Tape 6 - Side 2 - 241 to 582

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 3

March 16, 1972

Members Present: Judge James M. Burns, Chairman
Mr. Donald R. Blensly
Mr. Donald E. Clark
Representative Norma Paulus

Staff Present: Mr. Donald L. Paillette, Project Director

Others Present: Mr. Barnes Ellis, attorney, Portland
Mr. Dave Hattrick, Deputy District Attorney, Multnomah County
Mr. James Hennings, Metropolitan Public Defender, Portland
Mr. M. Chapin Milbank, Chairman, Oregon State Bar Committee on Criminal Law and Procedure
Mr. John Osburn, Solicitor General, Department of Justice
Mr. Ray Robinette, Washington County District Attorney

Agenda: PRE-TRIAL DISCOVERY
Preliminary Draft No. 1; March 1972

The meeting was called to order at 1:30 p.m. by Judge James M. Burns, Chairman of Subcommittee No. 3, in Room 315 State Capitol, Salem.

Minutes of Meeting of February 21, 1972

Representative Paulus moved that the minutes of the meeting of February 21, 1972, be approved.

Chairman Burns said that before the vote was taken on the motion, he wished to correct a statement made by him as set forth on page 27 of the minutes:

> "Judge Burns said that Multnomah County took care of 600 cases between September 1971 and January 1972 and in a sizeable number of those instances the judge took part in the plea bargaining process."

Because that statement inferred that Judge Jones took part in the bargaining process in 600 cases whereas it actually concerned the time in office of a different judge, it was inaccurate and unfair to Judge Jones. The word "sizeable," he said, did a disservice to Judge Jones and might be construed as being inappropriate.

Vote was then taken on the motion to approve the minutes with the above clarification and it carried unanimously.

Pre-Trial Discovery; Preliminary Draft No. 1; March 1972

Explanation of sections 1 through 6. Mr. Paillette advised that the draft on today's agenda was substantially the same as the discovery Article in the New York Criminal Procedure Law which became effective last September and for the first time enacted statutory discovery procedures in that state. The New York law in turn drew heavily upon Federal Rule 16. Compared to the ABA standards, the New Jersey rules and the Florida rules, the draft represented a conservative approach to the subject of discovery although there were many similarities between all of the plans.

As drafted, Mr. Paillette advised that the provisions of the draft would be applicable to any criminal case. The ABA standards suggested that their recommendations should apply only to "serious" criminal cases, but the meaning of "serious" was unclear.

Section 1, Mr. Paillette explained, set forth three basic definitions. An "order of discovery" would require a motion of a party to a criminal action to initiate discovery proceedings. It did not require discovery prior to an order of discovery issued by the court, although it would not prohibit it.

"Property" was defined very broadly and was meant to include reports of examinations, records of testimony, etc.

The definition of "exempt property" operated to exclude certain work products of a district attorney, a peace officer, law enforcement agent or the defendant himself or his agents as well as any records of statements made to any of these persons.

Section 2, Mr. Paillette continued, was the basic section in the draft and was intended to apply not only at the circuit court level but at other levels as well. The existing statute, ORS 133.755, required a motion by the defendant "any time after the filing of the indictment or information, and upon a showing that the items sought are material to the preparation of his defense and that the request is reasonable . . . . " This same test was applied in a more limited sense in a subsequent portion of the draft. The existing statute required the order to "specify the time, place and manner of making the inspection" whereas the draft did not require the court to specify the manner in which the discovery was to be made but at the same time did not prohibit the court from doing so.

Mr. Paillette introduced Mr. Barnes Ellis who had written, he said, the most definitive article that had been undertaken on discovery

in Oregon, a portion of which was quoted on pages 7 and 8 of the commentary to section 2. He said he would be inclined to agree with his statements with respect to the need to recognize that other states and other courts were moving toward more discovery in the criminal field and that up to now neither the Oregon legislature nor the Oregon courts had responded.

Section 3, Mr. Paillette explained, dealt with a mandatory type of discovery with respect to certain property described therein. Section 240.20 of the New York law, from which section 3 was drawn, specifically referred to recorded testimony before the grand jury. In his opinion that provision did not appear essential and if such material were available, he believed the language of the section was broad enough to cover it. The existing statute, he said, included written statements made by the defendant and, as pointed out in the commentary on page 9 of the draft, this was the one area in which the states had been the most liberal in granting discovery by the defendant.

Section 4 concerned other types of property where discovery was not mandatory. Section 4 was discretionary with the court and provided for additional orders of discovery, drawing into it by reference sections 5 and 6.

Section 5 set out special conditions, namely, a reciprocity provision that would allow the state to make a showing on which the court would condition the order of discovery by the state of property other than exempt property. The exempt property provision would apply to either side.

Section 6 would allow the adverse party an opportunity to present a showing in opposition to a motion for discovery.

General discussion. Chairman Burns noted that by defining records of statements made by witnesses as "exempt property," section 1 would rule them out as an area of discovery. He was of the opinion that statements of witnesses should be discoverable provided there were adequate safeguards. Florida and some of the other states specifically allowed discovery of witnesses' statements conditioned on reciprocity. Mr. Paillette acknowledged that the Chairman had raised one of the major issues in the draft. Chairman Burns said that as he read the draft, the defendant could get any statement the defendant had made virtually as a matter of right, but everything else -- whether property, reports, experiments, etc. -- was subject to reciprocity and was discoverable. Mr. Paillette agreed.

Mr. Clark asked if the draft being considered was more limiting than current discovery practices. Chairman Burns replied that there was nothing in the draft that was intended to prevent a more open file policy than either the defense or the prosecution followed at the

present time. Mr. Paillette added that probably many, but not all, district attorneys already went beyond what was required by the draft.

Mr. Milbank commented that he did not see why statements of witnesses should be exempt property. Chairman Burns asked Mr. Milbank how he felt about two-way discovery of witnesses' statements and was told that he would approve of reciprocity in that situation.

Mr. Blensly inquired if it was contemplated that this draft would take the place of the present alibi statute and its requirement of notice of alibi and received a negative reply from Mr. Paillette. Mr. Blensly said that if a prior conviction was to be introduced during the course of a trial, the district attorney should be forced to notify the defendant of that intention; likewise, if the defendant intended to collaterally attack it, the district attorney should be so notified. He advised that he had no objection to discovery but did have some reservation with respect to discovery on all witness statements. If discovery of witnesses' statements was to be included in the statute, there should be carefully drafted procedures setting forth precisely when the court could refuse to grant discovery on them in order to protect certain cases. Most district attorneys he had talked to, he said, were not opposed to discovery nor were they necessarily opposed to giving statements of witnesses provided they were at the same time given the story as to what would be presented by the other side. Their greatest fear concerned protection of witnesses and their other major concern centered on the fact that defendants were quite capable of making up a story to meet the evidence they knew was going to be presented by the prosecutor. If those two areas were covered, he said, there would be very few district attorneys who would object strenuously to discovery.

Chairman Burns called attention to page 26 of the draft wherein the New Jersey rules discussed the categories where discovery should be denied, including protection of witnesses from harm, maintenance of secrecy of informants, etc. He asked Mr. Blensly his opinion of that provision and was told he would prefer to study it in more detail but it appeared to contain the type of language he believed was imperative. Mr. Blensly expressed approval also of the New Jersey provision permitting the court to allow the showing in the form of a written statement to be inspected by the court alone.

Representative Paulus asked Mr. Ellis to expand upon his statement set forth on page 7 of the draft where he urged that consideration be given to according trial courts greater discretion and "requiring a significant showing by the side seeking to limit discovery."

