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OREGON CRIMINAL LAW REVISION COMMISSION

Twenty-seventh Meeting, January 28, 1972

Members Present: Senator Anthony Yturri, Chairman
Senator Wallace P. Carson, Jr.
Mr. Robert W. Chandler
Mr. Donald E. Clark
Representative George F. Cole
Attorney General Lee Johnson
Representative Leigh T. Johnson
Mr. Frank Knight
Representative Norma Paulus (Present for morning session only)
Judge Herbert Schwab (Ex-officio) (Present for morning session only)

Excused: Senator John D. Burns, Vice Chairman
Judge James M. Burns
Mr. Bruce Spaulding
Representative Robert Stults

Staff Present: Mr. Donald L. Paillette, Project Director
Mr. Bert Gustafson, Research Counsel

Also Present: Mr. Nick Chaivoe, Association of Criminal Defense Counsel, Portland
Mr. John Moore, Oregon District Attorneys' Association Criminal Law Revision Liaison Committee
Mr. Gene Murphy, Lane County District Attorney's Office
Mr. Scott Parker, Chief Criminal Deputy District Attorney, Clackamas County (Present for morning session only)
Mr. John Osburn, Solicitor General, Department of Justice (Present for afternoon session only)

Agenda:

Senator Anthony Yturri, Chairman, called the meeting to order at 10:00 a.m. in Room 315 State Capitol.

Approval of Minutes of Commission Meeting of December 16, 1971

Mr. Chandler moved that the minutes of the Commission meeting of December 16, 1971, be approved as submitted. Motion carried unanimously.

Policy Discussion Regarding Revision of Criminal Procedure Statutes Governing Operation of Municipal and Justice Courts

Mr. Paillette recalled that last November the staff prepared and distributed a list of some 82 separate statutes that the Commission would be concerned with if it were to undertake the task of revising the justice of the peace criminal procedure statutes. He felt it advisable to make a decision as to whether the revision of these statutes should be undertaken by the Commission, not only from the standpoint of the operation of the justice courts but also in connection with a collateral issue that had arisen as a result of a letter received from Mr. Don Jones, Executive Secretary of the League of Oregon Cities, in which he requested that the Commission consider revision of the criminal procedure statutes governing operation of municipal courts. Most of the municipal procedure statutes, Mr. Paillette said, were drawn from the justice of the peace statutes so the two revisions would go hand in hand. He indicated that the Judicial Reform Commission would undoubtedly be examining the advisability of abolishing courts below the district court level, but there was no way of anticipating the results of that group's deliberations.

Chairman Yturri commented that it was a virtual certainty that the Judicial Reform Commission would consider this area and come forth with some kind of a recommendation concerning justice courts. The Commission, he said, should attempt to avoid covering the same area as that covered by the Judicial Reform Commission. However, there were certain problem areas connected with justice courts where the Commission might want to do some work. One of these concerned a situation that had been called to his and Mr. Paillette's attention wherein the district attorney charged a defendant with the crime of criminal trespass for which the maximum penalty under the new Criminal Code was a year in jail or a fine of $1,000. Except in specific instances, the maximum jurisdiction of a justice of the peace court is $500 so the question arose as to whether the justice of the peace had jurisdiction in that particular instance. That case was resolved by charging the defendant with a lesser included offense, but the problem will undoubtedly arise again. Perhaps, he said, the Commission should consider whether the jurisdiction of justice courts should be increased to $1,000 to accommodate those few cases where the problem arises in

counties without district courts. In counties having a district court the case could simply be taken there, and the problem would be resolved.

Mr. Paillette said his concern was whether or not the Commission should attempt to rewrite the 82 justice of the peace statutes, in view of the limited time available, and take a chance on their becoming obsolete because of a basic policy decision regarding discontinuation of justice courts.

Judge Schwab advised that he was a member of the Judicial Reform Commission as were Chairman Yturri and the Attorney General. If the staff had the time, he said the Commission would be doing a public service to undertake this revision. Whatever work the Judicial Reform Commission did on the subject would probably not encompass a detailed revision of the statutes such as that envisioned by the Criminal Law Revision Commission.

Mr. Chandler asked if it would be possible to revise the statutes in such a manner that they would still be applicable should the functions of justice courts be shifted or merged. Mr. Paillette was of the opinion that such a rewrite was possible.

Mr. Knight pointed out that in the present code many of the same procedures applied to both district courts and justice of the peace courts. He suggested that the Commission set up procedures for district courts and make them applicable to justice courts. If that course were adopted, another major revision would be unnecessary should justice courts be eliminated in the future.

Mr. Paillette observed that revision of justice court statutes would involve some difficult problems, one of which would concern counties without district courts where a general provision applicable to both district and justice courts would not fill the bill.

Chairman Yturri indicated that two instances had been called to his attention where persons were arrested for being drunk in a public place. Pleas of guilty were entered and the justice of the peace sent the defendants to jail pending presentence investigations. One of the men was held in jail for 65 days and the question arose as to whether justices of the peace had authority to conduct presentence investigations. This was another area, he said, that should be clarified because this was apparently becoming a common practice among justices of the peace.

Mr. Chandler said the Judicial Fitness Commission was recently told of an indigent who spent 38 days in jail on a bad check charge before the justice of the peace would appoint an attorney to represent him.

