, it appears, as a matter of law, that a former prosecution bars the prosecution for the offense charged.

(2) The time of making the motion and its effect shall be as provided for a motion to set aside the indictment in ORS 135.520 and 135.530.

(3) An order to dismiss the accusatory instrument on grounds of former jeopardy is a bar to a future prosecution of the defendant for the offense charged in the accusatory instrument.

COMMENTARY

This is an entirely new provision to provide a different method of raising a former jeopardy defense. ORS 135.820 and 135.830 now deal with the matter by way of a separate plea, and ORS 136.620 provides for a separate kind of general verdict on a plea of former jeopardy. These statutes make it appear as if it were an issue of fact, although the issue frequently is handled as one of law decided by the trial court. ORS 138.060 (2) permits the state to appeal an order sustaining a plea of former conviction or acquittal.

The new section treats the question as a matter of law to be decided by the court. The related statutes are amended accordingly. For further discussion of this area generally, see the Article on Former Jeopardy.

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES
Arraignment Proceedings
Preliminary Draft No. 2

Section 12. ORS 135.510 is amended to read:

135.510. (Grounds for motion to set aside the indictment.) (1)

The indictment shall be set aside by the court upon the motion of the defendant in either of the following cases:

[(1)] (a) When it is not found, indorsed and presented as prescribed in ORS 132.360, 132.400 to 132.430 and 132.580.

[(2)] (b) When the names of the witnesses examined before the grand jury are not inserted at the foot of the indictment or indorsed thereon.

(2) Nothing in paragraph (b) of subsection (1) of this section shall affect the application of ORS 132.580.

COMMENTARY

The amendment is to make the section consistent with the amendment to ORS 132.580 made by Grand Jury and Indictments, Tentative Draft No. 1, s. 25.

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES

Arraignment Proceedings

Preliminary Draft No. 2

Section 13. ORS 135.520 is amended to read:

135.520. (Time of making motion; hearing.) [The] A motion to set aside the indictment or dismiss the accusatory instrument shall be made and heard at the time of the arraignment or within 10 days thereafter, unless for good cause the court [postpones the hearing to a future time] allows additional time. If not so made, the defendant is precluded from afterwards taking the objections [mentioned in ORS 135.510] to the indictment or accusatory instrument.

COMMENTARY

The section is amended to provide for a motion to dismiss, as well as the existing statutory motion to set aside the indictment. A conforming amendment to ORS 135.530 appears in section 14 infra. As amended, the section would allow a defendant 10 days from the time of arraignment in which to move to set aside or dismiss or such further time as the court allows.

Section 14. ORS 135.530 is amended to read:

135.530. (Effect of allowance of motion.) (1) If the motion to set aside or dismiss is allowed, the court shall order that the defendant, if in custody, be discharged therefrom or, if he has [given bail or deposited money in lieu thereof, that his bail be exonerated or his money refunded to him,] been released, that his release agreement be discharged and his security deposit be refunded as provided by law, unless [it] the court [directs that] allows the case to be refiled or resubmitted to the same or another grand jury.

(2) If the court allows the case to be resubmitted or refiled, it must be resubmitted or refiled by the state within 30 days from the date on which the court enters the order. If the case is not resubmitted or refiled within that time, the defendant shall be released from custody or his release agreement discharged or his security deposit returned.

COMMENTARY

The statute, as amended, would continue to leave it to the discretion of the court whether to permit a case to be resubmitted after the allowance of the motion. However, the new provisions allow a refile of an information or complaint, and also specifically limit the time for refile to 30 days from the date the court announces the order. If the matter is not refiled within that time, the defendant must be discharged from custody or his release agreement discharged. The same provisions are proposed for ORS 135.670, relating to demurrers.

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES

Arraignment Proceedings

Preliminary Draft No. 2

Section 15. ORS 135.540 is amended to read:

135.540. (Effect of resubmission of case to grand jury.) Subject to the limitations of subsection (2) of ORS 135,530, if the court [directs that] allows the case to be resubmitted or refiled, the defendant, if then in custody, shall so remain, unless he is [admitted to bail] released as provided by law. If he has already [given bail or deposited money in lieu thereof, the bail or money is answerable for] been released, the release agreement or any security deposited as provided by law, shall continue to insure the appearance of the defendant to answer a new indictment, if one is found.

COMMENTARY

The amendment is to make the section consistent with proposed changes relating to Release of Defendants and with section 14.

Page 28

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES

Arraignment Proceedings

Preliminary Draft No. 2

(ORS 135.550 is repealed by this draft.)

135.550 Failure to find new indictment before next grand jury is discharged. Unless a new indictment is found before the next grand jury of the county is discharged, the court shall, on the discharge of such grand jury, make the order prescribed by ORS 135.530.

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES
Arraignment Proceedings
Preliminary Draft No. 2

Section 16. ORS 135.560 is amended to read:

135.560. (Order to set aside is no bar to future prosecution.)
Except for an order dismissing an accusatory instrument on grounds of
former jeopardy, an order to set aside an indictment [, as provided in
ORS 135.510 to 135.550,] or to dismiss an accusatory instrument is no
bar to a future prosecution for the same crime.

COMMENTARY

This amendment makes the statute consistent with the
new provisions in s. 11 supra.

Page 30

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES

Arraignment Proceedings

Preliminary Draft No. 2

(ORS 135.610 is not affected by this draft.)

135.610 Time and place of entering. The demurrer shall be put in, in open court, either at the time of the arraignment or at such other time as may be allowed to the defendant for that purpose.

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES

Arraignment Proceedings

Preliminary Draft No. 2

Section 17. ORS 135.620 is amended to read:

135.620. (Form; signature; filing; specification of grounds.)

The demurrer shall be in writing, signed by the defendant or his attorney and filed. It shall distinctly specify the ground of objection to the [indictment or it may be disregarded] accusatory instrument.

COMMENTARY

The section contains a conforming amendment and deletes surplus language.

Section 18. ORS 135.630 is amended to read:

135.630. (Grounds of demurrer.) The defendant may demur to the [indictment] accusatory instrument when it appears upon the face thereof:

(1) If the accusatory instrument is an indictment, that the grand jury by which it was found had no legal authority to inquire into the crime charged because the same is not triable within the county;

(2) If the accusatory instrument is an indictment, that it does not substantially conform to the requirements of ORS 132.510 to 132.570, 132.590, 132.610 to 132.690, 132.710 and 132.720;

(3) That more than one crime is charged in the [indictment] accusatory instrument;

(4) That the facts stated do not constitute [a crime] an offense;

(5) That the [indictment] accusatory instrument contains [any] matter which, if true, would constitute a legal justification or excuse of the crime charged or other legal bar to the action; or

(6) That the accusatory instrument is not definite and certain.

COMMENTARY

The section embodies conforming amendments, generally. Subsection (6) sets out new language that specifically applies the requirements that an indictment be definite and certain to other accusatory instruments.

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES

Arraignment Proceedings

Preliminary Draft No. 2

Section 19. ORS 135.640 is amended to read:

135.640. (When objections which are grounds for demurrer may be taken.) When the objections mentioned in ORS 135.630 appear upon the face of the [indictment] accusatory instrument, they can only be taken by demurrer, except that the objection to the jurisdiction of the court over the subject of the [indictment] accusatory instrument, or that the facts stated do not constitute a crime, may be taken at the trial, under the plea of not guilty and in arrest of judgment.

COMMENTARY

This section contains conforming amendments.

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES

Arraignment Proceedings

Preliminary Draft No. 2

(ORS 135.650 and 135.660 are not affected by this draft.)

135.650 Hearing of objections specified by demurrer. Upon the filing of the demurrer, the objections presented thereby shall be heard either immediately or at such time as the court may direct.

135.660 Judgment on demurrer; entry in journal. Upon considering the demurrer, the court shall give judgment, either allowing or disallowing it, and an entry to that effect shall be made in the journal.

Section 20. ORS 135.670 is amended to read:

135.670. (Allowance of demurrer.) (1) If the demurrer is allowed, the judgment is final upon the [indictment] accusatory instrument demurred to and is a bar to another action for the same crime unless the court, being of the opinion that the objection on which the demurrer is allowed may be avoided in a new [indictment] accusatory instrument, [directs] allows the case to be resubmitted or refiled. [to the same or another grand jury.]

(2) If the court allows the case to be resubmitted or refiled, it must be resubmitted or refiled by the state within 30 days from the date on which the court enters the order. If the case is not resubmitted or refiled within that time, the defendant shall be discharged from custody or his release agreement discharged or his security deposit returned as provided in ORS 135.680.

COMMENTARY

See commentary to s. 14 supra.

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES

Arraignment Proceedings

Preliminary Draft No. 2

Section 21. ORS 135.680 is amended to read:

135.680. (Failure to resubmit case after allowance of demurrer.)

If the court does not direct the case to be resubmitted or an amended complaint or information filed, the defendant, if in custody, shall be discharged. If he has been [admitted to bail, his bail shall be exonerated] released his release agreement shall be discharged. If he has deposited [money in lieu of bail, the money shall be refunded to him] any security, the security shall be returned to the defendant as provided by law.

COMMENTARY

This section contains conforming amendments.

Page 37

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES
Arraignment Proceedings
Preliminary Draft No. 2

(ORS 135.690 is not affected by this draft.)

135.690 Resubmission of case to grand jury. If the court directs that the case be resubmitted, the same proceedings shall be had thereon as are prescribed in ORS 135.540 and 135.550.

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES

Arraignment Proceedings

Preliminary Draft No. 2

Section 22. ORS 135.700 is amended to read:

135.700. (Disallowance of demurrer.) If the demurrer is disallowed, the court shall permit the defendant, at his election, to plead, which he must do forthwith or at such time as the court may allow; but if he does not plead, [judgment shall be given against him] a plea of not guilty shall be entered.

COMMENTARY

The amendment conforms the section to the provisions of the draft on Plea Discussions and Agreements.

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES

Arraignment Proceedings

Preliminary Draft No. 2

(ORS 135.810 and 135.820 will be repealed.)

135.810 Time of entering. The plea shall be put in, in open court, either at the time of the arraignment or at such other time as may be allowed to the defendant for that purpose.

135.820 Types of plea. There are three kinds of plea to an indictment:

- (1) Guilty.
- (2) Not guilty.
- (3) A former judgment of conviction or acquittal of the crime charged, which may be pleaded either with or without the plea of not guilty.

COMMENTARY

ORS 135.810 will be repealed by section 4 of the draft on Plea Discussions and Agreements. ORS 135.820 will be repealed by section 1 of the draft on Plea Discussions and Agreements.

Section 23. ORS 135.830 is amended to read:

135.830 Presentation of plea; entry in journal; form. Every plea shall be oral and shall be entered in the journal of the court in substantially one of the following forms:

(1) "The defendant pleads that he is guilty of the crime charged in this indictment."

(2) "The defendant pleads that he is not guilty of the crime charged in this indictment."

(3) "The defendant pleads that he has already been convicted (or acquitted, as the case may be) of the crime charged in this indictment by the judgment of the court of _____ (naming it), rendered at _____ (naming the place), on the _____ day of _____, 19____."

(3) "The defendant pleads
no contest to the crime charged
in this indictment."

COMMENTARY

The amendment is consistent with the proposal for a "no contest" plea in Plea Discussions and Agreements, Tentative Draft No. 1, s. 1. A similar amendment to ORS 135.840 is set forth in s. 21 infra. The existing subsection (3) is deleted and former jeopardy will be dealt with under a motion to dismiss.

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES

Arraignment Proceedings

Preliminary Draft No. 2

Section 24. ORS 135.840 is amended to read:

135.840. (Special provisions relating to presentation of plea of guilty and no contest.) (1) Except as provided in subsection (2) of this section, a plea of guilty or no contest to a crime punishable as a felony shall in all cases be put in by the defendant in person in open court unless upon an [indictment] accusatory instrument against a corporation, in which case it may be put in by counsel.

(2) Any circuit judge may, within any county in his own district other than the county where the accusation is pending, accept pleas of guilty or no contest from persons charged with [felonies] a crime punishable as a felony and pass sentence thereon upon written request of the accused and his attorney and upon not less than one day's notice to the district attorney. All orders entering such pleas and such sentences shall be as effective as though heard and determined in open court in the county where the accusation is pending and shall be transmitted by the judge to the clerk of the court in the county where the accusation is pending, whereupon the same shall be filed and entered and become effective from the date of filing thereof.

COMMENTARY

The amendments conform the section to other sections of this draft and to other provisions relating to guilty and no contest pleas. The requirement that the plea be put in by the defendant is limited to felonies, although the provisions covering plea agreements may require a defendant to plead in person in order that he may be completely apprised of his rights even though charged only with a misdemeanor.

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES

Arraignment Proceedings

Preliminary Draft No. 2

Section 25. ORS 135.850 is amended to read:

135.850. (Withdrawal of plea of guilty.) The court may at any time before judgment, upon a plea of guilty or no contest, permit it to be withdrawn and a plea of not guilty substituted therefor.

COMMENTARY

The section contains a conforming amendment.

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES

Arraignment Proceedings

Preliminary Draft No. 2

Section 26. ORS 135.860 is amended to read:

135.860. (Not guilty plea as denial of allegations of indictment.)

The plea of not guilty controverts and is a denial of every material allegation in the [indictment] accusatory instrument.

COMMENTARY

The section contains a conforming amendment.

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES

Arraignment Proceedings

Preliminary Draft No. 2

(ORS 135.870 is repealed by this draft.)

135.870. Evidence admissible under plea of not guilty. All matters of fact tending to establish a defense to the charge in the indictment or information, other than those specified in subsection (3) of ORS 135.820, may be given in evidence under the plea of not guilty.

COMMENTARY

This statute is considered unnecessary by the Commission. Matters of fact tending to establish a defense to a charge would come in under a not guilty plea as a matter of course. The special former jeopardy plea would no longer be necessary under the draft proposal to deal with that specific issue by way of a motion to dismiss.

(ORS 135.875 is not affected by this draft.)

135.875 Notice prior to trial of intention to rely on alibi evidence; content of notice; effect of failure to supply notice. (1) If the defendant in a criminal action proposes to rely in any way on alibi evidence, he shall, not less than five days before the trial of the cause, file and serve upon the district attorney a written notice of his purpose to offer such evidence, which notice shall state specifically the place or places where the defendant claims to have been at the time or times of the alleged offense together with the name and residence or business address of each witness upon whom the defendant intends to rely for alibi evidence. If the defendant fails to file and serve such notice, he shall not be permitted to introduce alibi evidence at the trial of the cause unless the court for good cause orders otherwise.

(2) As used in this section "alibi evidence" means evidence that the defendant in a criminal action was, at the time of commission of the alleged offense, at a place other than the place where such offense was committed.

[1969 c.293 §1]

COMMENTARY

See the Article on Pre-Trial Discovery for a discussion of this statute.

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES

Arraignment Proceedings

Preliminary Draft No. 2

Section 27. ORS 135.880 is amended to read:

135.880. (Defect in accusatory instrument as affecting acquittal on merits.) When the defendant [was] is acquitted on the merits, he is [deemed] considered acquitted of the [same] crime charged in the accusatory instrument, notwithstanding a defect in form or substance in the [indictment] accusatory instrument on which he [was] is acquitted.

COMMENTARY

This section contains conforming amendments with respect to accusatory instruments and makes other minor style changes.

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES

Arraignment Proceedings

Preliminary Draft No. 2

(ORS 135.890 and 135.900 will be repealed.)

135.890 Proceedings not constituting former acquittal. If the defendant was formerly acquitted on the ground of a variance between the indictment and the proof, or if the indictment was dismissed upon a demurrer to its form or substance or discharged for want of prosecution, without a judgment of acquittal or in bar of another prosecution, it is not an acquittal of the same crime.

135.900 Effect of conviction or acquittal of crime of different degrees. When the defendant has been convicted or acquitted upon an indictment for a crime consisting of different degrees, such conviction or acquittal is a bar to another indictment for the crime charged in the former, for any inferior degree of that crime, for an attempt to commit the same or for an offense necessarily included therein of which he might have been convicted under that indictment, as provided in ORS 136.650 and 136.660.

COMMENTARY

ORS 135.890 will be repealed and replaced by section 4 of the Former Jeopardy draft. ORS 135.900 will be repealed and replaced by section 2 of the Former Jeopardy draft.