Mr. Ellis said he had started with the basic premise that trials would be more fair in proportion to the extent disclosure was permitted on both sides. He suggested that in considering the discovery area

the subcommittee should approach it from the viewpoint of whether there was a good reason not to allow discovery. He was particularly concerned that under the draft, discovery was not extended even to the names of witnesses, access was not given to their statements, to transcribed grand jury testimony nor to depositions of recalcitrant witnesses. From the prosecution's point of view the basic discovery procedure was available at the present time through the grand jury but was not available to the defense side at all. Section (f) of the Florida rules on page 28 of the draft, he said, set out a rational approach to the problem of discovery depositions. With respect to trial court discretion, Mr. Ellis said he would like to see trial courts have the power to grant a great variety of discovery not contemplated by the draft and also be given discretion, in cases where the state can make a proper showing, to impede discovery. By and large, Mr. Ellis said, the draft was very conservative, and this was particularly true in the area of witnesses.

In regard to discovery by the prosecution, Mr. Ellis said he did not like the notion of conditioning it on the defense's request. He believed the prosecution should have a direct right of discovery -- not only discovery of third party witnesses by open process rather than just the grand jury process but also he thought the prosecution could constitutionally be granted a fair amount of power to get physical property from the defense. He said he would like to see a provision where the prosecution could give notice to the defendant for deposition. If the defendant elected to assert the Fifth Amendment, that would be notice that he was going to assert it also at trial. His concern was that if all the prosecution discovery rights were conditional upon reciprocity, it would lead to an argument of waiver by the defendant of what was presumed to be a constitutional insulation. It was poor constitutional judgment by a legislature, he said, to try to force by leverage that kind of waiver. If that right was not constitutionally protected, the prosecution should not be required to wait for the defendant to initiate a discovery process.

Mr. Ellis added that the Commission's ultimate decision regarding grand juries and preliminary hearings would have a great deal to do with the net product of knowledge on both sides as they went into the courtroom. Chairman Burns recapitulated the position taken by the Commission with respect to grand juries at its last meeting. [See Commission minutes, 3/10/72, pp. 43, 44.]

Chairman Burns asked Mr. Ellis if any other state had enacted legislation similar to his recommendation that a prosecutor be permitted to give notice to a defendant that he was going to be deposed and make him decide whether he was going to plead the Fifth Amendment. Mr. Ellis said he did not know of a state where that had been done, but he believed that the prosecution was entitled to know whether the defendant intended to testify.

Mr. Blensly remarked that many times the defendant did not know whether he would testify until he had heard the prosecution's testimony. He said he did not see how the defendant could intelligently make that decision at the time he was deposed. Mr. Ellis replied that he was assuming that the defense, prior to trial, would have had an opportunity to examine some of the prosecution's witnesses.

Chairman Burns indicated that this course would cause a problem by requiring a significant enlargement of deposition rights that could be very difficult to handle in terms of running a speedy docket. His concern was that there might be an enormous increase in pre-trial mechanics which the courts were not equipped to handle, particularly in light of the 60-day rule, and, further, that in instances where the defendant was convicted, as happened in a substantial number of cases, post-conviction proceedings could be increased by adding more grounds for complaint by the defendant against his attorney.

Mr. Blensly expressed objection to adding yet another requirement to the criminal process from the defendant's point of view.

Chairman Burns explained that there was a proposed federal rule which had not been acted upon that reached the problem under discussion by requiring reciprocal exchange of witnesses' names, except for those cases where there was likelihood of physical harm, etc., and provided that the person disclosing the name may depose that witness. In other words, the defense and prosecution would trade names of lists of witnesses but there would not be a wholesale deposition. Mr. Ellis advised that the Florida statute did not contemplate wholesale depositions but would permit depositions to be obtained from an important witness who refused to discuss the matter with either the defense or the prosecution. He indicated approval of that approach.

