

CRIMINAL LAW REVISION COMMISSION  
311 State Capitol  
Salem, Oregon

CRIMINAL PROCEDURE

PART III. ARRAIGNMENT AND PRE-TRIAL PROVISIONS

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES

Pleadings of Defendant; Plea Discussions and Agreements

Preliminary Draft No. 2; February 1972

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Subcommittee No. 3

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES

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Section 1. Pleading by defendant; alternatives.

The kinds of plea to an indictment, information or complaint, or each count thereof, are:

(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.

(4) No contest.

|   |            |
|---|------------|
| ( | Existing   |
| ( | <u>Law</u> |
| ( | ORS        |
| ( | 135.820    |

COMMENTARY

The pleas provided for in subsections (1), (2) and (3) are the same as in ORS 135.820. The existing statute refers only to pleas to an indictment, whereas the proposed section includes the other charging instruments of informations and complaint. The section also specifically provides for a plea to a part of an indictment, *i.e.*, a "count," in order to codify the common practice of pleading separately to individual counts in an indictment or complaint.

Subsection (4) represents the most radical departure from the existing statute and was written into the section to provide for an "Alford" type of plea. In North Carolina v. Alford, 400 US 25 (1970), the Supreme Court held that a first-degree murder defendant's protestations of innocence did not bar the acceptance of his plea of guilty to second-degree murder that was made with advice of counsel, was supported by substantial prosecution evidence of guilt and was motivated by a desire to avoid the death penalty, since the Fourteenth Amendment does not require the admission of guilt as a prerequisite to the acceptance of guilty pleas.

In spite of the Alford decision, there apparently is no assurance in Oregon that a particular judge will accept such a plea, and subsection (4) is an attempt to formally provide for the use of the plea. The standards to be followed by the court are set forth in section 5.

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Section 2. Time of entering plea; aid of counsel.

(1) A defendant shall not be required to plead to an offense punishable by imprisonment until he is represented by counsel, unless the defendant knowingly waives his right to counsel.

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|---|------------|
| ( | Existing   |
| ( | <u>Law</u> |
| ( | ORS        |
| ( | 135.410    |
| ( | 135.440    |
| ( | 135.810    |

(2) A defendant with counsel may plead guilty or no contest on the day of arraignment or any time thereafter. A defendant without counsel shall not be allowed to plead guilty or no contest to a felony on the day of arraignment.

(3) Upon completion of the arraignment, unless the defendant enters a plea in the manner provided in this Article, he shall be considered to have entered a plea of not guilty.

(4) A plea of former jeopardy shall be entered within 10 days after arraignment or within such further time as the court allows.

COMMENTARY

A. Summary

This section establishes the basic procedure for entering pleas to criminal charges. The following rules are incorporated within the section:

(1) A defendant who faces the possibility of imprisonment shall not be required to enter a plea without the assistance of a lawyer, unless the defendant knowingly waives his right to counsel. (2) If a defendant with counsel is to plead "not guilty" he shall do so upon completion of the arraignment on the charge. He may plead guilty or no contest on the day of arraignment, but is not required to do so. If he is without counsel, he shall not be allowed to plead guilty or no contest to a felony on the same day as the arraignment. (3) Upon completion of the arraignment, if the defendant does not enter a plea in the manner provided for in the Article, a "not guilty" plea is entered automatically. (4) A 10-day time period for former jeopardy pleas is established.

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The section deals only with pleas and is not meant to change ORS 135.430 which provides that the pleadings on the part of the defendant are the demurrer and plea. Neither is the entry of a plea of not guilty meant to prevent the defendant from otherwise moving against the indictment or complaint.

The main purpose of the section is to try to provide for the efficient and expeditious handling of pleas by the courts, while protecting the rights of the individual defendant during a "critical stage" of the criminal proceedings against him. The section also triggers the timetable for subsequent events such as pre-trial conference and trial dates.

B. Derivation

Subsection (1) is based on ABA Standards Relating to Pleas of Guilty s. 1.3 (Approved Draft, 1968). Subsections (2) and (4) are new. Subsection (3) is similar to ORS 135.440.

C. Relationship to Existing Law

Two existing statutes deal generally with the time allowed for answering or pleading to an indictment:

135.410. 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.

135.810. 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.

"Arraignment" is defined in ORS 135.020.

135.020. 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 to the defendant, delivering to him a copy thereof and the indorsements thereon, including the list of witnesses indorsed on it or appended thereto, and asking him whether he pleads guilty or not guilty to the indictment.

Pleading to a complaint in district or justice court is in the same manner as pleading to an indictment, by operation of ORS 156.080 and 156.610.

The ABA reporter makes the point that "because it is seldom possible to engage in effective negotiations minutes before the defendant is to be called upon to plead, this means that some reasonable interval must elapse between

appointment of counsel and the pleading stage." (Commentary, p. 22). In practice, the usual procedure followed is to enter a plea of "not guilty" to the crime charged, and to later change the plea if it becomes necessary.

No attempt is made in the ABA Standards or in this draft to set forth the kinds of cases for which counsel must be made available to an indigent defendant and the procedures for appointment in advance of the time for pleading, or to indicate what is necessary for effective waiver of counsel. These matters will be dealt with elsewhere in the Criminal Procedure Code.

The section does not require appointment of counsel against his wishes simply because of the nature of his plea. A defendant can waive his right to counsel if he does so understandingly and intelligently. Johnson v. Zerbst, 304 US 458 (1938). It has been held that if a defendant pleads guilty, or the record shows that an offer of counsel was made and refused by the defendant, the burden is on the defendant to show that he did not understandingly and intelligently waive his right to counsel. Moore v. Michigan, 355 US 155 (1957).

Subsection (2) subscribes to the ABA position that even if the defendant has effectively waived counsel, he nonetheless should not be hurried through the plea of guilty process without sufficient time to consider his decision.

Section 3. Defendant to be advised by court. (1) The court shall not accept a plea of guilty or no contest to a felony or other charge on which the defendant appears in person without first addressing the defendant personally and determining that he understands the nature of the charge.

(2) The court shall inform the defendant:

(a) That by his plea of guilty or no contest he waives his right:

(A) To trial by jury;

(B) Of confrontation; and

(C) Against self-incrimination.

(b) Of the maximum possible sentence on the charge, including that possible from consecutive sentences.

(c) When the offense charged is one for which a different or additional penalty is authorized by reason of the fact that the defendant may be adjudged a dangerous offender, that this fact may be established after his plea in the present action, thereby subjecting him to different or additional penalty.

COMMENTARY

This section has been amended by the subcommittee to attempt to meet the ABA Standards, as well as the apparent requirements of Boykin v. Alabama, without creating an impossible situation in the lower courts in the disposition of misdemeanor cases. (See Preliminary Draft No. 1 for general discussion of this section).

Section 4. Determining voluntariness of plea. (1) The court shall not accept a plea of guilty or no contest without first determining that the plea is voluntarily and intelligently made.

(2) The court shall determine whether the plea is the result of a plea agreement. If the plea is the result of a plea agreement, the court shall determine the nature of the agreement.

(3) If the district attorney has agreed to seek charge or sentence concessions which must be approved by the court, the court shall advise the defendant personally that the recommendations of the district attorney are not binding on the court.

COMMENTARY

See Preliminary Draft No. 1

Section 5. Determining accuracy of plea. The court shall not enter a judgment upon a guilty plea without making such inquiry as may satisfy the court that there is a factual basis for the plea.

Section 5. (Alternate) Determining accuracy of plea. The court shall not enter a judgment upon a guilty plea without making such inquiry as may satisfy the court that there is a factual basis that the defendant has committed a crime.

COMMENTARY

Section 5 is the language approved by the subcommittee and requires such inquiry as will satisfy the court that there is a factual basis for the plea itself. The alternate section embodies the policy recommended by the Oregon State Bar Committee on Criminal Law and Procedure that the inquiry should be sufficient if it satisfies the court that the defendant has committed a crime. The Bar Committee believed that this approach would permit more latitude in the plea bargaining process by providing a wider range of crimes from which to choose. The subcommittee was of the opinion that both sections should be submitted to the full Commission for further discussion. (See Preliminary Draft No. 1 for additional commentary).



Section 6. Plea discussions and plea agreements. (1) In cases in which it appears that the interest of the public in the effective administration of criminal justice would thereby be served, and in accordance with the criteria set forth in section 7 of this Article, the district attorney may engage in plea discussions for the purpose of reaching a plea agreement.

(2) The district attorney shall engage in plea discussions or reach a plea agreement with the defendant only through defense counsel, except when, as a matter of record, the defendant has effectively waived his right to counsel or, if the defendant is not eligible for court-appointed counsel, has not retained counsel.

(3) The district attorney, in reaching a plea agreement, may agree to one or more of the following, as required by the circumstances of the individual case:

(a) To make or not to oppose favorable recommendations as to the sentence which should be imposed if the defendant enters a plea of guilty to the offense charged;

(b) To seek or not to oppose dismissal of the offense charged if the defendant enters a plea of guilty to another offense reasonably related to the defendant's conduct; or

(c) To seek or not to oppose dismissal of other charges or to refrain from bringing potential charges against the defendant if the defendant enters a plea of guilty to the offense charged.

COMMENTARY

A. Summary

This section adopts the ABA recommendation that the plea negotiation process should be formally recognized and controlled. Subsection (1) is a general provision regarding the district attorney's authority to engage in plea discussions. Subsection (2) requires negotiation through defense counsel except when the defendant is not represented by his own voluntary choice. Although a defendant might elect not to have counsel, if the court appoints counsel to advise the defendant, the lawyer could be with defendant during any negotiations to advise him. For the purposes of this section then, the defendant would not have waived his right to counsel. Note, also, that subsection (2) is not intended to prevent the defendant from being present during plea discussions, but to assure that he has the benefit of counsel during the process. Subsection (3) sets forth the types of concessions that the district attorney may make in reaching a plea agreement. (Subsection (4) in Preliminary Draft No. 1, requiring equal plea agreement opportunities for similarly situated defendants, was deleted by the subcommittee).

B. Derivation

The section is derived from ABA Standards Relating to Pleas of Guilty s. 3.1 (Approved Draft, 1968).

C. Relationship to Existing Law.

(See Commentary, Preliminary Draft No. 1)

Section 7. Criteria to be considered in plea discussions and plea agreements. In determining whether to engage in plea discussions for the purpose of reaching a plea agreement, the district attorney may take into account any of the following considerations:

(1) The defendant by his plea has aided in ensuring the prompt and certain applications of correctional measures to him.

(2) The defendant has acknowledged his guilt and shown a willingness to assume responsibility for his conduct.

(3) The concessions made by the state will make possible alternative correctional measures which are better adapted to achieving rehabilitative, protective, deterrent or other purposes of correctional treatment, or will prevent undue harm to the defendant from the form of conviction.

(4) The defendant has made public trial unnecessary when there are good reasons for not having the case dealt with in a public trial.

(5) The defendant has given or offered cooperation when the cooperation has resulted or may result in the successful prosecution of other offenders engaged in equally serious or more serious criminal conduct.

(6) The defendant by his plea has aided in avoiding delay in the disposition of other cases and thereby has increased the probability of prompt and certain application of correctional measures to other offenders.

COMMENTARY

(See Commentary, Preliminary Draft No. 1)

Section 8. Responsibilities of defense counsel. (1) Defense counsel shall conclude a plea agreement only with the consent of the defendant, and shall ensure that the decision whether to enter a plea of guilty is ultimately made by the defendant.

(2) To aid the defendant in reaching a decision, defense counsel, after appropriate investigation, shall advise the defendant of the alternatives available and of factors considered important by him in reaching a decision.

COMMENTARY

(See Commentary, Preliminary Draft No. 1)

Section 9. Responsibilities of judge. (1) The judge shall not participate in plea discussions.

(2) If a tentative plea agreement has been reached which contemplates entry of a plea of guilty in the expectation that other charges before the court will be dismissed or that sentence concessions will be granted, the judge, upon request of the parties, may permit the disclosure to him of the tentative agreement and the reasons therefor in advance of the time for tender of the plea. The judge may then advise the district attorney and defense counsel whether he will concur in the proposed disposition if the information in the presentence report or other information available at the time for sentencing is consistent with the representations made to him.

(3) If the judge concurs, but later decides that the final disposition of the case should not include the charge or sentence concessions contemplated by the plea agreement, he shall so advise the defendant and allow the defendant a reasonable period of time in which to either affirm or withdraw his plea of guilty.

(4) When a plea of guilty is tendered or received as a result of a prior plea agreement, the judge shall give the agreement due consideration, but notwithstanding its existence, he is not bound by it, and may reach an independent decision on whether to grant sentence concessions under the criteria set forth in section 7 of this Article.