Mr. Paillette said he had addressed a group of municipal judges at the League of Oregon Cities convention in Portland in December. While there, he had the opportunity to talk with a number of city attorneys regarding criminal procedure. Many of them were of the opinion that cities should have their own set of procedures and not be tied into the justice of the peace statutes. He asked the members whether, as a policy matter, they felt the Commission should involve itself in attempting to suggest revisions that would be directed solely at municipal court procedures and whether they felt this subject was within the scope of the Commission's concerns.

Chairman Yturri observed that it was not initially contemplated that the Commission would go into municipal court procedures.

Mr. Chandler said that if the Commission could complete its revision of the criminal procedure code within the allotted period and still have time remaining to undertake revision of the criminal procedure statutes governing operation of municipal and justice courts, he would be in favor of doing so, but he would be opposed to adding this task to the present workload.

After further discussion, the concensus of the Commission was to concur with Mr. Chandler's summation as stated above.

Transition to New Criminal Code

Mr. Paillette advised that Mr. John Moore, Chief Criminal Deputy District Attorney for Lane County, was present today and had attended most of the Commission and subcommittee meetings since the beginning of the procedure revision. Inasmuch as Lane County was one of the busier counties in the state from the standpoint of its criminal caseload, he thought it would be of general interest to the members to hear what Mr. Moore had to say with respect to the transition into the use of the new substantive Criminal Code.

Mr. Moore advised that since last August, there had been a number of schools sponsored by the Oregon District Attorneys' Association and other local law enforcement offices. They had generated some feeling that when the new Criminal Code went into effect on January 1, 1972, the sky was going to fall and the courts would be immersed in a deluge of demurrers and an unbelievable number of problems. As a practical matter, he said, January 2nd came and passed, the sky remained in place, the motion docket was noticeably unchanged and the transition had been remarkably free of difficulty. The only area where any problem had arisen at all was in the matter of how to plead or prove, and who had jurisdiction over, marihuana cases involving less than one ounce where there was no prior conviction for a narcotic offense. That problem would be resolved, he said, as soon as there was an

opportunity to get a ruling from the Supreme Court. He indicated that one of the reasons the transition had gone so smoothly was because most of the law enforcement personnel were instructed in courses conducted by the Board of Police Standards and Training where they had an opportunity to become generally familiar with the code before it went into effect.

Compared to the old code, Mr. Moore said it was easier to have a comprehensive knowledge of the new code as a body of law and once a person read through the new code, it was easier to retain its provisions than was the collection of statutes under the old code.

Mr. Paillette asked Mr. Moore if he had received any reaction to the new code from police officers and was told that he had noticed little reaction one way or the other. The officers, he said, did not appear to have the apprehension about the new code that some of the prosecutors had, but the prosecutors were finding that what was a crime under the old code is still a crime under the new code except that the offense was sometimes set out in two or three degrees which actually made it easier for everyone.

Mr. Knight said the only area he was aware of that was causing any concern on the part of the police was the question of how they should operate when they made an arrest on a charge of drunk in a public place. Under the amendments made by the legislature to the Commission's draft of the public intoxication section, a person had to be creating a disturbance before he could be taken to the police station and there was no authorization to pick up a drunk person to hold him for his own protection so he wouldn't wander out onto the highway and get hit by a car. This problem would, however, be resolved on July 1 when the statute to take a person into custody for his own protection or the protection of others would take effect.

Mr. Paillette explained that Senate Bill 40 as originally drafted by the Commission would have taken care of that problem because it referred to a person endangering himself or others, but Senate Bill 40 had to be amended to conform to Senate Bill 431. In the absence of the amendment to SB 40, it would have had the effect of superseding what the legislature had already done in the other bill. Mr. Knight commented that many of the city ordinances would take care of the situation until July 1, but in the interim police agencies acting outside of the city had no authority to take a drunk person into custody unless he was creating a disturbance.

Resignation of Mr. Knight

Mr. Chandler said he had noticed in the newspaper (a highly reliable source of information!) that Mr. Knight had resigned as District Attorney of Benton County effective February 15 and would therefore no longer be eligible to serve on this Commission. He recalled that Mr. Knight was one of the original Commission members

and said he had been extremely faithful in attendance both at Commission and subcommittee meetings. He had always done his "homework," had argued his points well and the kind of work he had done for the Commission for nearly five years was the kind that made it possible to accomplish as much as it had. He indicated that the Commission owed him a vote of thanks for the time and effort he had put forth.

Chairman Yturri agreed that Mr. Knight had been an extremely valuable member of the Commission and would be missed a great deal. On behalf of the staff, Mr. Paillette also expressed appreciation for the work Mr. Knight had accomplished during his years as a Commission member.

Former Jeopardy; Preliminary Draft No. 3; December 1971

Mr. Paillette explained that Subcommittee No. 1 had, by means of a conference telephone call, met on January 13 to discuss Preliminary Draft No. 3 on Former Jeopardy and had endeavored to resolve some of the problems raised at the Commission meeting on December 16 regarding the draft as well as to carry out the directives of the Commission with respect to specific amendments. Prior to the conference call, Mr. Paillette said he had discussed the draft with Mr. Knight and had relayed his suggestions to the subcommittee.

Section 1. Former jeopardy; definitions. Subsection (4). The chief area of concern at the December Commission meeting was with respect to the definition of "criminal episode" in subsection (4). Considerable difficulty was encountered in attempting to define the term in such a way that it would provide protection for a defendant charged with multiple prosecutions arising out of a single episode while at the same time allowing the prosecutors enough flexibility to permit a subsequent prosecution under certain circumstances. In most cases, Mr. Paillette said, the subsequent prosecution would be needed because of the fact that at the time of the first prosecution there were not sufficient facts available to the prosecutor to allow him to join both charges.

Mr. Gustafson pointed out that the words "continuous and uninterrupted" had been inserted in the draft to modify "conduct" and the intent was to require that the crimes be "closely related." The second change made in the definition was to substitute the concept of a single criminal objective for the evidentiary test set forth in Preliminary Draft No. 2.

Mr. Gustafson called attention to a list of hypothetical situations illustrating the application of the definition of "criminal episode," a copy of which is attached hereto as Appendix A. Their purpose was to determine whether the revised definition of "criminal

episode" coincided with the directive of the Commission as articulated at its December meeting. (See Minutes, Criminal Law Revision Commission, December 16, 1971, p. 10.) With respect to the perpetrator's intent, Mr. Gustafson stated that the "single criminal objective" as used in the draft was meant to apply only to an objective test.

The fact situation in hypothetical #1, Mr. Gustafson said, contemplated a joinder in time, place and circumstances where the conduct was continuous and would therefore constitute one criminal episode.

In #2 only the severity of the crime was changed which made no difference in the number of episodes and the result was again one criminal episode. Representative Paulus asked if it would still be a single criminal episode under #2 if the bank guard died after a considerable lapse of time and was told that such a situation was covered by subsection (4) of section 3.

Under #3 the perpetrator had assaulted two persons, the teller and the manager. Here again there was a joinder of time, place and circumstances. The kidnapping and the robbery were both directed toward a single criminal objective, i.e., insuring the success of the robbery.

Mr. Paillette commented that hypothetical #4 was one that severely tested the definition of "criminal episode" and might point up some of its weaknesses. Mr. Gustafson explained that in #4 there was a joinder in time, place and circumstances. However, there was a question as to whether the crimes were directed to the accomplishment of a "single criminal objective." If, as a matter of policy, the Commission wanted to join the two crimes of rape and robbery in this type of situation, the definition in subsection (4) would do so.

Mr. Paillette said that in his view the strongest argument for joining the two crimes under the definition of "criminal episode" would be that the robbery was the main objective and the rape was incidental. Senator Carson said that if someone took a girl into a bedroom, raped her and scooped up whatever money was in sight on his way out, rape would be the main objective in that situation and the robbery would be incidental.

Mr. Chandler pointed out that it made little difference which crime was considered as the principal objective in any of the hypotheticals under discussion. The two objectives in this draft were the protection of the citizen from a series of prosecutions and protection of the public by permitting them to prosecute for crimes. The basic issue was whether the Commission wished to adopt a compulsory joinder statute. Despite the views expressed by Mr. Knight to the contrary, Mr. Chandler said he expected that adoption of this statute

would result in a reduction of total trial time and would give a district attorney a powerful tool to use when discussing his case with the defense attorney and the defendant and could make for better use of the plea bargaining system.

Judge Schwab agreed that when a jury was going to hear about all the crimes the defendant committed at one time rather than just one of them, it placed the defense in a weaker position and could have some effect on the plea bargaining process. In cases where it was a close question as to whether the defendant's conduct constituted one criminal episode, the defendant would probably move to sever the crimes. If the judge ruled that the acts were not part of the same criminal episode, the defendant could then be tried separately on each of the charges, and he could not later claim double jeopardy.

Attorney General Johnson pointed out that subsection (4) provided for an objective test and urged that this be spelled out in the commentary. He asserted that the draft should be perfectly clear that the defendant could not come in and say he had two different objectives in mind when he committed the crimes.

Mr. Paillette advised that this exact problem was discussed by the subcommittee with respect to making subsection (4) clear that it applied to an "objective" objective. The subcommittee discussed the possibility of including language such as "necessarily directed to the accomplishment of a single criminal objective." He concurred with Mr. Johnson that it should be clear that it would not help the defendant to say his objective was not to rob the grocery store but was to rape the clerk. In response to a question by the Chairman, Mr. Paillette indicated it was his intention to clarify that point in the commentary.

Mr. Gustafson then referred to hypothetical #5 and noted that it contained a time variable of two hours plus a place variable. The two episodes were therefore severed on the bases of time and place, and it was unnecessary to deal with the question of whether there was a single criminal objective.

Senator Carson asked if he was correct in saying that the compulsory joinder statute meant that if the district attorney chose not to indict for each of the crimes in the episode, the defense of former jeopardy would then be available to the defendant should the prosecutor later attempt to indict him for another of the crimes in that episode. If the district attorney felt he had the best case on the rape charge, for example, he could indict for rape but could not then later indict for robbery. Mr. Paillette confirmed that this was correct.

Mr. Gustafson recited the fact situations in hypotheticals #6 and #7. In #7 the elapsed time between the two acts was very short and it would therefore be considered one criminal episode. Furthermore, there was a strong argument that stealing the car was part of the criminal objective.

Chairman Yturri asked what the analysis would be if 12 hours had elapsed between the time the person stole the car and the time he robbed the market. Mr. Gustafson replied that the time element would be weaker but the element of a single criminal objective was still present. The court would then have to make the determination as to whether the acts consisted of a single criminal episode. Chairman Yturri then inquired what factors the court would take into consideration in reaching a decision. Judge Schwab said that if he were a district attorney faced with that situation under this statute, he would join the offenses. If the defendant objected, he could then move to sever and the court would make its decision based upon the facts.

Mr. Knight agreed that if there were a question as to whether the crimes were part of the same criminal episode, the district attorney would undoubtedly charge both offenses in one indictment. He said this area involved the problem discussed at the last meeting in connection with subsection (2) of section 2 concerning a situation where more than one crime was committed but only one was known to the prosecutor at the time of the first prosecution. He cited several possible circumstances where such a problem could arise.

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Judge Schwab commented that no matter how the statute was drawn, there would always be gray areas posing a problem of proof for the district attorney that he did not know of the other crimes. He expressed the view that the proposed statute was workable and would avoid situations that exist under the present law where a defendant is acquitted of a charge of burglary in a motel and then the district attorney indicts him for larceny of television sets taken from the motel. He reiterated his earlier assertion that the close questions would cause no problem because the court would decide the matter.

Mr. Gustafson then explained hypothetical #8. Mr. Paillette commented that in that situation it seemed clear that the defendant was not attempting to escape from the scene of the first crime at the time the officer attempted to arrest him, and Episode II was therefore a separate criminal episode entirely.

Mr. Knight suggested that another hypothetical situation be added to this list to cover the situation where a person robs a number of super markets in one night or where he burglarizes a number of homes

in a residential area in a single night. If it was the intent of the Commission that all of the robberies committed in one night should not be part of the same episode because they were not joined in place and circumstances, that should be covered in the commentary to this section. Chairman Yturri and other members of the Commission expressed agreement with Mr. Knight that a fact situation to this effect should be included in the commentary and that a series of robberies or burglaries should not be considered as one criminal episode simply because they were committed within a few hours or within a few blocks of each other.

Judge Schwab said he and Representative Cole had been discussing a hypothetical situation where there was a motion to sever, the motion was denied by the court and the defendant was convicted. He then appealed on the ground that the counts should have been severed and there was evidence of prejudice by virtue of the fact that evidence of another unrelated crime was introduced which should have been severed. This could be covered by setting forth another hypothetical, he said. He expressed the view that when the defendant moves for severance, trial judges will probably sever the questionable cases.

Mr. Chaivoe said that when arrests are made for possession of drugs and narcotics, the officers frequently find all kinds of drugs and narcotics in the possession of one person. In that situation he asked if it was correct to say that if the defendant was charged only with sale of drugs, for example, a later charge for possession would constitute double jeopardy. He was told by the Chairman that this was correct and was the intent of the draft.

Mr. Knight suggested that a fact situation might also be included in the list of hypotheticals concerning a person selling narcotics. The Commission should decide whether selling to three or four different people on the same day would constitute more than one criminal episode.

Mr. Paillette advised that this question had been discussed at some length by the subcommittee when considering this draft. Preliminary Draft No. 2 contained subsection (4) in section 3 which was deleted by the Commission at its December meeting and provided:

> "When the former prosecution was for an offense which required proof of a fact not required in the subsequent prosecution and the law defining each of such offenses is intended to prevent a substantially different harm or evil, or the subsequent prosecution was for an offense which was not consummated when the former prosecution began."

That subsection, Mr. Paillette said, was intended to deal with the kind of problem being discussed so that type of crime would be looked upon as an exception to the attachment of jeopardy.

Mr. Knight commented that selling to several different people would not constitute "a substantially different harm or evil" so it wouldn't come under the exception in the deleted section. Mr. Paillette disagreed on the ground that each separate crime would require proof of a fact not required for one of the other sales.

Mr. Chandler said it was not the intent of the draft to say that a sale at 10 o'clock, one at 12 o'clock, one at 2 o'clock and finally one to the undercover man at 4 o'clock were so closely connected in time and circumstance as to create a single criminal episode and to require joinder.

With respect to Mr. Knight's earlier example concerning a number of burglaries committed by one person in a single night, Mr. Paillette asked Mr. Knight if he thought a problem was posed from the standpoint of the state in view of the provision in the new Criminal Code allowing the prosecutor to tack amounts in theft offenses to aggregate $200 in value for purposes of charging the defendant with a felony. In other words, if the prosecutor wanted to tack for the purpose of reaching a value of $200 so he could charge the defendant with felony theft, should he then be required to charge all those offenses as one criminal episode in a single indictment for jeopardy purposes?

Mr. Knight replied that the draft was talking about compulsory joinder whereas the tacking provision concerned permissive joinder. The question, he said, was whether the prosecutor was required to join because jeopardy would attach if he did not. Mr. Moore expressed agreement with Mr. Knight and said the test was whether the crimes concerned compulsory or permissive joinder. If any other view was adopted, the problem would arise as to testing the scope of the evidence that would be admissible in the trial. Enactment of this law should not be interpreted to say that the test would limit the evidence that the state might be able to present under some theory of common scheme, plan or design in a fraud situation involving, perhaps, a similar method of operation.

Mr. Paillette commented that it would be advisable to put something in the commentary (1) to cover the distinction between the situation under discussion and the permissive joinder which the Commission will later be dealing with as part of the criminal trial provisions of the procedure code and (2) to cover the distinction from an evidentiary standpoint regarding the common scheme or design situation.

Subsection (5). Representative Cole asked what effect the proposed statute would have in an instance involving a single criminal episode where one crime violated a federal statute and the other crime or crimes violated the state statute. Chairman Yturri replied that the proposed statute would have no effect on the federal law whatsoever.

In reply to a question by Mr. Moore, Mr. Paillette explained that while subsection (5) of section 1 contained the definition of the term "prosecuted for an offense," the controlling section was subsection (2) of section 2 which had to be read in context with that definition. The statement in section 2, subsection (2), with respect to proper venue in a single court made it clear that the crimes could not be separately prosecuted in a state court. For the purposes of jeopardy, the federal prosecution would not bar the state from going ahead with a prosecution even though the federal courts had already tried the defendant.

Mr. Moore said he could see no good policy reason why a federal prosecution should bar a state prosecution.

Chairman Yturri said the ultimate question to be decided was how often one person was to be prosecuted for the same charge, regardless of whether it was the federal government or the state that was conducting the prosecution. He objected to adopting a policy that said the federal government was an entirely different entity and the state was therefore justified in prosecuting the man a second time if he violated both a state and a federal law.

Mr. Chandler said that if a man stole a car in Ontario, Oregon, and drove it across the state line to Payette, Idaho, it was not the intent of the subcommittee in drafting this section to say that he should be prosecuted in Oregon for car theft and again prosecuted by the federal government for unlawful flight across a state line to avoid prosecution. On the other hand, if he robbed a bank and killed someone in the process, Mr. Chandler said he was not convinced that the defendant should be freed of all charges by the state just because he was tried first in federal court. As subsection (2) of section 2 was written, it was not the intent of the subcommittee to bar a prosecution in a state court in cases where the defendant was first tried in a federal court.

Mr. Gustafson pointed out that Preliminary Draft No. 1 on Former Jeopardy contained a subsection in section 2 that specifically dealt with this dual sovereignty problem, but it had been deleted by the subcommittee. Mr. Paillette observed that in view of that deletion, it was unnecessary to retain the statement in subsection (5) of section 1 referring to the jurisdiction of United States courts. He was of the opinion that the phrase was irrelevant in terms of the draft under consideration because whatever the draft said would have no controlling effect on prosecution in a federal court. Also, section 2, subsection (2), provided that the state prosecution would not be a separate prosecution because the element of the same venue in a single court was missing.

Mr. Chandler moved to amend subsection (5) of section 1 by deleting "or of any jurisdiction within the United States,". Motion carried.

Mr. Chandler then moved to adopt section 1 as amended in subsection (5). Motion carried unanimously. Voting: Carson, Chandler, Clark, Cole, Mr. Johnson, Representative Johnson, Knight, Paulus, Mr. Chairman.

Section 2. Previous prosecution; when a bar to second prosecution. Mr. Gustafson explained that section 2 had been amended, as directed by the Commission at its December meeting, to make the exceptions in sections 3 and 4 applicable to all three subsections in section 2.

Mr. Chandler moved approval of section 2 and the motion carried unanimously. Voting: Carson, Chandler, Clark, Cole, Representative Johnson, Knight, Mr. Chairman.

Section 3. Previous prosecution; when not a bar to subsequent prosecution. Mr. Gustafson explained that the phrase "other than by judgment of acquittal" had been moved from the introductory paragraph of section 3 to subsection (2) as directed by the Commission. The other change in section 3 was contained in subsection (1) where "by an appeal upon judgment of conviction" was added to make it clear that when a defendant appealed, he waived his right to double jeopardy.

Mr. Chandler moved to approve section 3. Motion carried with the same members voting as voted on section 2.

Mr. Paillette indicated that Mr. Spaulding had raised a question in connection with the case of State v. Berry, 204 Or 69, during the meeting of the subcommittee. (See Minutes, Subcommittee No. 1, January 13, 1972, p. 4.) The subcommittee was advised that the staff would check to determine if the holding in that case would cause any problem so far as this draft was concerned.

Mr. Gustafson recapitulated the facts of the Berry case. If a similar situation were to arise in the future, under the terms of this draft the argument could be made that the defendant had consented to termination by objecting to the indictment. By in effect demurring to the indictment, he would, under section 3, subsections (1) and (2) (b), waive his right to double jeopardy. Mr. Paillette added that the Berry case was decided under the old statute before the state's appeal rights were expanded and the state might not be faced with the same problem under its present expanded right of appeal. Nevertheless, this draft is clear that the defendant cannot have it both ways.

Section 4. Proceedings not constituting acquittal. Mr. Gustafson indicated that section 4 was approved by the Commission in December.

Mr. Chandler moved approval of Preliminary Draft No. 3 on Former Jeopardy as amended in section 1, subsection (5). Motion carried unanimously. Voting: Chandler, Clark, Cole, Mr. Johnson, Representative Johnson, Knight, Mr. Chairman.

Stopping of Persons; Preliminary Draft No. 2; January 1972

Mr. Gustafson advised that the draft on Stopping of Persons consisted of three sections. The first section contained the definitions, the second the authority for stopping of persons and the third set out guidelines for the frisk of a person who had been stopped. The two sections relating to stop and frisk were separated, he said, to indicate that a stop did not necessarily justify a frisk. The draft was concerned with situations where the police had less than probable cause to arrest an individual. The reason for codifying the stop and frisk provisions was that this authority was buried in the United States Reports and was difficult for both police and citizens to find. Furthermore, the holding in Terry v. Ohio, 392 US 1 (1968), on which portions of the draft were based, did not clearly state the complete policy of stopping and frisking. This draft would permit the Commission to state precisely what it would like the social policy in this area to be.

Section 1. Stopping of persons; definitions. Mr. Johnson advised that Subcommittee No. 2, in considering the draft on Search and Seizure, had raised a question concerning the definition of "peace officer" as defined in the new Criminal Code. With respect to the issuance of warrants, it was the subcommittee's decision that the definition should be more limited. The same question arose in connection with this draft, he said.

Chairman Yturri noted that the definition in the new code read:

> "'Peace officer' means a sheriff, constable, marshal, municipal policeman or member of the Oregon State Police and such other persons as may be designated by law."

Senator Carson pointed out that the last phrase was the one that caused the problem because it included reserve officers, campus policemen, the Sergeant-at-Arms on the floor of the Senate, liquor inspectors and a number of others.

Mr. Johnson suggested that the solution might be to include only officers certified by the Board of Police Standards and Training in the definition. Mr. Chandler said that could cause a problem by excluding a rookie policeman hired by the city of Madras, for example, who was the only officer on duty and who had not yet been certified.

Chairman Yturri outlined that the true objective of the draft was to reach the type of officer who was entitled to the protection offered by this draft and who should be free to take precautions to safeguard himself from possible danger caused by someone carrying a concealed weapon.

Mr. Clark contended that the authority given to a peace officer by this draft should be narrowly defined because it contained a serious public policy question concerning the necessity for stop and frisk.

Mr. Chandler asked what Subcommittee No. 2 had ultimately decided to do with the definition of "peace officer" in the Search and Seizure area and was told by Senator Carson, Chairman of that subcommittee, that they had made the definition specific to the persons enumerated in the definition and deleted the phrase referring to other persons designated by law. Mr. Paillette indicated that they had adopted the language contained in the original Senate Bill 40.

Mr. Paillette urged that the Commission keep in mind the differences between Search and Seizure as opposed to Stop and Frisk. The Search and Seizure draft was concerned with the authority of an officer to request and execute a search warrant. Stop and Frisk, on the other hand, more closely resembled the kind of situation the legislature was faced with in considering this definition in Senate Bill 40 which was the rights, privileges and immunities of an individual designated as a peace officer in making an arrest and, more specifically, the degree of force that individual could use in making an arrest. The legislature believed Senate Bill 40 did not go far enough and amended the original bill by adding "and such other persons as may be designated by law." He urged that the Commission bear the legislature's action in mind when considering the definition in the context of the Stop and Frisk draft.

Mr. Chandler indicated that the subcommittee's basic consideration in the frisk portion of this draft was to give the officer some protection so he wouldn't have to wait until the man pulled a gun on him to find out whether or not he had a gun on his person. Mr. Paillette said that limiting the definition would tie one hand behind a parole officer's or a liquor inspector's back by saying that he was a peace officer and was expected to perform the duties of a peace officer while at the same time denying him the same protection as that given a policeman. It was putting him at a distinct disadvantage.

Chairman Yturri was of the opinion that the point Mr. Johnson had raised was valid with respect to the Search and Seizure draft but not as to the draft on Stopping of Persons.

Mr. Clark objected to the definition of "peace officer" in this draft because it was setting up a special class of people and giving them statutory authority to go beyond probable cause to stop and frisk a citizen.

Mr. Paillette told Mr. Clark that those individuals already had that authority under existing case law and, secondly, the legislature had said that these kinds of people will be allowed to have extraordinary arrest powers and to use deadly force -- to shoot to kill -- to make an arrest. At the last session, he said, the legislature made

a policy decision on that very point, not at the recommendation of this Commission, but by amendment to Senate Bill 40.

Mr. Knight agreed that the proposed Stop and Frisk statute was not giving peace officers any authority they did not already have under court decision to protect themselves. What the draft was actually doing was saying that the Commission agreed with Terry v. Ohio and recognized that the police officer had a right to protect himself.

Mr. Johnson expressed agreement with Mr. Paillette's assessment that the legislature had made the basic policy decision that these individuals had to have certain powers in order to carry out their duties and said their decision should be accepted by the Commission.

After further discussion of this point, the Commission recessed for lunch and reconvened at 1:30 p.m.

Mr. Chandler moved to approve section 1 and the motion carried. Voting for the motion: Carson, Chandler, Cole, Mr. Johnson, Representative Johnson, Mr. Chairman. Voting no: Clark, Knight.

Mr. Knight explained that he had voted against the motion because he disapproved of codifying Stop and Frisk provisions.

Section 2. Stopping of persons. Mr. Gustafson explained that section 2 authorized the peace officer under certain circumstances to stop a person for questioning. The subcommittee had changed "felony" to "crime" in subsection (1) because they felt that the bases for stopping a person should be broader than suspicion of a felony but not so broad as to include violations. "Crime" was therefore substituted to include felonies and misdemeanors but not violations.

Chairman Yturri asked if the subcommittee, in changing "felony" to "crime," intended to include Class C misdemeanors. Mr. Paillette replied that the subcommittee discussed the possibility of going only part way on misdemeanors, as did New York when they said "a felony or a Class A misdemeanor." The difficulty with that course, however, was that it imposed an additional burden on the police officer to sort through his mind and try to determine what crime was being committed and the penalty for that crime. For ease of application and for certainty on the part of the police officers, the subcommittee decided the statute should either be limited to felonies or go all the way and include all crimes. Mr. Chandler added that the Illinois code referred to "offenses" which would even include "violations," but the subcommittee objected to going that far.

Mr. Johnson moved adoption of section 2. Motion carried. Voting for the motion: Carson, Chandler, Cole, Mr. Johnson, Mr. Chairman. Voting no: Clark, Knight.

Section 3. Frisk of stopped persons. Mr. Gustafson explained that section 3 referred to the frisk of a person who had been stopped. In Terry v. Ohio the court had articulated the reason for a frisk based upon a suspicion or a belief by the officer that a person is armed and presently dangerous to either the officer, himself or others present. He called attention to the definition of a frisk in section 1 which limited a frisk to a patting down of a person's outer clothing. The frisk was limited because it was based on the limited concept of reasonable suspicion and not on probable cause. Inasmuch as the initial encounter was based on less than probable cause, the search was limited also.

Mr. Johnson suggested substituting "or" for "and" in line 3 of subsection (1) so the draft would read "armed or presently dangerous to the officer . . . . " If the officer had reasonable suspicion to believe that a person was armed, he said he could not see why he should also be required to believe that the person was presently dangerous.

Mr. Chandler replied that a person could be driving out to go pheasant hunting and when he stepped from his car, he would be armed with a shotgun, but an officer would have no reason to suspect that he was "presently dangerous" under that circumstance.

Mr. Paillette pointed out that the proposed statute followed the language of the Terry decision which said "where he has reason to believe that he is dealing with an armed and dangerous individual." He said it was conceivable that a person could be armed and not dangerous as in the circumstance cited by Mr. Chandler. Furthermore, if the officer didn't reasonably suspect that the person was armed, there was no reason to frisk him.

Mr. Johnson moved to insert a period after "armed" in subsection (1) and to delete the balance of the subsection. He was of the opinion that the officer should be able to frisk anyone he suspected of being armed and that the Terry decision had gone too far in requiring both elements. If a person were armed, the officer should have a right to disarm him, he said.

Mr. Knight expressed agreement with Mr. Johnson's position. He was of the opinion that there was no good reason why an officer should have to subject himself to the danger of standing and talking to a person who had been stopped without frisking him if he reasonably believed that he was armed.

Mr. Chandler explained that the subsection was an attempt by the subcommittee to codify case law. Placing a period after "armed," he said, would not change the basic law under which the courts and the police must operate. Mr. Chandler also pointed out that the subsection said "dangerous or deadly weapons" to cover situations not only where the officer suspected the person of having a gun but also where he thought he might have a knife or a bottle on his person.

Mr. Moore commented that the whole thrust of the Terry decision was the protection of the officer. If the proposed statute were amended as Mr. Johnson had suggested, it was going one step too far and could destroy the legal sufficiency of the statute.

Vote was then taken on Mr. Johnson's motion to place a period after "armed" in subsection (1). Motion failed. Voting for the motion: Clark, Mr. Johnson, Knight. Voting no: Carson, Chandler, Cole, Representative Johnson, Mr. Chairman.

Mr. Chandler moved to approve section 3. Motion carried. Voting for the motion: Carson, Chandler, Cole, Representative Johnson, Mr. Chairman. Voting no: Clark, Mr. Johnson, Knight.

Stopping of Persons; Preliminary Draft No. 1; November 1971. Section 4. Report of persons stopped. Mr. Paillette pointed out that Preliminary Draft No. 1 on Stopping of Persons contained a section 4 which was deleted by the subcommittee. It required police to file a report on persons who had been stopped. Its purpose was to guard against any possible abuse of the authority to stop and to provide some record of this kind of activity for examination at a later time. A person who is illegally or unlawfully arrested has some recourse whereas there is a serious question whether a person who is unjustifiably stopped has any recourse whatsoever. The subcommittee believed that the provision would give a person a record for being stopped and therefore voted to delete it. This, however, was not what was intended when the section was drafted, Mr. Paillette said.

Mr. Chandler stated the subcommittee recognized that most police departments had such records but they were internal police department records and not public records that could later be picked up by some prospective employer or public agency to be used against the person.

Mr. Clark commented that national Commissions had recommended that this type of record be purged and had most often advocated that no record be kept of that type of activity.

After further discussion, which included an explanation by Representative Johnson of the recently adopted Stop and Frisk ordinance in the city of Ashland, the Commission concurred with the subcommittee's decision to delete the provision requiring police to file a report on persons who had been stopped.

Section 5. Admissibility of items seized during frisk. Mr. Paillette said that the question had not been answered as to what happens to other evidence found in the course of a frisk. Preliminary Draft No. 1 attempted to deal with that question by codifying an exclusionary rule, but it was deleted by the subcommittee because the members believed that any other evidence found during the course of a frisk, such as narcotics or anything not in the weapons classification, would be subject to motions to suppress when there was an attempt to use it in evidence against the individual. They preferred to leave to

the courts the question of whether the other items would be admissible in evidence rather than trying to set out the provision in the statute.

Mr. Knight said that unless the evidence was seized by reasonable means, it would not be admissible in any event and he could see no reason to codify such a provision.

Chairman Yturri was of the opinion that the purpose of the exclusionary rule was accomplished simply by omitting the proposed section.

Mr. Moore commented that the addition of section 5 would go too far and concurred with the subcommittee that it should be left to the court to determine whether or not the officer acted reasonably in obtaining evidence. If he did act reasonably and, in looking for a dangerous or deadly weapon, found contraband, it should be admissible. Mr. Clark also expressed opposition to inclusion of the proposed section.

Mr. Gustafson said he would like to see section 5 reinstated in the draft to make it clear that the stopping of persons was not to be used as an excuse to find evidence of another crime. Mr. Knight observed that the defendant was already protected from a search to find evidence of another crime by the Fourth Amendment.

Mr. Moore added that under the exclusionary rule, if a person acted suspiciously and the officer had reasonable grounds to believe that he was armed, that person would gain himself an advantage he would not otherwise enjoy simply by being frisked by the officer. Mr. Johnson expressed agreement that the officer might well have cause to arrest the individual, but if he happened to frisk him before he made the arrest and discovered evidence of another crime, that evidence would be excluded. In his view the exclusionary rule offered no practical protection and amounted to a trap for police officers.

Other members of the Commission agreed that section 5 of Preliminary Draft No. 1 should not be included in the final version of the Stop and Frisk draft.

Approval of Preliminary Draft No. 3. Mr. Chandler moved that Stopping of Persons, Preliminary Draft No. 3, be adopted. Motion carried. Voting for the motion: Carson, Chandler, Cole, Mr. Johnson, Mr. Chairman. Voting no: Clark, Knight.

Next Meeting of Commission

The Commission decided to devote the month of February to subcommittee meetings and to hold a two-day Commission meeting on March 9 and 10.

The meeting was adjourned at 2:30 p.m.

Respectfully submitted,

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission

CRIMINAL LAW REVISION COMMISSION

SUBJECT: Former Jeopardy; Preliminary Draft No. 3; December 1971

INTRODUCTION: The following examples illustrate the application of the definition of "criminal episode" (section 1, subsection (4)) to specific fact situations. These examples do not try to distinguish among different degrees of the same crime or lesser included offenses, but are concerned only with testing the definition as applied to separate and distinct offenses.

1. FACTS: D enters bank, points a pistol at a teller and demands money. D flees the bank with money and shoots a bank guard who attempts to prevent his escape.

   ANALYSIS: One criminal episode consisting of crimes of robbery and assault.

2. FACTS: Same facts as #1, but the bank guard is killed as result of gunshot wound.

   ANALYSIS: One criminal episode consisting of crimes of robbery and felony murder.

3. FACTS: D enters bank, confronts teller and manager with a gun and demands money. After taking possession of the money, D ties up the manager and takes the teller with him as hostage.

   ANALYSIS: One criminal episode consisting of crimes of robbery and kidnapping.

4. FACTS: D enters 24-hour market late at night, points gun at lone female clerk and demands money. After getting money, D forces her to back room, rapes her and flees with money.

ANALYSIS: Crimes of robbery and rape. Whether D's conduct is a single episode is questionable. His conduct is "continuous and uninterrupted." The conduct is closely joined in "time, place and circumstances." However, it is difficult to determine whether such conduct is "directed to the accomplishment of a single criminal objective." Because the robbery was already completed before the rape took place, it would appear that D's objective was robbery. The rape would not seem to be directed to the accomplishment of the robbery. However, it could be argued that D's objective was rape and that the robbery was preliminary to the commission of the rape. Or, D's objective could be both robbery and rape.

5. FACTS: Same facts as #4, except D forces the clerk to go with him when he flees the store. He takes her to remote area where, two hours after the robbery, he rapes her and leaves her on deserted road.

ANALYSIS: Two criminal episodes. Episode I consisting of crimes of robbery and kidnapping. Episode II consisting of crime of rape. It would seem much clearer that the rape was not directed to the accomplishment of the first objective, the robbery.

6. FACTS: Same facts as #4, except that D takes the clerk to a remote cabin in the mountains and locks her in bedroom. D rapes the clerk the following day, then flees, leaving her at the cabin.

ANALYSIS: Two criminal episodes. Episode I consisting of robbery and kidnapping. Episode II consisting of rape. Because of the greater length of time elapsing between the robbery and the rape, it would make even stronger argument than in #5 that the rape was a separate criminal objective from the original crime of robbery.

7. FACTS: D steals a car at 9 p.m., robs market at 9:30 p.m. and flees in stolen car.

ANALYSIS: One criminal episode consisting of crimes of theft and robbery.

8. FACTS: Same facts as #7, except that D is seen entering a tavern at 11 p.m. by a police officer. The officer attempts to arrest D and is wounded by D in an exchange of gunfire.

ANALYSIS: Two criminal episodes. Episode I consisting of crimes of theft and robbery. Episode II consisting of crimes of resisting arrest and assault.