Mr. James Hennings, Metropolitan Public Defender, in response to the Chairman's request for his comments on the draft, stated there were certain things each side should have as a matter of right. He objected to the exclusion of scientific tests and said that everyone he had talked to in the identification bureau and in the Medical Investigator's office wanted to become independent professionals. Excluding their reports, he said, in effect made them investigators for the district attorney and that result should not be encouraged; instead the Commission should encourage full discovery of all scientific tests. Mr. Paillette said that the draft did not exclude scientific tests, and Mr. Hennings replied that he would recommend that their use not be discretionary; if either side was going to use scientific tests, they should be revealed to the other side and not be contingent upon a request to the court.

He further believed that witnesses' statements, particularly where the court exercised discretion only in order to protect a witness, should not be conditioned upon a request. In addition, he

said that other than the defendant's statements which were protected by Fifth Amendment rights, any witness to the actual incident should be revealed by both sides and the same was true with respect to confessions of the defendant.

Mr. Hennings advised that his office in Portland maintained an open file policy and it was working very well. In response to a question by Chairman Burns, Mr. Hennings said he would approve of the Florida plan to permit deposition of witnesses if the witness, other than the defendant, refused to talk, and that provision should be open both ways.

Chairman Burns asked Mr. Hennings his impression of the New Jersey rule on page 26 of the draft setting forth specific grounds for denying discovery. Mr. Hennings replied that the rule appeared to contain a reasonable list of considerations for the court to follow in denying discovery. In regard to the in camera hearing, he said that if there were certain things the defense attorney wished to ask of a particular witness, he believed he should be allowed to give a list of questions to the judge in order that the judge may make an independent decision as to whether a neutral statement may be taken from the witness.

Mr. Osburn advised that his office in the Department of Justice had been preparing a draft on the subject of pre-trial discovery which they had hoped to present prior to the time the draft under consideration today was discussed. They had, however, not yet had an opportunity to talk to all the district attorneys to solicit their views although he had talked to most of them. Basically, he said, he was in accord with the view expressed by Mr. Ellis that discovery should be bilateral rather than reciprocal and perhaps the way to do that would be to avoid making discovery conditional and instead provide precisely what the defense and the prosecution would be required to reveal. Generally, he believed the comments as to what should be added to the list of things that were discoverable were appropriate; i.e., statements of witnesses, scientific tests, etc. Police records of potential witnesses had not been discussed by the committee but that was something to which the prosecution had access and he believed the defendant should also be able to have that information.

With respect to depositions, Mr. Osburn said there was a danger in having the court conduct in camera examinations of witnesses because it could result in an informal trial that might be just as long as the formal trial. A procedure should be established which would enable the parties to exchange information without getting the court involved at that point unless there was something on which the court had to rule, such as an issue of protective custody of a witness. To some extent, he said, the district attorney would have to make a cautious judgment whether to use the right to obtain a protective order because he could run into Brady v. Maryland problems.

Mr. Osburn indicated concern over the provision in the draft requiring a motion to be filed in order to trigger the discovery procedure. If the defense attorney failed to file such a motion, the case would in all likelihood be tried all over again in a post-conviction proceeding. He believed it would be better to have a rule, as in the case of alibi witnesses, requiring a list of witnesses to be provided to both defense and prosecution. If the list was not provided, the witnesses could not be called. He urged that the procedure be made as automatic as possible so that both sides would receive the information without having to go to court to trigger the process.

Mr. Hattrick inquired as to the meaning of "statement of a witness" and was told by Chairman Burns that the phrase would mean whatever the committee ultimately decided. Typically in this area they would be statements made by the victim to the police officer which thereafter appeared in written form in the police report. By definition, however, a statement could be defined to mean something the witness had signed, something he had put on tape, etc.

Mr. Hattrick said that if a statement were so defined, it would create a problem in that at the early stage of the criminal process there would be virtually no statements meeting that definition for the defense, but there would be many statements for the state. That would mean, he said, that if the prosecution's statements were discoverable but the defense's statements were not reduced to writing and therefore not discoverable, the state would be at a decided disadvantage.

Chairman Burns replied that there was a continuing duty inherent in discovery, right up to the time of trial. Mr. Paillette advised that the draft contained a section specifically directed to that continuing duty.

Mr. Hennings commented that if the draft required a statement to be reduced to writing, there would be a danger that statements might not be included in, for example, police reports. The committee should consider, he said, the type of testimony that appears for the first time at trial simply because it was consciously not reduced to writing. He said that as long as he was given the opportunity to interview a witness, that was all he felt was necessary.

Mr. Blensly remarked that the question of timing was also important. If the state had to reveal its information too early, the defendant's story could be tailored to the information he had received from the prosecution witnesses.

Chairman Burns said it would be necessary to determine the point where discovery would start, at least in felony cases. Assuming that a probable cause preliminary hearing procedure was to be adopted and thereafter the case would go to circuit court, presumably the discovery

process would operate between those two times. Mr. Blensly commented that the committee should also direct attention to the question of whether there should be some distinction in discovery between minor cases and serious ones. Chairman Burns said he wouldn't want to see a ponderous procedure imposed in misdemeanor cases.

Mr. Milbank remarked that there existed the possibility of denial of equal protection from the economic standpoint because of the difference in the quality and amount of investigative work between those cases where there was an unlimited defense budget and court appointed cases where investigation was limited by time factors and by the county budget. The defense bar, he said, was spending a tremendous amount of time in an attempt to do a proper investigative job, and the open file policy would somewhat balance that factor against the investigative staff at the disposal of the state. He indicated that the economic overtones in pre-trial discovery were very important.

Mr. Paillette asked if the open file policy was uniformly applied in all cases as far as the Multnomah County district attorney's office was concerned. Mr. Hennings replied affirmatively and said on the whole his office had experienced no trouble with that policy. Chairman Burns said that in Multnomah County in January and February there was not a single request to him to see a file, so it was no problem at all at the circuit court level. He added that he had been told that at the misdemeanor level in the district court there had been some difficulty which was partly attributable to relatively inexperienced deputies in authority-granting situations.

Mr. Paillette commented that the open file policy was not used in every county and asked what procedure was followed in Yamhill County. Mr. Blensly said he had a quasi-open file policy. If the attorney came in, he talked to him about his case and gave him the information orally he had in his file so long as there was bilateral discovery.

Mr. Osburn advised that both Linn and Lane Counties had open file systems. Generally, he said, district attorneys tended to be going to an open file system, one reason being that the press of cases had made it an economic necessity.

Chairman Burns stated that the more open the file, the more quilty pleas were entered. Mr. Osburn agreed but added that some attorneys abused the system, and in those cases the open file policy tended to break down and those attorneys found that the open file was no longer available to them.

Mr. Hennings, in reply to an earlier comment by Mr. Blensly, said that he was sure it sometimes happened that the defendant made up his story after the police report was read to him. He pointed out, however, that it was unethical as far as the defense attorney was concerned to put on perjured testimony or to allow his client to take the stand

and do so. This acted as a safeguard for that type of statutory pre-trial discovery. To reinforce it, it could be written into the statute.

Mr. Osburn commented that there was some question as to whether a criminal defendant was entitled to federal habeas corpus relief because his attorney would not put on perjured testimony. Mr. Blensly said he believed the status of that question at the present time was that the case was thrown out because the attorney refused to put on perjured testimony.

Following a brief recess, Chairman Burns asked Mr. Robinette for his comments regarding discovery. Mr. Robinette said a problem might arise if some limitation were not placed on discovery of materials that were not intended to be used at trial. In certain cases, he said, it was the state's honest and true intent not to use a particular witness or a particular document. However, because of something that occurred during the course of the trial, it became imperative to use that information and provision should be made for that contingency.