#### COMMENTARY

Subsection (1) was approved by subcommittee. The balance of the section is submitted to the Commission without recommendation. (For additional Commentary, See Preliminary Draft No. 1.)

Section 10. Discussion and agreement not admissible. Unless the defendant subsequently enters a plea of guilty which is not withdrawn, the fact that the defendant or his counsel and the district attorney engaged in plea discussions or made a plea agreement shall not be received in evidence for or against the defendant in any criminal or civil action or administrative proceeding.

COMMENTARY

(See Commentary, Preliminary Draft No. 1)

Section 11. Withdrawn plea not admissible. A plea of guilty which is not accepted or has been withdrawn shall not be received against the defendant in any criminal proceeding.

COMMENTARY

This section is taken from ABA Standards Relating to Pleas of Guilty s. 2.2 (Approved Draft, 1968) and is consistent with the current Oregon position. See commentary under s. 10, Preliminary Draft No. 1.

Section 12. Pleading to other offenses. (1) Upon entry of a plea of guilty or no contest, or after conviction on a plea of not guilty, the defendant's counsel may request permission for the defendant to enter a plea of guilty or no contest as to any other crime he has committed which is within the jurisdiction of coordinate courts of the state.

(2) With consent of the district attorney of the county in which the plea is to be entered, and upon written approval of the district attorney of the county in which the crime is charged or could be charged, the court may allow the defendant to enter the plea.

(3) Entry of a plea as provided in this section constitutes a waiver of:

(1) Venue, as to crimes committed in other counties of the state; and

(2) Formal charge, as to offenses not yet charged.

COMMENTARY

This section is based on ABA Standards Relating to Pleas of Guilty s. 1.2. It was not included in Preliminary Draft No. 1, but was adopted by the subcommittee at the request of the Bar Committee. The above draft requires the consent of the district attorney of the county in which the plea to other offenses is to be entered, and differs from the ABA standard in that regard.

The rationale for the provision is stated in the ABA Commentary at pp. 19-20:

"It is not unusual for a defendant to have committed several crimes in more than one governmental unit\* \* \*of the state, or to have committed in one governmental unit several crimes which cannot be joined in one indictment. If the defendant is willing to enter a plea of guilty or nolo contendere to such offenses, several separate proceedings should not be required to accomplish that result. It is also usually preferable to have one judge impose sentence on all the offenses at one time.



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"The\* \* \*Standard makes it possible for a defendant to seek a simultaneous disposition as to all offenses he has committed in the state, whether or not he has been theretofore charged with all of these offenses. \* \* \* Such a disposition can be of considerable benefit to the defendant: (1) he will be able to start with a clean slate when he is released from prison; (2) he may gain some benefit from the imposition of concurrent sentences or similar consideration in sentencing; and (3) he can avoid the risk of an intrastate detainer being lodged against him while he is serving his sentence. The public is also benefited by a prompt disposition as to all those offenses."

(Note: This section and section 13 have been placed at the end of this draft to avoid rewriting the entire draft to accommodate them. If the sections are retained, they will be relocated in a later draft between sections 1 and 3.)

Section 13. Legal effect of plea of no contest. A judgment following entry of a no contest plea is a conviction of the offense to which the plea is entered.

COMMENTARY

As noted in the Commentary to section 1, the purpose of the "no contest" plea is to provide for more flexibility in the criminal pleading process, particularly in the "Alford" type of case. The plea, however, would be considered to have the same force and effect as a "guilty" plea.

The ABA Committee takes a middle position regarding this type of plea:

"The Advisory Committee has reached the following conclusions. First, the case for the nolo plea is not strong enough to justify a minimum standard supporting its use. Second, because use of the plea contributes in some degree to the avoidance of unnecessary trials (a major goal in these standards), the minimum standards should not proscribe use of the nolo plea. Finally, because some risks are involved in accepting nolo pleas without sufficient inquiry, it is necessary in these standards to establish safeguards to govern the taking of the nolo plea where it is permitted." ABA Standards Relating to Pleas of Guilty, 16 (Approved Draft, 1968). See, also pp. 13-18 for other Commentary regarding this plea.

SUPPLEMENTARY COMMENTARY

See Commentary, Preliminary Draft No. 1 at 33-35 for supplementary discussion of related Oregon statutes and cases. See pp. 36-41 for complete text of ABA Standards Relating to Pleas of Guilty.