Note: Identified as Article 6 but Arraignment and Related Procedures is Article 7 in Final Draft and Report - Nov. 1972

CRIMINAL LAW REVISION COMMISSION
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CRIMINAL PROCEDURE

PART III. ARRAIGNMENT AND PRE-TRIAL PROVISIONS

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES

Arraignment Proceedings

Preliminary Draft No. 1; August 1972

Reporter: Staff

Subcommittee No. 1

PART III. ARRAIGNMENT AND PRE-TRIAL PROVISIONS

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES

Arraignment Proceedings

Preliminary Draft No. 1; August 1972

Section 1. 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. If the defendant is in custody, the arraignment shall be held during the first 24 hours of custody, excluding holidays, Saturdays, and Sundays. In all other cases, the arraignment shall be held within 72 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 24 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 72 hours after his arrest.

Section 2. 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."

Section 3. 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 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 a conforming amendment.

Section 4. ORS 135.120 is amended to read:

135.120. (Bringing in defendant who is in custody.) [When the personal appearance of the defendant is necessary, if he is in custody, the court may direct the proper officer to bring him before it to be arraigned and the officer shall do so accordingly.] The court may direct the appropriate officer to bring a defendant, who is in custody, before the court for an arraignment.

COMMENTARY

The amendment requires any defendant in custody to be brought before the court for arraignment.

(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.

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.

(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 is bailable, 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.

135.170 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.

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.

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.

(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.

(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.

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 ability to obtain counsel] inability to obtain adequate representation without substantial hardship to himself or his family 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.

(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 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) The district attorney may initiate a civil proceeding within two years of judgment for recovery of monies expended by the county for a defendant's legal assistance if:

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

(b) The defendant is currently 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 the exclusive remedy for recovery of monies expended for legal assistance and such 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

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 proposed test for indigency attempts to separate the right to appointed counsel from eligibility for receipt of public welfare assistance and establish a more flexible standard. The use of the phrase "without substantial hardship to himself or his family" is to prevent an ironclad test of complete lack of assets before counsel will be appointed. The commentary to ABA Standards on Providing Defense Services s. 6 states:

> " . . . eligibility is not to be determined on the supposition that one is entitled to be provided counsel only after he has exhausted every financial resource that might be required for other vital personal or family necessities, such as food, shelter or medicine. At the point at which payment of a fee to retain counsel would inflict substantial hardship on the family unit, or on himself, if he has no family, society's obligation to provide counsel arises."

The recovery of counsel fees from the defendant by the county or state has recently been discussed by the United

States Supreme Ccurt 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.

Oregon's recoupment statute was repealed by the Criminal Code of 1971. Presently only subsection (5) of ORS 133.625 provides any authority for recoupment of appointed counsel fees. The problem with the present subsection (5) is the unavailability of civil exemptions from execution provided for in James v. Strange. The current practice, authorized in subsection (5) appears to be an order to pay the county the appointed counsel fees as a condition of probation. The ABA Standards on Providing Defense Services at section 6.4 discourage the condition of probation technique. The ABA suggests that this practice may raise constitutional questions as to

> "whether due process is denied if the accused is compelled to pay after having been acquitted or if he is not informed of his obligation at the time that counsel is provided; whether a waiver of counsel is valid if it is made because of the accused's unwillingness to undertake such an obligation."

The ABA also fears that the practice of requiring payment from funds not available at the time of eligibility may discourage the acceptance of counsel by those most in need.

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.

Section 9. ORS 135.350 is amended to read:

135.350. (Name used in further proceedings.) 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.

COMMENTARY

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

(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.

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.

(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.

(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 and 135.460 are 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.

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. ORS 135.510 is amended to read:

135.510. (Grounds for motion to set aside the indictment.) The indictment shall be set aside by the court upon the motion of the defendant in either of the following cases:

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

(2) Except as provided in subsection (2) of ORS 132.580, when the names of the witnesses examined before the grand jury are not inserted at the foot of the indictment or indorsed thereon.

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.

Section 12. 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 unless for good cause the court postpones the hearing to a future time. If not so made, the defendant is precluded from afterwards taking the objections [mentioned in ORS 135.510] to the 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 13 infra.

Section 13. ORS 135.530 is amended to read:

135.530. (Effect of allowance of motion.) 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] in case of an indictment, the court directs that [the case] it be resubmitted to the same or another grand jury.

Section 14. ORS 135.540 is amended to read:

135.540. (Effect of resubmission of case to grand jury.) If the court directs that the case be resubmitted, 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.

(ORS 135.550 to 135.610 are not affected 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.

135.560 Order to set aside is no bar to future prosecution. An order to set aside an indictment, as provided in ORS 135.510 to 135.550, is no bar to a future prosecution for the same crime.

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.

Section 15. 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] accusatory instrument or it may be disregarded.

COMMENTARY

The section contains a conforming amendment.

Section 16. 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;

(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.

Section 17. 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.

(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 18. ORS 135.670 is amended to read:

135.670. (Allowance of demurrer.) 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 the case to be resubmitted. When the accusatory instrument is an indictment the court may direct that the indictment be submitted to the same or another grand jury. When the accusatory instrument is an information or complaint, the court may allow the district attorney to file an amended complaint or information.

Section 19. 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 TO ss. 16 to 19

These sections contain conforming amendments.

(ORS 135.690 and 135.700 are 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.

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.

(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 20. 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—."

(4) "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.

Section 21. 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 shall in all cases be put in by the defendant in person in open court unless upon an indictment 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 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.

Section 22. 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, permit it to be withdrawn and a plea of not guilty substituted therefor.]**

(1) The court shall allow the defendant to withdraw his plea of guilty or no contest whenever the defendant, upon a timely motion for withdrawal, shows by a preponderance of the evidence that withdrawal is necessary to correct a manifest injustice.

(2) A motion for withdrawal is timely if made with due diligence, considering the nature of the allegations therein, and is not necessarily barred because it is made subsequent to judgment or sentence.

(3) Withdrawal is necessary to correct a manifest injustice whenever the defendant shows that:

(a) He was denied the effective assistance of counsel as provided by law;

(b) The plea was not entered or ratified by the defendant or a person authorized to so act in his behalf;

(c) The plea was involuntary, or was entered without knowledge of the charge or that the sentence actually imposed could be imposed; or

(d) He did not receive the charge or sentence concessions contemplated by the plea agreement and the district attorney failed to seek or not to oppose these concessions as promised in the plea agreement.

(4) The defendant may move for withdrawal of his plea without alleging that he is innocent of the charge to which the plea has been entered.

(5) In the absence of a showing that withdrawal is necessary to correct a manifest injustice, a defendant may not withdraw his plea

of guilty or no contest as a matter of right once the plea has been accepted by the court. However, the court in its discretion may allow the defendant to withdraw his plea before sentence for any fair and just reason unless the state has been substantially prejudiced by reliance upon the defendant's plea.

COMMENTARY

A. Summary

The proposed amendment to ORS 135.850 sets forth guidelines for the trial judge in allowing the withdrawal of a plea.

B. Derivation

Section 23 is derived from ABA Standards on Pleas of Guilty, s. 2.1 (Approved Draft, 1968).

C. Relationship to Existing Law

Presently, ORS 135.850 sets no guidelines for the withdrawal of a plea. The acceptance of a withdrawal is addressed to the sound discretion of the trial judge and will not be set aside for trial by a reviewing court absent a showing of an abuse of discretion.

In State v. Burnett, 228 Or 556, 365 P2d 1060 (1961), the Supreme Court stated that the withdrawal of a plea of guilty is addressed to the sound discretion of the court and will not be set aside unless there is an abuse of discretion. In Burnett, the defendant voluntarily pleaded guilty to sexual molestation of a child. However, when the court decided to send him to the state hospital for examination, he attempted to withdraw his plea. The defendant alleged that the district attorney " . . . has given him reason to 'assume' that the court would treat the case as a misdemeanor." (228 Or at 558).

The trial court held a hearing to determine the factual basis for the plea and the existence of any sentence concessions on the part of the district attorney. The trial court found no concessions were made by the district attorney and therefore upheld the guilty plea.

On appeal to the Supreme Court, the plea was also upheld because of a lack of any sentence concessions or abuse of

discretion. However, the Supreme Court did adopt the view that if a district attorney offered sentence concessions in exchange for a guilty plea, the plea would be set aside for trial if the concessions were not given:

> "The general rule of law as stated by numerous decisions of this and other courts is that an application to withdraw a plea of guilty is addressed to the sound discretion of the trial court; that the law favors the trial of criminal cases on the merits and where it reasonably appears a plea of guilty was influenced by persons in authority or apparent authority***[who] led a defendant to believe that by entering a plea of guilty his punishment [would] be thereby mitigated he should be permitted to withdraw the plea of guilty and to enter a plea of not guilty and the refusal to permit him to do so is an abuse of discretion. [Citing cases.] Sloan v. State, 54 Okla Cr 324, 326, 20 P2d 917." 228 Or at 558, 559. See also State v. Thomson, 203 Or 1, 278 P2d 142 (1954), and State v. Little, 205 Or 659, 288 P2d 446 (1955), cert den 350 US 975.

Section 23. 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.

Section 24. ORS 135.870 is amended to read:

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] accusatory instrument, other than those specified in subsection [(3) of ORS 135.820] (1)(c) of Article 6, Pleadings of Defendant; Plea Discussions and Agreements, may be given in evidence under the plea of not guilty.

(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]

Section 25. ORS 135.880 is amended to read:

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

COMMENTARY TO ss. 23 to 25

These sections contain conforming amendments with respect to accusatory instruments.

(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.