In reply to a question by the Chairman as to the general practice followed in Washington County concerning the open file policy, Mr. Robinette advised that he reserved the right to edit all material he disclosed but, generally speaking, he maintained an open file. He sometimes found it necessary to edit police reports, he said, because on occasion they contained comments that were irrelevant or had nothing to do with the facts of the case under consideration. He had an open file policy regarding medical reports, chemical reports, crime laboratory reports, etc.

Chairman Burns indicated that his impression of the discussion thus far was that the subcommittee would be in favor of a draft which was considerably broader than the one under discussion and doubted that it would be worthwhile to go through this draft section by section.

Mr. Clark agreed that everyone at the meeting was apparently saying that discovery should be maximized with proper protections and that discovery should be bilateral by rule without motion. He expressed the view that a draft should be prepared to meet that criteria.

Mr. Osburn, in reply to a question by the Chairman, said the draft being prepared by his office should be available very soon and in that draft, the area of items subject to discovery would be broader and would not involve the motion process.

Mr. Paillette asked Mr. Osburn if his plan was to distribute the Attorney General's draft generally, submit it to the Commission or submit it to the legislature and was told that they had hoped to circulate it among the district attorneys and obtain their views before submitting it to this subcommittee.

Chairman Burns said that rather than spend time going over this draft, in view of the comments at today's meeting, it appeared advisable to redraft the Article using as a starting point some of the provisions of other states that had been discussed today.

Mr. Paillette commented that it seemed pointless to redraft the Article until the Attorney General's proposal was completed. Mr. Osburn indicated he would meet with Mr. Paillette by the first of the following week to let him know what progress had been made on the draft being prepared by his office. He said he had talked to most of the district attorneys and there had been no disagreement expressed with the general tenor of the draft.

Chairman Burns asked Mr. Ellis if he had prepared any specific language along the general lines of the recommendations he had made at today's meeting and received a negative reply. Mr. Ellis added that he would be happy to assist in preparing the draft, however.

Mr. Milbank expressed concern over the phrase, "in which a criminal action is pending," in subsection (1) of section 1. Ultimately the circuit court, as opposed to the district court, was going to make a ruling in any felony case as to what was discoverable. In those counties that "allow" preliminary hearings, there should be some final arbiter.

Mr. Paillette commented that if the draft permitting very broad discovery were adopted, more waivers of the probable cause hearing would occur. When the search and seizure draft was being considered, Subcommittee No. 2 had discussed the desirability of having the circuit court judge make this decision rather than the district judge.

Mr. Robinette said he would agree that the ruling of a circuit court was essential in both a search and seizure as well as a discovery proceeding. The ruling of a district court in a discovery proceeding could be damaging, he said.

Mr. Paillette asked Mr. Robinette if the District Attorneys' Association had discussed pre-trial discovery or taken a general position on the subject. Mr. Robinette said that their general consensus was that they were very concerned about this subject and felt some approach or some safeguards in a reciprocal process should be part of any pre-trial discovery. It was his impression that district attorneys would not object to discovery so long as the state's rights to discovery were given due consideration.

Mr. Paillette commented that he believed Preliminary Draft No. 1 recognized that the state had a right to discovery, as did the ABA standards and the rules of some of the other states. He urged that the subcommittee bear in mind, however, that when this subject came before the legislature, there would be a vast difference between a

proposed discovery statute that not only permits but encourages such things as an open file policy and a statute that demands it. In a state such as Oregon that has traditionally been very conservative about criminal discovery the members should be realistic about the proposal. Unless the Commission submitted a procedural code that had the support of defense lawyers and prosecutors alike, it would end up with nothing.

Mr. Clark expressed the view that there was a consensus in the meeting and the time had come to liberalize discovery procedures. Mr. Paillette agreed that there was a consensus at this meeting, but this would not necessarily be true in the legislature.

Chairman Burns said the committee had to recognize one of the facts of life which was that some of the district attorneys were willing to have an informal open file policy on a voluntary basis, but would start drawing back if they were required by statute to maintain an open file.

Mr. Paillette explained that he was not suggesting that the code should not be progressive but that it should be realistic. He said he could visualize some police and district attorneys who, as they did on Senate Bill 40, would come into the legislature and accuse the Commission of coddling criminals and this would be even more true on the procedural aspect of the code than on the substantive.

Mr. Osburn said he was concerned from the standpoint of the prosecution about liberalizing discovery rules. At the very end of the legislative session there could be one small amendment made that said discovery would not be bilateral as a result of the opposition of lawyers who would come in and say, "This has a chilling effect on Fifth Amendment rights."

Mr. Blensly agreed that if there was to be a concerted effort on the part of law enforcement to block the passage of the code, it would be aimed at the area of discovery and of search and seizure. Those would be the two crucial areas as far as prosecutors were concerned.

Representative Paulus added that it only took one or two district attorneys to get some group, such as the Oregon State Grange, to write letters to non-legal members of the legislature and they could make it very difficult to get a bill passed over that kind of opposition.

Mr. Clark pointed out that the mandate to the Commission initially was to come up with a reformed set of statutes, and he was of the opinion that the proposed statute should be a progressive one rather than being considered on the basis of what would pass the legislature. Chairman Burns remarked that five or six Portland police plus an attorney had very nearly recalled that mandate when Senate Bill 40 was before the last legislature.

Mr. Robinette said he thought the hesitancy on the part of the district attorneys to broaden discovery procedures was that the majority of district attorneys presently maintained an open file policy and saw no reason to pass legislation requiring it. They also had some hesitation about getting a bill into the legislature and then having it amended at the last minute.

Mr. Paillette said he could envision an amendment to a proposed discovery statute that would say, "This does not apply to the following felonies: murder, armed robbery, rape, etc." He had, he said, seen those kinds of amendments in an attempt to get bills out of committee. The discovery statute would be one of the focal points of the procedural code, and he urged that the subcommittee bear in mind that while there was perhaps a majority of the district attorneys who now maintain an open file policy, that did not solve the problem for the individual defendant who wanted discovery but couldn't get it in a county where no such policy existed when there was no discovery statute to fall back on.

Chairman Burns suggested that the best way to proceed was, as soon as possible after the Attorney General's draft was completed, to redraft this proposal generally along the lines discussed at today's meeting and then discuss the specific language of the new draft at the next subcommittee meeting. The members concurred.

Omnibus Hearing. Mr. Paillette called attention to the omnibus hearing standards of the ABA beginning on page 44 of the draft. He advised that an experiment on omnibus hearings had been conducted in the federal district court for Southern California. He had written Judge James Carter, U. S. Court of Appeals, 9th Circuit, in February concerning that experiment and had received a reply saying his reaction was that it was successful in the federal district court and a committee was studying possible revisions to the procedure. He said he hoped that this subcommittee, as a part of discovery or in connection with some other phase of its work, would examine the possibility of suggesting this type of a procedural device to get at certain problem areas, one of which was raised by Mr. Ellis at today's meeting concerning notice of possible defenses.

Chairman Burns agreed that the subject should be considered by one of the subcommittees. He advised that a committee had been formed in Portland to talk about the general problems in the criminal courts and at its first meeting in January the committee discussed omnibus hearings and had tentatively drafted a form similar to an omnibus hearing form. He said he suspected that if the sort of discovery discussed by the subcommittee today were to be adopted, it probably would increase the demand for an omnibus hearing even though the number of cases in which it was necessary today was relatively small. He agreed that the framework for an omnibus hearing should be included in the procedure code and its use should be encouraged.

Representative Paulus suggested that Subcommittee No. 3 should assume it would take up the subject of omnibus hearings as a part of its work. Mr. Blensly indicated he was in favor of omnibus hearings, but the circuit court judge in his county was opposed to it.

The meeting was adjourned at 4:00 p.m.

Respectfully submitted,

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission