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OREGON CRIMINAL LAW REVISION COMMISSION

Thirty-Seventh Meeting, February 28, 1973

Minutes

Members Present: Senator John D. Burns, Chairman
Senator Anthony Yturri, Chairman Emeritus
Senator Wallace P. Carson, Jr.
Mr. Donald E. Clark
Judge Charles S. Crookham
Attorney General Lee Johnson

Excused: Senator Elizabeth Browne
Mr. Robert W. Chandler
Representative George F. Cole
Representative Leigh T. Johnson
Representative Norma Paulus
Mr. Bruce Spaulding
Representative Robert M. Stults

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

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The meeting was called to order by Chairman John D. Burns at 7:30 p.m. in Room 14 State Capitol.

Minutes of Meeting of November 20, 1972

Mr. Clark moved approval of the minutes of the Commission meeting of November 20, 1972. Motion carried unanimously.

Commission Membership

The Commission discussed the exigency of filling the vacancy created by the resignation of Donald Blensly. Following a brief discussion, Senator Yturri moved that action on the matter be deferred until the next meeting. Motion was seconded by Mr. Clark and carried with Mr. Johnson voting no.

Progress Report on Senate Bill 80, Proposed Oregon Criminal Procedure Code

Mr. Paillette advised that in his opinion Senate Bill 80, as a result of the hearings conducted thus far, had received a favorable response from the Senate Judiciary Committee. He had sensed, he said, that the committee's reaction to the codification of the Search and Seizure Article was that they might be willing to retain the warrantless search provisions with some amendments. Other provisions such as the over-all approach the Commission had taken in drafting the Code, the general cleaning up of the statutes, the use of the "accusatory instrument" language and the grand jury provisions had been well received by the committee. In addition, the plea bargaining proposals had received strong support from all the witnesses who testified before the committee, including district attorneys.

Mr. Paillette indicated that Judge Sulmonetti had suggested abolition of preliminary hearings. Mr. Paillette's opinion was that to do so would complicate the Commission's grand jury proposals in Senate Joint Resolution 1. Judge Crookham expressed the view that the preliminary hearing served a valid purpose because many times it was the first opportunity the police had to get an objective view of the case. Mr. Paillette indicated that he had tried to point out to the Senate Judiciary Committee that the Commission's grand jury proposal allowing the district attorney the option of going through a preliminary hearing should result in fewer preliminary hearings because of the broad pre-trial discovery proposals, and the two should be considered together as an integrated package.

Mr. Paillette advised that pre-trial discovery had received strong support from the Bar Committee on Criminal Law and Procedure which had, in fact, been meeting each Saturday in an effort to stay a week ahead of the Senate committee in order to be in a position to testify with respect to the Articles on the following week's agenda.

The only part of the code where Mr. Paillette said he expected to encounter strong opposition was with respect to Article 8, Release of Defendants. Not only were the bail bondsmen opposing the Article, but some of the district attorneys had also appeared in opposition. It was incomprehensible to him, he said, why the district attorneys would support the present bail system.

Chairman Burns commented that before he could vote for the bail Article he would have to be satisfied that the cost to the counties of implementing the system would not be excessive.

Mr. Paillette indicated he had some recent figures from Cook County, Illinois, which showed that they had actually made money under the 10% system. He said the figures to the contrary quoted to the Senate committee by Mr. Marv Hollingsworth, the bonding companies' lobbyist, were not only obsolete but were in many respects erroneous.

Mr. Clark said that fiscally it was to Multnomah County's advantage to institute the 10% system. The proposed bail system, he said, would more than pay for itself simply because of the impact on the number of cells the county would be required to operate together with the savings in construction of new facilities.

Chairman Burns advised that the only circuit judge who had testified on Article 8 was Judge Allen from Lane County who was highly critical of the proposal. One of his contentions was that the district attorneys would not go after those who skipped bail whereas the bail bondsmen would. A subsequent telephone call to Judge Allen, however, had resulted in his qualifying his testimony to restrict it to the district attorney in Lane County. Chairman Burns suggested that it might be helpful to the Senate committee to receive some testimony from other judges on the subject and also from Multnomah County as well as some of the outlying counties.

Judge Crookham indicated he too had encountered occasions where the bondsmen had brought people back when the district attorney would not have done so. He said he was not in favor of destroying the option to institute the new system but he also supported preservation of the present bail bond system if the judge wanted to use it. Another advantage of the bail bondsman, he said, was that he had powers of arrest and could sometimes get the person back from another jurisdiction without going through all the niceties of extradition.

Chairman Burns said some of the criticism had been that the judges, instead of setting, for example, $10,000 bail, might set bail at ten times that amount. Mr. Paillette asked Judge Crookham for his assessment of that possibility and was told that the Court of Appeals would undoubtedly put a stop to that kind of practice.

Mr. Paillette pointed out that the problem of getting Article 8 passed was not so much in getting it out of committee as it was of being sure that it would pass once it reached the Senate floor.

Chairman Burns reported that a Senator had suggested to him that it might be appropriate to take search and seizure out of SB 80 and make it the subject of another bill. Senator Yturri recalled that the Commission had discussed that course of action and decided against it. Mr. Paillette was also opposed to that proposal and stated that if the committee wanted to take out warrantless searches, that could be done but there was little, if any, opposition to the balance of the Search and Seizure Article.

After further discussion, Mr. Paillette requested an enunciation of policy by the Commission with respect to retention of the provisions on bail. His personal inclination, he said, was that he would rather see the Senate Judiciary Committee amend bail reform out of the bill before it went to the floor rather than take a chance on losing the bill in the Senate.

Judge Crookham asked Mr. Paillette if he would oppose amending the bill to add the present bail system as an alternative procedure. Mr. Paillette replied that the practical effect of amending the Article in that manner would be that it would leave the system as it was at the present time in many counties. Multnomah and Lane Counties, he said, currently had a progressive bail system, but the rest of the counties did not. The proposed Article would bestow authority to create a Release Assistance Officer and would switch the stress to release on recognizance. However, many of the counties would not bother with a Release Assistance Officer and would stick to the present bail system if given an option.

Mr. Johnson was in favor of deleting the Search and Seizure Article from the Code and retaining Article 8. The Commission's decision was that if it became necessary to do so in order to pass the bill, the warrantless searches should be deleted from the Search and Seizure Article.

Chairman Burns indicated that the Commission had three choices so far as the bail Article was concerned:

(1) Drop the proposed bail system;

(2) Put in an optional system; or

(3) Fight for the Article as drafted.

Chairman Burns said his feeling was that they should take the middle ground and amend the bill in committee to make the system optional. Senator Yturri advised against standing fast for the bail Article as drafted because it might run the risk of killing the entire bill.

Mr. Clark said he could think of no more important reform to pass at this session of the legislature than the reform of the bail system. It would be fiscally advantageous to counties and it was also a very important thing for poor people. He added that he would not be unalterably opposed to allowing additional options. Mr. Paillette agreed with Mr. Clark that the Article on Release of Defendants was the single most important Article in the proposed Procedure Code from the standpoint of reforming a bad system.

Mr. Johnson proposed to conduct a poll among the district attorneys to determine whether a majority would favor bail reform. The Commission agreed that this would be worthwhile.

After further discussion, the concensus of the Commission was:

(1) The proposed revision of the bail system contained in Article 8 of the Proposed Criminal Procedure Code was a matter of highest priority and should be kept in at all costs unless circumstances forced its deletion.

(2) The Attorney General would poll the 36 district attorneys for a response to their position on the bail Article.

(3) Judge Crookham would solicit support for the Article from the circuit judges.

(4) Commissioner Clark would solicit support and statistics from the Association of Oregon Counties.

Chairman Burns indicated he would rely upon each of the above individuals to keep either Mr. Paillette or the Chairman informed of his progress, and as soon as feasible arrangements would be made with Senator Browne, Chairman of the Senate Judiciary Committee, to schedule a hearing to bring this information before the committee.

Other Bills Before the Legislature Relating to Criminal Law and Criminal Procedure

Chairman Burns asked if it would be appropriate for the Commission to review certain bills before the legislature relating to criminal law and criminal procedure, take a position with respect to them and authorize Mr. Paillette to represent the Commission's position in front of the various committees. Senator Yturri replied that the Commission had not undertaken that task in the past and suggested that to do so might dilute the effectiveness of testimony on the Commission's principal bill. Senator Carson also opposed taking a position on the bills, one reason being that less than a majority of the Commission was present at this meeting.

Mr. Paillette said that almost every day he was asked by a legislator for his opinion or for the Commission's position on a given bill and he would appreciate some guidance, particularly if any member had a strong feeling one way or the other on any of the bills.

House Bill 2526 reclassifying manslaughter from Class B to Class A felony. Senator Carson pointed out that the Commission had taken a position on House Bill 2526 when the substantive criminal code was drafted.

Mr. Paillette explained that the argument for the bill was that the district attorneys had no place to go on a "cop out" when a defendant was charged with murder. Inasmuch as second degree murder no longer existed, the penalties went from life imprisonment for murder down to 10 years for manslaughter which virtually forced the district attorneys to go to trial. Judge Crookham's response was that it was a rare instance in the past when a second degree murder plea was entered and, in fact, he had never seen one.

The concensus of the members was that the Commission's original position remained the same and that the penalty classification for manslaughter should, therefore, not be changed. They were also in agreement that Mr. Paillette was free to state an opinion to the contrary, however, so long as it was clear that it was his personal opinion and not that of the Commission.

House Bill 2527 expanding appeals by state in criminal cases from any order of trial court disposing of case other than by jury verdict. Mr. Paillette advised that House Bill 2527 was introduced at the request of the District Attorneys' Association. He said he had pointed out to the Association that they had not called any problem in this area to the Commission's attention at the time this area of the law was under discussion. He added that this bill was on the agenda only for the purpose of calling its existence to the attention of the Commission.

Attorney General Johnson expressed support of the bill.

House Bill 2528 providing for pretrial hearing for determination of specified matters in criminal prosecutions. Mr. Paillette explained that House Bill 2528 was largely based on the ABA recommendations for an omnibus hearing. Omnibus hearings were discussed by Subcommittee No. 3 during the course of the criminal procedure revision but time did not permit a full consideration of the subject.

Judge Crookham was of the opinion that the bill was unnecessary and added that Multnomah County was following this procedure at the present time. Mr. Paillette stated that it could be amended into Senate Bill 80 but several members objected to doing so.

House Bill 2898 prohibiting menacing by means of a deadly weapon and providing penalties. Mr. Paillette indicated that the Multnomah County District Attorney wanted a more severe penalty for threatening a person with a deadly weapon.

Mr. Clark pointed out that here again the Commission had taken a position on this subject, and the members agreed that there was no reason to change that concept at this time.

House Bill 2110 relating to parole procedure. Mr. Paillette indicated that House Bill 2110 was introduced at the request of the Criminal Law Revision Commission and was alluded to in the editorial note in the Final Draft of the Commission's report. If approved by the House Judiciary Committee, it would, he said, go to Ways and Means because the Parole Board had advised that they could not carry out its provisions with their present staff. He indicated that because it was a Commission bill, he would testify in support of it.

House Bill 2900 relating to arrest without a warrant. Mr. Paillette pointed out that House Bill 2900 was taken word for word from the Arrest Article in Senate Bill 80. Another interesting point concerning the bill, he said, was that it was introduced at the request of the Multnomah County District Attorney yet the district attorneys had not supported the warrantless misdemeanor arrest provisions before the Senate Judiciary Committee.

Senator Yturri observed that the Commission should be recorded as favoring this bill inasmuch as it was lifted intact from Senate Bill 80 and the members agreed.

House Bill 2279, revision of the Medical Investigators' Act. Mr. Paillette reported that House Bill 2279 would be heard by the House Judiciary Committee on the following Monday. Senator Yturri recalled that Dr. Brady, State Medical Investigator, had presented an early version of this bill to the Commission for inclusion in SB 80 and while the Commission had decided against incorporating it into the Procedure Code, they nevertheless agreed to support its concept.

Increasing Fine Limit in Drug Cases

Judge Crookham raised a question he had encountered in connection with drug and narcotics cases. To illustrate, he told of a recent incident where narcotics officers had picked up a man on both counterfeiting and narcotics charges. The IRS seized $9,000 in cash (not counterfeit) and liens on vehicles and other equipment amounting to about $55,000. Should that individual be convicted in circuit court on the narcotics charge, the highest fine he could be assessed was $2,500. Last year, he said, a defendant was in his court pleading to a narcotics charge who was dealing in one and two million dollar amphetamine transactions, and again the court was limited to a maximum fine of $2,500.

The Commission was in agreement that the fine should be raised to $25,000 and Judge Crookham suggested the following language be added to ORS 161.625:

"; except a sentence to pay a fine for a conviction of a Class A or Class B felony under ORS 167.207 may be an amount not exceeding $25,000."

It was decided that Mr. Paillette would review the bills already introduced on the subject of drugs and narcotics and attempt to add the proposed amendment to one of them. Judge Crookham indicated he would appear before the appropriate legislative committee to explain the need for the amendment.

Class A Misdemeanors in Justice Courts

Mr. Paillette stated that the Justice of the Peace in Malheur County had pointed out a problem she had encountered after the last legislature passed the new Criminal Code making the penalties for a Class A misdemeanor one year, a thousand dollar fine, or both. The statute relating to justice courts said that $500 was the maximum fine that could be imposed in a justice court and the result in some counties was that Class A misdemeanors could no longer go into justice court. This created a particular problem in the counties where there was no district court. Judge Crookham was of the opinion that it was a highly desirable result for all Class A misdemeanors to go into the circuit court in that situation. No further action was taken.

The meeting was adjourned at 9:00 p.m.

Respectfully submitted,

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission