Tape 5 - Side 2 - 168 to end
Tape 6 - Side 1 - 1 to end
Side 2 - 1 to 241

OREGON CRIMINAL LAW REVISION COMMISSION

Twenty-eighth Meeting, March 9 and 10, 1972

March 9, 1972

Members Present Morning Session:	Senator Anthony Yturri, Chairman Mr. Donald R. Blensly Judge James M. Burns Senator Wallace P. Carson, Jr. Mr. Robert W. Chandler Representative George F. Cole Attorney General Lee Johnson Representative Norma Paulus Mr. Bruce Spaulding
Excused:	Senator John D. Burns, Vice Chairman Mr. Donald E. Clark Representative Leigh T. Johnson Representative Robert M. Stults
Staff Present:	Mr. Donald L. Paillette, Project Director Mr. Bert Gustafson, Research Counsel
Also Present:	Mr. Robert Coblens, Salem attorney Mr. Larry Derr, Secretary, Oregon State Bar Committee on Criminal Law and Procedure Mr. Dave Hattrick, Deputy District Attorney, Multnomah County Mr. Steve Keutzer, Chief Criminal Deputy District Attorney, Lane County Mr. Scott Parker, Chief Criminal Deputy District Attorney, Clackamas County

Agenda:

Senator Anthony Yturri, Chairman, called the meeting to order at 9:30 a.m. in Room 315 State Capitol.

Approval of Minutes of Commission Meeting of January 28, 1972

Mr. Chandler moved that the minutes of the Commission meeting of January 28, 1972, be approved as submitted. Motion carried unanimously.

Introduction of Mr. Blensly

Mr. Donald R. Blensly, Yamhill County District Attorney, was introduced by Mr. Paillette who explained that he had been appointed by the Governor to fill the vacancy created by the resignation of Mr. Frank Knight. On behalf of the Commission, Chairman Yturri welcomed him as a member.

Pleadings of Defendant; Plea Discussions and Agreements; Preliminary Draft No. 2; February 1972

Mr. Paillette explained that the draft on today's agenda was concerned with what had been called "the cop-out," plea bargaining, plea negotiations, bargained plea, etc. The ABA, in attempting to add legitimacy to the process, talked in terms of plea discussions and plea agreements. Whatever label was attached to the process, he said, it was an important and integral part of the criminal justice system, and much attention had been focused on the area by recent United States Supreme Court decisions, by the American Law Institute, American Bar Association and others concerned with criminal justice.

Mr. Paillette said many of the areas in the draft were not readily adaptable to statutory law and could be dealt with better through court rules, but for discussion purposes and for the purpose of the ultimate recommendations to be made by the Commission to the legislature, the best approach to the problem was to present the issues and policy questions in the form of proposed statutory law. In order to have this draft available for today's meeting and because a number of changes were made by Subcommittee No. 3, Mr. Paillette indicated that Preliminary Draft No. 2 did not restate all of the commentary that appeared in the first draft. He also noted that copies of two Supreme Court opinions important to this area of law had been reproduced for ready reference by the Commission: North Carolina v. Alford, 400 US 25 (1970), and Boykin v. Alabama, 395 US 238 (1969).

Section 1. Pleading by defendant; alternatives. Mr. Paillette explained that section 1 restated in part the provisions of ORS 135.820 regarding the types of pleas a defendant may enter. The section, he said, was concerned with pleas, and not motions or demurrers, which would be dealt with separately. There was, however, nothing in this draft that was meant to preclude a demurrer or some other form of attack by the defendant on an indictment. The section continued to provide for the familiar pleas of guilty, not guilty and former jeopardy, and at the recommendation of the Bar Committee on Criminal Law and Procedure the subcommittee had inserted "or each count thereof" in the opening paragraph to give recognition to the common practice of pleading to one count of an indictment, information or complaint or to less than an entire indictment. The draft referred to "indictment,

information or complaint" rather than "indictment," as did ORS 135.820, to attempt to gather into one section all types of charging documents.

The greatest departure in section 1 from the existing statute was the addition of subsection (4) which referred to a new type of plea called "no contest." This plea, Mr. Paillette advised, was meant to be similar to the plea of nolo contendere and was included as one means of dealing with the Alford type case, although Alford was not a no contest plea. The problem the no contest plea was meant to resolve was first raised at a meeting of the Bar committee prior to the subcommittee meeting at which this draft was considered, that problem being that Alford pleas were presently being used in some parts of the state whereas other judges refused to recognize them. The Alford case, in effect, permitted a defendant to enter a plea without really admitting his guilt, and the no contest plea was one way of facilitating this approach by allowing him to enter a plea without actually admitting he did the act.

Chairman Yturri asked what a defendant would actually plead to in a case where he was charged with murder. Judge Burns replied that usually the defendant would plead to a lesser charge. At the present time he would enter a plea of not guilty, the bargaining process would then take place and when he went back into court, he would, for example, say he wanted to enter an Alford type plea and would plead guilty to manslaughter. If section 1 were the law, he would instead plead no contest and an Alford type record would be made. The subcommittee, he explained, was attempting to use the no contest plea to formalize and regulate the Alford type situation but was not attempting in any way to get into the anti-trust area where nolo contendere pleas were frequently used. Judge Burns advised that this type of plea would be used probably most frequently where there was a series of bad check charges against a defendant who wanted to limit his risk or liability. He would therefore plead to one charge and the others would be dismissed as a part of the plea bargain. Under the no contest plea he still would not say that he actually wrote the checks but would admit that the judge could sentence him as if he had.

Mr. Paillette pointed out that in the plea agreement, the district attorney would have to agree to a no contest plea and that enactment of section 1 would not destroy the district attorney's option in the bargaining situation to refuse to let the defendant plead no contest; he could still require him to enter a plea of guilty in striking a bargain with the defendant. The defendant, of course, could still enter a no contest plea to the original charge if he chose to do so, but the proposed statute would not require the district attorney to agree to a no contest plea and would not affect the district attorney's control over charge reductions or charge concessions.

Mr. Johnson noted that there were a great many misdemeanors and violations committed by corporations, one example being violation of

certain pollution control Acts. Corporations almost invariably chose to plead no contest to that type of charge, he said, in an effort to mitigate their crime in the eyes of the public. By doing so, they received, perhaps, a $1,000 fine which was not what bothered them so much as the social sanction aspect of the charge. Chairman Yturri replied that under the draft the effect of a no contest plea was a guilty plea so that it made little difference which plea was entered.

He next pointed out that under the proposed statute a defendant could plead no contest initially even before any plea bargaining took place. Judge Burns agreed that was true, but the plea was subject to being accepted by the court under the provisions of section 5 of the draft. The court was not required to accept the plea. As a matter of constitutional law and also under section 5 the court had to satisfy itself that there was a factual basis for the plea. If the defendant simply said "no contest," there would be no factual basis for accepting that plea.

Mr. Spaulding pointed out that if the plea was voluntarily and intelligently made, under section 4 the court would have no discretion in accepting the plea. Judge Burns said that the subcommittee did not mean to suggest that a no contest plea could be entered as a matter of right.

Chairman Yturri indicated that under section 1 the court had no discretion to refuse to accept a plea of guilty, not guilty or former jeopardy and the no contest plea in subsection (4) therefore appeared to be in a different category than did the first three subsections. Judge Burns replied that the defendant could not enter a guilty, not guilty or former jeopardy plea unless he also complied with sections 4 and 5. He admitted that there was an error in drafting in that the subcommittee should have included in section 5 the same criterion as that contained in section 4; namely, that the court must be satisfied not only that the no contest plea was voluntary and intelligent but also that there was a factual basis for it. He advised that the intention of the subcommittee was that the no contest plea had to be approved by the court on the basis of voluntariness, intelligence and factual basis and added that the Alford type plea had to be a factual situation which was inherent in and related to the charge itself.

Chairman Yturri said it would relieve his concern if reference to the no contest plea were inserted in section 5.

Mr. Johnson was in favor of adding a requirement that the no contest plea could not be entered without the consent of the district attorney. Mr. Chandler commented that, as a practical matter, the plea would not be granted without the consent of the district attorney because there would be very few cases where no contest would be pleaded initially. Mr. Blensly disagreed that the no contest plea

would be used primarily in plea bargaining situations, but with section 13, which said that a judgment following entry of a no contest plea was a conviction of the offense, it made no difference.

Mr. Derr advised that where the no contest plea was the same as an Alford plea, the Supreme Court had held that the district attorney could not prevent that plea.

Mr. Keutzer agreed with Mr. Johnson that the district attorney should be permitted to say whether he would accept a no contest plea and asked how section 5 would be applied to a no contest plea where the court required a factual determination. Judge Burns replied that, as in the case of an Alford plea, the court would either have the state produce witnesses or would have the substance of the state's case summarized by the district attorney and ask the defense to stipulate as to the accuracy of his statements.

Mr. Keutzer next inquired if the court could require the district attorney to put on his witnesses in order to make his factual basis and was told by Chairman Yturri that the draft was not intended to take any control away from the court and the judge could require the witnesses to be called if he chose to do so.

Judge Burns moved that section 1 be adopted and the motion carried. Voting for the motion: Blensly, Judge Burns, Carson, Chandler, Cole, Paulus, Spaulding, Mr. Chairman. Voting no: Johnson.

Section 2. Time of entering plea; aid of counsel. Mr. Paillette explained that section 2 set out some of the basic plea bargaining procedures. The subcommittee had struggled for sometime with subsection (1), he said, with respect to the types of cases to which these standards should apply. Ordinarily, when speaking about plea bargaining, it was considered in the light of felony cases and circuit court proceedings. However, this was not always the case because district courts and misdemeanors were also involved. He outlined the question that was raised in subcommittee in connection with the run-of-the-mill traffic case in district court as to whether this entire panoply of requirements should be applicable to those cases. At the present time defendants cited and charged with a traffic misdemeanor may, in effect, plead guilty by mail by signing the traffic citation, mailing it to the court and forfeiting bail. Mr. Paillette pointed out that there was nothing in the Boykin decision which said it applied only to felonies and serious crimes. On the other hand, the ABA standards were meant to apply to "serious" crimes but their commentary was vague on the application of their standards to misdemeanors, one possible reason being that those standards were formulated prior to Boykin. The directive to Mr. Paillette by the subcommittee was to write language that would solve that problem. The best solution he had been able to find, he said, was that set forth in subsection (1) of section 2 and in section 3. He was not certain that it entirely resolved the district court problem because a defendant was required to be advised by the court of his right to counsel, of the constitutional rights he

was waiving by a plea of guilty, etc. It was difficult to find a way to limit the draft so that district courts and traffic courts would not be thrown into utter chaos by requiring that every defendant be personally charged by the judge. This, then, was one of the major problems the Commission would have to decide today: how to settle on an approach that would protect the defendant, comply with Boykin and at the same time be a practical approach that would not require every defendant charged with any kind of an offense not only to have counsel but also to be advised by the court of all his rights before his plea could be accepted.

Mr. Paillette advised that some traffic offenses were punishable by imprisonment and under the new criminal code even Class C misdemeanors were punishable by imprisonment, so there could be some relatively minor cases to which the standards in this draft would apply.

Chairman Yturri inquired if it would be constitutional to limit the application of the draft to felonies and misdemeanors carrying a sentence of imprisonment in excess of a given number of months. Judge Burns replied that the Stevenson decision in Oregon said that a defendant was entitled to counsel in any case for which he might be imprisoned.

Mr. Blensly suggested that the problem might be resolved by printing the defendant's rights on the back of the citation and having him acknowledge that he had read those rights before pleading guilty, forfeiting bail and mailing in the ticket with his check.

Mr. Johnson said that the real answer to the problem was to remove all traffic offenses from the criminal courts and make them punishable by fine only. There were a number of studies under way, he said, which advocated that approach. Chairman Yturri commented that it might be ten years before that point was reached in Oregon and in the meantime it was necessary to find a practical solution.

Mr. Spaulding asked if the phrase in subsection (1) of section 3, "other charge on which the defendant appears in person," meant that the defendant was required to appear. Mr. Paillette said that was a difficult question and one that had not been answered in subcommittee. Mr. Spaulding stated that apparently under that language the defendant who wished to forfeit bail on a traffic offense would not be required to appear in person.

Judge Burns recalled that the subcommittee had discussed instances where the attorney appeared in court without the defendant and the problem had not been resolved as to how the court could then be assured that the defendant understood the nature of the charge, the waiver of his rights, etc.

Chairman Yturri asked for a resume' of the Boykin decision, and Mr. Paillette replied that there was some disagreement as to its interpretation. One view was that Boykin required the defendant to

understand specifically what constitutional rights he was giving up by entry of a guilty plea, i.e., trial by jury, confrontation of witnesses and the privilege against self-incrimination. The other reading was that all Boykin required was that the plea be voluntary and intelligent, encompassing within the voluntary part of that test the fact that he knew what was involved and what he was giving up. Mr. Paillette said he would expect that most courts would advise the defendant of his rights as part of the record before accepting the guilty plea, but the Boykin opinion did not in so many words say that the court was required to do so. In reply to a further question by the Chairman, he said there was nothing in the decision that would render it inapplicable to misdemeanors.

Judge Burns pointed out that the Court of Appeals in Raisley v. Sullivan, 94 Adv Sh 339, ___ Or App ___ (1972), had addressed itself to the Boykin case and spoke about the two ways in which state courts had interpreted it. The court said:

> "Some courts have required the record to show that the defendant was advised of, understood and voluntarily waived his privilege against self-incrimination and his rights to trial by jury and confrontation. . . Other states have held that the issue to be determined . . . is whether the guilty plea was entered voluntarily and intelligently. . . We agreed with those state courts which have decided that the standard for determining the validity of a guilty plea is whether the plea was entered understandingly and voluntarily.
>
> "We decline to impose a rigid formula on our own courts. The judge who accepts a guilty plea must have sufficient latitude to tailor his questions to the needs of the defendant before him.
>
> "Of course the requirement that a guilty plea must be voluntary and intelligent in order to be valid is not a new one. The element added by Boykin is that the record must contain an affirmative showing of the voluntariness of the plea."

Judge Burns stated that in view of that holding and as a matter of state law, so long as the record showed the affirmative showing of the voluntariness of the plea, the requirements would be met. Therefore, a guilty plea entered by mail should have language on the ticket advising the defendant of his rights. In instances where the defendant appeared through counsel only, the counsel should be required to bring into court some kind of a document in writing signed by the defendant acknowledging the receipt of the advice he had received concerning his rights and saying that he had waived them.

Chairman Yturri read the instructions printed on a traffic citation and expressed the view that it could be revised to take care of traffic violators who wished to forfeit bail by mail. Mr. Spaulding indicated that the fact that bail was forfeited did not prohibit the judge from imposing a jail sentence.

Mr. Blensly remarked that the biggest problem with putting this information on the traffic ticket would be how to inform the defendant of the maximum possible sentence for the offense he had committed. Chairman Yturri said it would be necessary to add language to advise him that despite the fact he had sent in his bail, the court had the right to impose a sentence and that by pleading guilty he was giving up certain rights. To inform him of the maximum sentence, a blank space could be inserted on the form which the officer could fill in at the time the citation was issued.

The problem of every police officer knowing the maximum sentence for every possible offense was discussed and Mr. Spaulding suggested that this might be resolved by stating that the offense was punishable by a jail sentence without stating the actual maximum sentence.

Chairman Yturri noted that the language on the citation said: "If you fail to comply with these instructions [which include sending in the bail] the court is authorized to issue a warrant for your arrest . . . . " That would indicate, he said, that if the defendant did comply with the instructions, the court was not authorized to do so.

Judge Burns said that when bail was forfeited in a traffic case, in effect the case was dismissed. The actual practice should be that when bail was forfeited, the case should be dismissed and at that point the judge's right to issue a warrant should cease.

Mr. Johnson moved that the staff be directed to prepare amendments that would eliminate jail sentences for all minor traffic offenses.

Mr. Paillette pointed out that the Commission had already gone on record, when classifying offenses in the new criminal code, that if the offense did not require culpability, it should be punishable as a violation. This was meant to be a policy decision with respect to offenses outside the criminal code as well, and that position would apply to minor traffic offenses which should not be punishable by imprisonment because they required no culpability.

Chairman Yturri said there might be occasions where it would be desirable to impose a jail sentence for a minor traffic offense. He also pointed out that minors were sometimes sent to jail by juvenile judges for minor traffic offenses and cited a recent case in his area where a 15 year old had spent the week end in jail for a minor offense involving a motorcycle.

Mr. Johnson said that if a juvenile were cited several times for speeding, he would have his license suspended and if he continued to

drive, he would have committed one of the five major traffic offenses and would be subject to a jail sentence.

Representative Paulus commented that the greatest cause of death in the United States for males 24 years and younger was traffic accidents. At a time in history when the automobile posed such a threat to health and safety, she opposed minimizing punishment for traffic violations. She added that she was constantly receiving mail from the Traffic Safety Commission encouraging her, as a legislator, to stiffen penalties rather than to diminish them. Mr. Johnson replied that the usual proposals for stiffening penalties was (1) to provide for broader powers for license suspension civilly rather than criminally and (2) to attempt to find better means for dealing with drivers who were driving without a license.

A brief recess was taken at this point after which Mr. Johnson renewed his motion that the staff be directed to go through the Motor Vehicle Code to eliminate jail sentences for minor traffic offenses and that the proposal then be submitted to the Traffic Safety Commission for their comments. Mr. Chandler suggested that the question to the Traffic Safety Commission be submitted by letter rather than asking the staff to go through all the statutes. Mr. Johnson agreed and amended his motion to direct Mr. Paillette to write to the Traffic Safety Commission to inquire whether they would approve of amendments to provide that there would be no jail sentences for violation of any of the minor traffic offenses. Motion carried. Voting for the motion: Judge Burns, Chandler, Johnson, Spaulding, Mr. Chairman. Voting no: Blensly, Cole, Paulus. Mr. Spaulding voted for the motion with the understanding that the proposal would not be submitted to the Traffic Safety Commission as one that had been recommended or approved by the Criminal Law Revision Commission.

Chairman Yturri said the whole matter under discussion was one that probably could not be solved positively, but the problems that would remain if this draft were approved would be of no great magnitude and would be such that judges could make their decisions in borderline situations on an individual basis.

With respect to subsection (4) of section 2, Representative Cole asked if a plea of guilty would bar a further plea of former jeopardy and was told by Judge Burns that section 1 said that former jeopardy could be pleaded with or without a plea of guilty. If the guilty plea were entered and the attorney later discovered that a former jeopardy plea would be proper, he would then have to apply to withdraw the plea of guilty. He further explained that the ABA spoke to the question of withdrawal of guilty pleas but that was beyond the scope of the work the subcommittee had done thus far. As a practical matter, he said, withdrawal of a plea caused no problem.

Chairman Yturri asked if it was contemplated that a withdrawal section would subsequently be added to this draft and received an affirmative reply from Judge Burns. Mr. Paillette noted that the supplementary commentary to Preliminary Draft No. 1 pointed out that the ABA standards contained sections on plea withdrawal. The law in Oregon, he said, had always been that a plea withdrawal was discretionary with the court and this draft was not meant to change that. The Commission, however, might want to add other standards regarding plea withdrawals such as those contained in sections 2.1 and 2.2 of the ABA standards. [Note: This subject was later discussed in more detail. See pages 31 to 34 of these minutes.]

Judge Burns explained that the reason the subcommittee had provided for the ten day period to enter a plea of former jeopardy under subsection (4) of section 2 was to recognize that frequently defense counsel would not be aware of the situation immediately and therefore should have additional time available to him. The framework the subcommittee envisioned under section 2, he said, was a prompt entry of a plea of not guilty, but subsection (2) provided that the defendant could not enter a plea of guilty on the day of arraignment if he were unrepresented.

In further reply to Representative Cole's question, Chairman Yturri noted that subsection (4) said "or within such further time as the court allows" which was intended to take care of those cases where the defense counsel did not discover that he could properly enter a plea of former jeopardy within the ten day period. In those circumstances the court could allow more time.

Representative Cole said he was concerned about situations where the court might deny the request for the withdrawal of a guilty plea. If the attorney discovered that a former jeopardy plea should be entered subsequent to the time a guilty plea had been entered, he believed that it should be mandatory that the plea be withdrawn. Judge Burns pointed out that the present statute required a plea of jeopardy to be entered at the time of the plea of not guilty, and it was waived if not entered at that time.

Senator Carson was of the opinion that the meaning of subsection (4) was unclear. He said that as the subsection was written, the presumption would be that "such further time as the court allows" would be within the ten day period. If the subsection intended to say that upon discovery at some later time the former jeopardy plea could be entered, it should be reworded to make that fact clear. Mr. Blensly suggested, and Senator Carson agreed, that the subsection should also contain a requirement "for good cause shown."

Judge Burns concurred that Senator Carson made a good point because ORS 17.615 said that motion for a new trial "shall be filed within 10 days after the filing of the judgment sought to be set aside, or such further time as the court may allow." By case construction

that had been held to mean that the court must arrange for the additional time within the ten day period. Mr. Paillette said that was not the intent of the subcommittee. Judge Burns agreed and indicated that the subcommittee had intended to extend the time beyond the ten day period at the discretion of the court.

Senator Carson said that the proposed statute should then, in effect, overrule the case to which Judge Burns had referred by specifically stating that upon good cause shown the court could permit a plea of former jeopardy to be entered even though the ten day period had expired. Judge Burns suggested that there should be some cut-off date beyond the ten day period and Mr. Spaulding agreed, adding that the defendant might bring up former jeopardy several years later. Chairman Yturri also concurred and suggested that the cut-off date might be prior to the completion of the trial.

Mr. Blensly commented that the defendant could not enter both a plea of guilty and a plea of former jeopardy. The plea of guilty, he said, would foreclose the plea of former jeopardy. As far as withdrawal of the guilty plea, if it took place in another term of court, the court would have no authority to allow withdrawal of the guilty plea. Chairman Yturri asked what the situation would be if the defendant pleaded not guilty and was convicted. Mr. Blensly replied that upon sentencing and upon completion of the term of court, the court would have no authority to make any change in the plea.

After further discussion, Judge Burns moved that subsection (4) of section 1 be amended to provide that a plea of former jeopardy may be entered within ten days after arraignment or at such later time, prior to judgment, as the court may allow upon good cause shown. The motion carried unanimously.

With respect to the second sentence of subsection (2) of section 1, Mr. Chandler said the minutes of the subcommittee meeting showed that the members had discussed at some length the defendant who knowingly waived his right to counsel. He was not completely satisfied, however, that the language met a practical problem in some of the eastern Oregon counties where the judge was not always within easy distance of the defendant. The defendant might have had to bring a lawyer in from some distant city or he might not have a lawyer, yet everyone involved would want to complete the arraignment in one day. The subcommittee minutes showed that Judge Burns did not agree that the unrepresented defendant in that instance should be able to enter a plea of guilty on the day of arraignment. Mr. Blensly indicated that the subcommittee had considered that aspect of the problem and had reduced the time from 48 hours to one day. He noted that the provision applied only to those cases where the defendant did not have an attorney and furthermore it applied only to felony cases. It was a rare exception where a defendant would enter a plea of guilty to a felony without an attorney and he maintained that the provision in

subsection (2) was a safeguard that should be retained in the proposed statute. Representative Paulus and Judge Burns concurred with Mr. Blensly.

Representative Cole was of the opinion that subsection (2) did not accomplish what the subcommittee obviously intended. The defendant would be arraigned one day, the charge would be read to him and he would be told by the judge that since he chose not to have a lawyer, his plea would not be taken until the following day in order that he would have time to think the matter over. At that point, he asked, what would the defendant have to reflect on? He would not be told what his rights were until the following day when he attempted to enter his plea at which time the judge would explain to him what he was giving up by entering a plea of guilty. It would seem more logical that the delay would take place after that explanation to the defendant. Mr. Blensly said the defendant would have an opportunity to reflect on whether he wanted an attorney to represent him. Judge Burns stated that on the first day he would be advised of his right to counsel and presumably he would have waived that right at that time. Representative Cole was not convinced that the defendant was being given time to reflect upon the loss of his rights.

At the suggestion of Mr. Derr, Judge Burns moved that the commentary to section 2 be revised to say that if an unrepresented defendant wished to plead guilty and the completion of the arraignment therefore had to be set over until the following day because of the requirements of subsection (2), judges were encouraged to give him the warnings required by sections 3, 4 and 5 of this draft on the first day and go over them again the next day. If judges followed that recommendation, he said, it would take care of Representative Cole's concern. Mr. Chandler seconded and the motion carried.

Mr. Paillette called attention to the language in subsection (3), "he shall be considered to have entered a plea of not guilty." The subcommittee, he said, had discussed the desirability of having the not guilty plea entered promptly in order that dates for trial, pretrial conferences, etc. could be set. Because entry of the plea triggered these subsequent events, the subcommittee decided to provide for an automatic not guilty plea if the defendant had not pleaded otherwise. Mr. Spaulding pointed out that this was the rule at the present time; if the defendant refused to plead, the court entered a plea of not guilty.

Judge Burns explained that it was not the subcommittee's intention, by including subsection (3), to foreclose motion and demurrer rights.

Mr. Derr pointed out that neither section 2 nor any of the following sections placed any requirement on the judge to inform the defendant of his right to counsel and asked if that should be included

somewhere in the draft. Mr. Paillette answered that the defendant's right to counsel would be included in the Article on arraignment procedures which was yet to be drafted.

Senator Carson asked if it would get around the question of waiting one day to complete the arraignment to require the defendant to have a lawyer. Mr. Paillette replied that Johnson v. Zerbst held that if the defendant didn't want a lawyer, he could not be forced to have one. The Commission was generally agreed that a lawyer should not be foisted upon a defendant who did not want one, providing the record was clear that he had been advised of his right to counsel and had waived it.

Mr. Johnson moved that section 2 be approved as amended and the motion carried unanimously. Voting: Blensly, Judge Burns, Carson, Chandler, Cole, Paulus, Spaulding, Mr. Chairman.

Section 3. Defendant to be advised by court. Mr. Paillette said that section 3 was the best language he could devise to protect the individuals who needed to be protected and at the same time attempt to comply with Boykin. He said he did not know whether it would entirely solve the problem, but he believed it was a better approach than attempting to segregate and exclude certain kinds of cases or certain classes of defendants. That type of statute would only invite constitutional problems. Sooner or later the question of whether Boykin applied to minor cases would undoubtedly be settled in the courts, he said.

Chairman Yturri proposed to follow Mr. Spaulding's earlier suggestion of relating section 3 to the defendant who was required to appear in person. Judge Burns said that course might raise an equal protection problem but acknowledged that such a problem was inherent in the section regardless of how it was written. Mr. Paillette was of the opinion that the minor charges would of necessity have to be dealt with on a case-by-case basis whether or not this proposed statute was adopted.

He advised that the Raisley case to which Judge Burns referred earlier was rendered by the Court of Appeals after this draft was prepared, and it subscribed to the view that the record must show that the plea was voluntary and intelligent without the necessity of advising the defendant of his rights item by item and securing a waiver of each individual item. Whether the end result was any different was questionable, however, because the voluntary and intelligent stage could not be reached without first going through the list.

Mr. Paillette next explained the provisions of paragraphs (b) and (c) of subsection (2) and noted that under paragraph (c) the court would be required to advise the defendant if he had committed the type of crime for which he could receive an enhanced penalty. For example,

under the dangerous offender provisions of the new criminal code, if he could get up to 30 years in certain circumstances, the court would be required to advise him to that effect. There was, he said, precedent for this requirement in Oregon case law as noted on pages 7 and 8 of the commentary to Preliminary Draft No. 1.

Senator Carson suggested that paragraph (b) of subsection (2) would be clearer if, instead of reading "including that possible" it were revised to read " . . . including the maximum possible sentence from consecutive sentences." He also proposed to insert "and" after "dangerous offender," in the third line of paragraph (c). Mr. Paillette said he agreed with the suggested revision to paragraph (b) but not the one to paragraph (c), and the members concurred.

Senator Carson moved to amend paragraph (b) of subsection (2) of section 3 to read:

> "(b) Of the maximum possible sentence on the charge, including [~~that~~] the maximum possible sentence from consecutive sentences."

The motion carried unanimously.

Mr. Chandler moved section 3 be approved as amended and the motion carried unanimously. Voting: Blensly, Judge Burns, Carson, Chandler, Cole, Paulus, Spaulding.

The Commission recessed for lunch at this point and reconvened at 1:30 p.m.

Members Present Afternoon Session: Senator Anthony Yturri, Chairman
Senator John D. Burns, Vice Chairman
Mr. Donald R. Blensly
Judge James M. Burns
Senator Wallace P. Carson, Jr.
Mr. Robert W. Chandler
Representative George F. Cole
Representative Norma Paulus
Mr. Bruce Spaulding:

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

Also Present: Mr. Robert Coblens, attorney, Salem
Mr. Larry Derr, Secretary, Oregon State Bar Committee on Criminal Law and Procedure
Mr. Dave Hattrick, Deputy District Attorney, Multnomah County
Mr. Pat Horton, Board on Police Standards and Training
Mr. Steve Keutzer, Chief Criminal Deputy District Attorney, Lane County
Mr. John Osburn, Solicitor General, Department of Justice, representing Attorney General Lee Johnson

Section 4. Determining voluntariness of plea. Mr. Spaulding asked if "intelligently" had previously been used in Oregon statutes and inquired if the court would be required to measure the degree of intelligence of a defendant if the term remained in the proposed statute. Mr. Paillette replied that "voluntary and intelligent" were used in Boykin and that the ABA standards, which were used as the basis for section 4, although drafted prior to the Boykin decision, dealt with with the voluntariness of the plea. The voluntary and intelligence requirements, he said, were meant to be broad enough to allow the court some latitude in the kinds of inquiries it made of the defendant. "Intelligent and voluntary," he said, was also used in Raisley.

Mr. Paillette indicated that section 4 of Preliminary Draft No. 2 differed from the first draft in that it included the no contest plea which was consistent with section 1.5 of the ABA standards.

Mr. Chandler asked for an example of an unintelligent plea. Mr. Paillette explained that "intelligence" went beyond the I.Q. of the defendant and included what he knew about the significance of his plea. Chairman Yturri added that the term was synonymous with "understandingly" as used in the draft. Mr. Spaulding agreed that was the intent but questioned whether the meaning was clear. Chairman Yturri suggested that the commentary contain a statement to the effect that the reason "intelligently" was selected was because it appeared

in the Boykin and Raisley decisions and that it also indicate the sense in which "intelligently" was used. Other members expressed agreement with this proposal, and it was unanimously approved.

Judge Burns said that the subcommittee intended for section 4 to apply only to the cases governed by section 3. He suggested that language be added to section 4 similar to that in section 3 to make that point clear.

Judge Burns next remarked that he continued to be bothered by that part of subsection (3) requiring the judge to advise the defendant that charge concessions and recommendations were not binding upon the court. In a typical case, he said, the agreement might be that the defendant will plead guilty to Count 1 if the district attorney will dismiss Count 2. Under the existing statute the district attorney, in order to dismiss Count 2, must obtain the court's permission. At the present time Judge Burns advised that he did not say to the defendant, "You understand that I may deny the district attorney's motion to dismiss Count 2." In most cases the bargain is fulfilled, but if the judge were required to make that statement to the defendant, it would discourage a great many guilty pleas.

Chairman Yturri commented that in most cases the defendant would be given this information by his attorney. Mr. Blensly replied that it could not be assumed that counsel would so advise him. Judge Burns agreed and added that neither could it be assumed that the lawyer had in every case advised his client of the maximum possible sentence. Chairman Yturri was of the opinion that the provision should be retained for that very reason. Mr. Blensly said the only good reason for removing it would be if the procedure were changed to allow the district attorney to dismiss the charge without the approval of the court.

Judge Burns commented that the United States Supreme Court in Santobello v. New York, 10 Cr L 3017 (Dec. 20, 1971), had recently adverted to plea bargaining and had expressed approval of the procedure so long as certain safeguards were observed. He advised that in Multnomah County the district attorney never made sentencing recommendations and the defendant was told that the sentence was entirely up to the judge. In the case where a charge concession was made and Count 2 was in fact dismissed, the defendant had nothing to complain about even though he had not been told that the court was not obliged to grant the concession.

Mr. Blensly said that as a practical matter he did not believe it would discourage many guilty pleas to require the court to tell the defendant that the recommendations of the district attorney were not binding on the court.

Representative Cole advised that in his county the judge had given instructions that he wanted the district attorney, the defendant

and his attorney to work out the plea bargain and to inform the court of the agreement prior to trial. At that point the judge informed the parties whether the agreement was acceptable. In reply to a question by Judge Burns, Representative Cole said that the agreement could also include sentence recommendations. He said it seemed useless, when the judge had already agreed to the terms of the plea bargain, to require him to tell the defendant that the agreement was not binding on the court. Mr. Paillette pointed out that section 9 dealt with the responsibility of the trial judge and that problem would be taken care of by that section. Judge Burns further explained that if the judge received a presentence report showing that the defendant had a long record of previous convictions and was a very poor risk, under subsection (3) of section 9 he could call the defendant back, tell him that the agreement contemplated by the plea bargain was not approved and at that point he would be given the opportunity to withdraw his plea. Representative Cole said the provisions of section 9 (3) satisfied his objection to section 4.

Judge Burns moved that section 4 be amended to apply to those cases covered in section 3. Motion carried unanimously.

Mr. Chandler moved that section 4 as amended be approved. Motion carried unanimously. Voting: Blensly, Judge Burns, Chandler, Cole, Paulus, Spaulding, Mr. Chairman.

Section 5. Determining accuracy of plea. Mr. Paillette explained that section 5 was based on section 1.6 of the ABA standards and, as in the standards, did not apply to the no contest plea. Its purpose was to lay a foundation for the plea itself. The alternate section 5 was included in this draft at the recommendation of the Bar Committee on Criminal Law and Procedure. The discussion in that committee was that there would be more latitude for plea negotiation with respect to the foundation on which the plea rested if the section were phrased in terms of a showing that the defendant had committed a crime. Their concern was that the defendant had committed a crime at least as serious as the one charged to which he was willing to plead. The subcommittee had voted to submit both sections to the Commission for a final decision.

Regardless of which section was adopted, Chairman Yturri asked if the Commission was in agreement that the provision should apply to no contest as well as to guilty pleas. Judge Burns moved that section 5 be so amended and the motion carried unanimously.

Chairman Yturri was of the opinion that there should be a close relationship between the crime to which the defendant pleaded and the crime he committed. Mr. Spaulding agreed and commented that the way the alternate section read, he could plead to any crime.

Mr. Derr pointed out that a restraint on the range of crimes was contained in section 6 (3) (b) which required that the offense be

"reasonably related" to the crime charged. Mr. Spaulding observed that section 6 (3) (b) applied to plea bargaining only whereas section 5 applied to any plea and might or might not relate to plea bargaining.

Mr. Blensly asserted that there should be a reasonable basis for the plea entered by the defendant and there should be strict standards imposed on plea bargaining. He said it was not unreasonable to require a logical basis for the plea and the district attorney should not have latitude to reduce the charge to some misdemeanor that might be "reasonably related" but which the defendant had not actually committed just so he could get the defendant to plead as a matter of expediency. The punishment in the statutes, he said, should relate to the act committed, and he opposed the alternate section 5.

Mr. Pat Horton said there were certain situations where equity required that a minor charge be imposed and the defendant be allowed to plead to it. For example, under the drug laws there was no "cop-down" to a charge of criminal activity in drugs involving less than one ounce of marihuana. If both the defense attorney and the prosecutor determined that an innocuous plea was desirable, such as disorderly conduct, under section 5 there would not be a factual basis for that type of plea.

Representative Paulus commented that the solution to that problem was not to change section 5 but to change the criminal code in that respect at the next legislative session. Mr. Blensly remarked that when the legislature said it was a crime to possess less than one ounce of marihuana, the penalty they provided for that crime was the penalty that person should suffer for committing it.

Mr. Keutzer stated that from the prosecutors' viewpoint the alternate section 5 was more desirable if the theory was accepted that both defendants and prosecutors should be allowed to exercise their free will and that the defendant should be allowed to make the choice himself as to whether or not he wanted to accept a plea. If section 5 were to be accepted, the defendant would thereby be deprived of the right to make a plea to a lesser charge. Chairman Yturri advised that section 5 was directed toward giving the defendant a break rather than taking any right away from him.

Mr. Keutzer said his concern was that section 5 would rule out Alford type pleas and Judge Burns assured him that the intention of the subcommittee was to include Alford pleas. Representative Paulus affirmed that the subcommittee was unanimously agreed that Alford type pleas were included in section 5 and said she would strenuously object to the adoption of the alternate section 5.

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Mr. Paillette suggested that in view of Mr. Keutzer's comments it might be advisable to insert in the commentary an explanatory statement that section 5 did not require a full-blown trial on the facts of the case and also that the section was not intended to preclude the Alford type plea. The Commission expressed agreement with this proposal.

Mr. Chandler moved to reject the alternate section 5 and to adopt section 5 with an amendment to add no contest pleas plus the additional commentary suggested by Mr. Paillette. The motion carried unanimously. Voting: Blensly, Judge Burns, Chandler, Cole, Paulus, Spaulding, Mr. Chairman.

Section 6. Plea discussions and plea agreements. Mr. Paillette explained that sections 6, 7 and 8 dealt with the recognition and control of plea discussions and agreements, the criteria to be considered and the responsibilities of counsel. They concerned a subject that was difficult to codify, but it appeared to be the best way to approach the problem. All of the sections, he said, drew heavily upon the ABA recommendations and were part and parcel of the recognition that there should be more visibility to the plea bargaining system. Obviously, the district attorney was not required to engage in plea negotiations and he could not by statute be forced to do so. The sections were intended to serve as guidelines by setting forth considerations that district attorneys would take into account in virtually all cases.

Subsection (1) of section 6, Mr. Paillette said, was a statement of policy that imposed no sanction either directly or indirectly on the district attorney if he did not engage in plea discussions. The requirement in subsection (2) was no different than the practice currently followed and was in effect a statement of Bar ethics, while subsection (3) outlined the types of agreements in which the district attorney may engage.

Chairman Yturri asked if the provisions of subsection (3) were exclusive and questioned whether there was a possibility that something might have been omitted on which an agreement could be based. Mr. Blensly said he believed there were other possibilities and thought there was a danger in setting out a list such as that in subsection (3). Some judges might interpret the subsection to mean that there could be no other type of plea agreement. Furthermore, he said, it was limited to charges against the defendant. Many times there were co-defendants involved and it was not uncommon for the wife to be named as a co-defendant. In that situation the defendant would sometimes agree to a plea, providing the charges against the co-defendant were dismissed. He was of the opinion that circumstances such as that should also be a part of the record. Chairman Yturri suggested adding to subsection (3) "or to any other agreement, subject to the approval of the court," or words to that effect.

Mr. Osburn expressed the view that there were many good ideas that did not necessarily need to be codified and should not be codified. Sections 6, 7 and 8 fell into that category, he said. They attempted to write a handbook for prosecutors and defense attorneys and succeeded in providing a possible basis for post-conviction claims based on the fact that the district attorney or the defense attorney had failed to follow the statute.

Mr. Osburn indicated approval of the Commission's attempt to prescribe Boykin rules because they were essential to the validity of the plea whereas the criteria in section 6 were not essential to the plea's validity.

Judge Burns commented that there was nothing in section 6 to prevent the district attorney from making other agreements, assuming they were appropriate, and paragraphs (a), (b) and (c) of subsection (3) were not intended by the subcommittee to be an exhaustive list. Chairman Yturri remarked that it might not be so interpreted by some judges. Mr. Paillette stated that this criticism could be cured by redrafting the subsection to make it clear that it was not limited to the dispositions listed therein.

In reply to a question by Mr. Blensly as to the intent and purpose of sections 6, 7 and 8, Judge Burns replied that they were meant to get the subject of plea bargaining out in the open and to set some standards. The sections were not dealing with criminals but with public officials who would be responsive to the policy expressed by the legislature. He was of the opinion that they provided suitable broad guidelines by the policy making body of the people to govern the conduct of public officials, and it was unnecessary to include criminal sanctions. Mr. Chandler said that the public was inclined to become upset over what they considered to be unnecessary reductions in sentences whereas if the plea bargaining process were in the open, it would remove a great deal of the public's suspicion. Mr. Paillette added that the proposed statute would for the first time give legislative recognition to the fact that the district attorney does have authority and discretion to engage in plea bargaining.

Representative Cole suggested it would be appropriate to add "or no contest" to paragraphs (a), (b) and (c) of subsection (3) and the members unanimously concurred.

Mr. Keutzer commented that apparently everyone agreed that plea bargaining should be brought into the open but suggested that sections 6, 7 and 8 be incorporated into the commentary as guidelines rather than codifying them. Chairman Yturri replied that it would not have the same effect because the nofmal function of the commentary was to explain a question that might arise with respect to a particular section. If the dignity of legislative approval was going to be given to plea bargaining, it should be spelled out in the statutes, he said.

Representative Cole moved that subsection (3) be amended to make it applicable to no contest pleas and to make it clear that the agreements reached or entered into were not confined exclusively to those set forth. Motion carried without opposition.

Mr. Blensly moved to delete from subsection (3) (c) the words "against the defendant" to cover situations where a co-defendant was involved and to make the provision somewhat broader. Motion carried.

Mr. Chandler moved approval of section 6 as amended. Motion carried. Voting for the motion: Judge Burns, Chandler, Cole, Paulus, Spaulding, Mr. Chairman. Voting no: Blensly.

Section 7. Criteria to be considered in plea discussions and plea agreements. Mr. Paillette advised that section 7 involved some of the same policy questions just decided by the Commission. It discussed what the district attorney may take into account in reaching a plea agreement. From the standpoint of giving visibility to the plea negotiation system and also to add respectability to the system, he believed section 7 was even more important than section 6. It would lay out for all to see the reasons why plea negotiations and plea agreements are a desirable part of the criminal justice system because it set out the bases for allowing a defendant to enter a plea. Again in this section, he said, language should be added to indicate that the district attorney is not limited to the considerations listed.

Judge Burns moved adoption of an appropriate amendment to make it clear that section 7 did not contain an exclusive list of the proper considerations which may be taken into account by the district attorney in plea bargaining. Motion carried unanimously.

Judge Burns moved that section 7 be approved as amended. Motion carried. Voting for the motion: Judge Burns, Chandler, Cole, Paulus, Spaulding, Mr. Chairman. Voting no: Blensly.

Section 8. Responsibilites of defense counsel. Mr. Paillette advised that subsection (2) of section 8 had been amended in subcommittee by deleting "or the defendant" before the last phrase, "in reaching a decision."

Mr. Blensly commented that even more important in section 8 than in the prior sections was the consequence of codifying the responsibilities of defense counsel. To codify this provision, he said, would multiply the problem where the defendant through post-conviction proceedings or habitual criminal proceedings collaterally attacks a conviction several years later on the basis that he was not advised by his counsel of everything of which he should have been advised.

Judge Burns asked if there was anything that would presently prevent him from making such a claim, and Mr. Blensly said he knew of nothing. Chairman Yturri expressed the view that section 8 would help that situation rather than aggravating it. He observed that there were many young lawyers appointed as defense counsel who would be aided considerably by the codification of plea bargaining procedures. To some extent, he said, it would be of assistance in placing them on a parity with a more experienced district attorney.

Judge Burns moved adoption of section 8. Motion carried. Voting for the motion: Judge Burns, Chandler, Cole, Paulus, Spaulding, Mr. Chairman. Voting no: Blensly.

Section 9. Responsibilities of judge. Mr. Paillette advised that while the subcommittee did not disapprove of subsections (2), (3) and (4) of section 9, they did submit them to the Commission without recommendation. They were agreed, however, that subsection (1) was desirable. The balance of the section dealt with the situation in which there was a tentative plea agreement and contemplated a plea that would hinge upon whether or not the judge would allow it. Subsection (2) would permit the court to be advised of the tentative agreement in advance of the time of the plea and the court then could advise the district attorney and the defense counsel whether he would concur in the proposed disposition of the case if the presentence investigation and other information turned out to be consistent with other representations made to him.

Subsection (3) would provide that if the judge concurred with the agreement and later decided that he could not subscribe to it, particularly with respect to snetence concessions, he would advise the defendant of that fact and allow him to withdraw or affirm his plea.

Subsection (4) stated that the judge was not bound by the agreement but would give it due consideration.

Mr. Paillette advised that section 9 was derived from the ABA standards and was meant to be consistent with the policy of giving formal recognition to the plea bargaining process.

Chairman Yturri asked if section 9 should also include no contest pleas and Mr. Paillette replied affirmatively.

Mr. Chandler said that since there appeared to be a division of opinion as to the desirability of all the subsections, the question of approval should be divided. He therefore moved to approve subsection (1) of section 9. Motion carried unanimously.

Subsection (2). Judge Burns advised that he felt quite strongly that sentence concessions were no business of the district attorney and that the judge should be in a position to impose whatever disposition he believed desirable. Frequently, he said, the press of business by both sides was such that they had little or no opportunity to become acquainted with correctional systems or correctional institutions and the programs they offer whereas the court was in a better position to become familiar with them. The adversary system did not necessarily result in a fair disposition of the case reflecting the interests of the public, of the defendant and of the victim, and he contended that these were matters which the judge should have the prerogative of determining, free from any agreement that may have been reached between the adversarial parties.

Mr. Chandler commented that as he read section 9, Judge Burns made a good argument against subsections (3) and (4) but not against subsection (2).

Mr. Blensly said he agreed with Judge Burns that the judge should be the one to make the sentence determination. He noted that section 9 was discretionary and not mandatory, as were the prior sections, but there would nevertheless be strong pressure on the judge from both sides to get him to allow this type of proceeding, and the entire process was bound to reflect the personalities of the participants involved. He added that the majority of defendants did not consider the implications of having a criminal proceeding on their record; their main concern was whether they would have to go to jail. When they knew they were not going to jail if they pleaded guilty but instead would receive probation, they were more apt to plead guilty to a crime they didn't commit because it was easier to plead guilty and get out of jail than to wait 60 days to go to trial.

Representative Paulus said that subsections (2), (3) and (4) made it appear that the judge was participating in plea discussions, and she was of the opinion that the statute should be very clear that the separation of the judge from plea discussions was not being diminished by codification of the plea bargaining procedure. She favored retention of subsection (1) of section 9 and deletion of the balance of the section.

Mr. Osburn commented that it seemed anomalous that the ABA standards on the propriety of plea bargaining should be applied to district attorneys and defense counsel in sections 7 and 8, yet some of the members were now saying that those same standards should not be applied to the courts.

Judge Burns said that this draft, in adopting the ABA standards, reflected the situation which was prevalent in the east in which the plea was not actually entered until after the presentence investigation was concluded. If section 9 was to be adopted, he recommended that it be revised to more accurately reflect the practice in Oregon. In other words, if from the outset the defendant was told that the judge was not bound to go along with the agreement, section 9 should be worded to that effect to be consistent with the current practice and with the rest of the draft.

Mr. Paillette noted that subsection (3) of section 4 required the court at the time of determining the voluntariness of the plea to inform the defendant that the recommendations of the district attorney were not binding on the court.

Mr. Spaulding suggested that subsection (2) be limited in the third line to charges before the court because, as worded, it might involve an agreement not to file other charges that were not before the court.

Judge Burns agreed with Mr. Spaulding and moved to amend subsection (2) to read:

"(2) If a tentative plea agreement has been reached which contemplates entry of a plea of guilty or no contest in the expectation that [~~other charges before the court will be dismissed or that~~] charge or sentence concessions will be granted, ... "

Motion carried unanimously.

Judge Burns said he had no objection to having hortatory legislation directed at judges as well as district attorneys and defense lawyers, as had been suggested earlier. He said he would be satisfied with subsection (2) so long as it was construed to reach the following result: when the parties said a plea agreement had been reached and stated the agreement, the judge could then say to the defendant, "You understand that the maximum is five years, that the matter of sentencing is entirely up to me, and that the district attorney has nothing to say about sentencing. I will accept your plea only if you understand completely that sentencing will be by the court."

Mr. Spaulding commented that the subsection did reach that result but it suggested otherwise. Mr. Paillette advised that subsection (3) of section 4 was intended to take care of that very situation. Judge Burns agreed that section 4 (3) was directed at the recommendations of the district attorney but noted that it said nothing concerning the recommendations of the defense attorney. Representative Paulus suggested that problem could be resolved by amending section 4 (3) to read: " . . . the court shall advise the defendant personally that the plea negotiations are not binding on the court."

Chairman Yturri explained that subsection (2) of section 9 referred to a bargain reached in advance of the time the plea was tendered, and it then went on to explain that the judge may advise the district attorney and defense counsel whether or not he will concur in the agreement. At that point, he said, the judge was free to say, "If everything is as you relate it and the presentence report is satisfactory, I will go along with the agreement except that I will not be bound by any sentence concessions to which you may have agreed." If the judge later discovers that the facts are not as related to him, he may say, "I will not go along with any portion of the agreement, and you have an opportunity to withdraw your plea or you may leave it as it is." He indicated that he could not see how the judge was hampered in any way by the provisions of subsection (2).

Judge Burns said he would vote for inclusion of subsection (2) if appropriate commentary were included to clarify the matters just discussed.

Mr. Chandler moved to approve subsection (2) as amended. Motion carried with Mr. Blensly and Representative Paulus voting no.

Subsection (3). Mr. Chandler moved approval of subsection (3). Motion carried with Mr. Blensly and Representative Paulus again voting against the motion.

Subsection (4). Mr. Spaulding noted that the phrase, "as a result of a prior plea agreement," in subsection (4) implied that the agreement was the only reason for the defendant pleading guilty whereas the reason should be that he pleaded guilty because he was guilty. Judge Burns said there was a plea because there was a plea agreement, and Mr. Spaulding concurred that was one reason but not the total one. Judge Burns disagreed with Mr. Spaulding's interpretation. He thought subsection (4) meant that in this case a bargain had been reached and as a result of that bargain, the defendant entered a plea.

Chairman Yturri indicated that subsection (4) should be amended to apply to no contest pleas and the Commission agreed.

Mr. Chandler moved that subsection (4) be approved with the amendment to make it applicable to no contest pleas. Motion carried with Representative Paulus and Mr. Blensly voting no.

Mr. Chandler moved that section 9 be approved as amended. Motion carried. Voting for the motion: Judge Burns, Senator Burns, Carson, Chandler, Cole, Spaulding, Mr. Chairman. Voting no: Blensly, Paulus.

Section 10. Discussion and agreement not admissible. Mr. Paillette indicated that the no contest plea should be included in both section 10 and the following section. He explained that section 10 was concerned with a plea agreement rather than the plea itself. The section was an attempt, through the ABA recommendations, to encourage open negotiation without the fear that whatever the defendant said might be used against him at a later time.

Chairman Yturri questioned the meaning of "subsequently" and was told by Mr. Paillette that it was intended to mean subsequent to the discussion and the agreement. Mr. Spaulding asked why the first clause of section 10 was necessary at all. Judge Burns replied that one area where the clause might come into play was under the ruling in State v. McClain where it was suggested that when a defendant is sought to be impeached by a prior conviction, the trial judge has discretion to allow some brief explanation to be made by the defendant. He said he would assume that the Commission would not want to prevent that rule from operating.

Chairman Yturri asked why section 10 should not be applicable where a plea of guilty or no contest was entered without any plea bargaining. Mr. Paillette explained that if the discussions did not result in a plea, then nothing that occurred in the discussions or the agreement could be used unless he enters a plea which is not withdrawn. If he enters a plea that is not withdrawn, the protection of the section would not apply. It seemed to him, he said, that the word "subsequently" tied the first clause to the discussion followed by the plea and was intended to mean subsequent to the discussions.

Mr. Paillette said that the section might be clearer if it were drafted in two subsections. Subsection (1) could say "The fact that the defendant or his counsel and the district attorney engaged in plea discussions . . . shall not be received . . . . " Subsection (2) could then contain the exception by saying that subsection (1) shall not apply if the defendant enters a plea of guilty or no contest which is not withdrawn.

Senator Carson commented that another way to draft it would be to add the "unless" clause at the end of the section. He explained that the only time the discussion and agreement were admissible was when the defendant entered a plea of guilty and the rest of the law required it.

Mr. Blensly questioned the breadth of section 10 and asked what the situation would be where the defendant said one thing during the course of the plea negotiations and then testified differently when he took the stand. He asked if his earlier statement would be admissible to impeach him. Judge Burns indicated that the minutes of the subcommittee showed that Mr. Blensly raised the same question during that meeting and was told by Mr. Paillette that that was not the result. Mr. Blensly said that what Mr. Paillette had said at today's meeting would indicate to the contrary inasmuch as he had stated that plea discussions should not be hampered by reason of the fact that something the defendant said might be used against him later.

Chairman Yturri asked if there was any objection to redrafting section 10 in two subsections to read as follows:

> "(1) The fact that the defendant or his counsel and the district attorney engaged in plea discussions or made a plea agreement shall not be received in evidence for or against the defendant in any criminal or civil action or administrative proceeding.
>
> "(2) The provisions of subsection (1) will not apply if the defendant enters a plea of guilty or no contest which is not withdrawn."

On the assumption that section 10 would be adopted as set forth above, Judge Burns said he disagreed with Mr. Blensly's suggestion that a factual statement made during plea discussions could be used as impeaching material during the criminal trial if the plea discussion broke down. The record, however, should be clear one way or the other. He added that if the plea discussions broke down and the district attorney was later permitted to use the defendant's earlier statements against him at trial, it would severely inhibit plea discussions. Chairman Yturri agreed and suggested that the draft should contain a statement to the effect that anything the defendant said during plea discussions could not later be used against him.

Mr. Blensly said that the proposed provision would limit discussions between the district attorney and the defendant but not between the district attorney and the defense attorney. It would be difficult, he said, to determine in every case when a plea discussion was taking place and when it was not. Chairman Yturri said that regardless of where the line of demarcation was drawn, he felt strongly that any statement the defendant made during the process of plea bargaining should not be admissible at trial.

Mr. Gustafson pointed out that the word "fact" referred to "negotiation" and not to what took place during the negotiation process.

Senator Carson said this situation was analagous to an offer of compromise in a civil matter provided for by ORS 41.810. Mr. Spaulding agreed that the situations were comparable but noted that if anyone made an admission of fact during the discussion of a compromise settlement in a civil action, it was admissible.

Chairman Yturri commented that section 10 was confined to the fact that negotiations did occur and not to specific facts admitted by the defendant. Mr. Blensly suggested that the Chairman's statement be included in the commentary as the intent of the Commission. Chairman Yturri then stated that it was the intent of the Commission that the fact that negotiation did occur could not be used in any criminal, civil or administrative proceeding against the defendant.

The Chairman next asked for a decision as to whether statements made by the defendant during the course of the plea bargaining should be admissible. Judge Burns contended that they should not be admitted in cases where the negotiations broke down and the case went to trial.

Chairman Yturri stated that during the course of plea discussions, there was bound to be some discussion of the alleged or reported facts of the crime. If negotiations then broke down and the trial followed, he agreed with Judge Burns that the district attorney should not be permitted to use the defendant's statements made during the course of those negotiations against him; he should get the information elsewhere. Mr. Blensly observed that the district attorney could only negotiate with the defendant through his defense counsel, except in cases where counsel was waived.

Judge Burns asked what the intention of the Commission was in the following situation: while ascertaining the factual basis for the plea at the time the plea is being taken in open court, the defendant admits he was at the scene of the crime but was not aware of what he was doing. On that basis the judge rejects the plea. He asked whether the district attorney should then be allowed to repeat at the trial what the defendant said at the time he was entering his plea. Senator Carson said he could see nothing wrong with allowing the district

attorney to use the fact that the defendant had attempted to enter a plea of guilty but the judge had refused. Mr. Blensly and Mr. Spaulding concurred that at least the statements of the facts he gave under oath and the reasons he wanted to plead guilty should be admissible.

Judge Burns was in disagreement with their position as was Chairman Yturri who pointed out that under present law he did not believe evidence could be introduced at the trial based on statements made between the court and the defendant as to whether or not the defendant was going to plead guilty.

Mr. Coblens commented that when a judge accepted a plea, he asked the defendant what crime he had committed and that was a matter of public record which could hardly be kept secret. In connection with plea discussions, he said that these would ordinarily take place between the prosecutor and the defense attorney and the defendant should not even participate in them. Mr. Blensly pointed out that the plea was required to be voluntary on the part of the defendant. Mr. Coblens said that as a practical matter, the judge in chambers should tell the defense counsel and the district attorney whether or not the plea would be accepted so that if he was not going to accept a guilty plea, the defendant would be aware of it before the plea was entered and would therefore not plead guilty. Chairman Yturri informed Mr. Coblens that the draft contained provision for such a procedure.

Judge Burns pointed out that in Multnomah County there were 307 pre-trials in January of this year, each one of which involved plea discussions with the defendant personally present, so it was not correct to say that it was an isolated instance where plea discussions were carried on without the defendant in attendance.

Mr. Paillette, in an attempt to clarify the statements he had made earlier, indicated that he did not mean to say, nor did the ABA mean to intimate, that section 10 would cover everything that was said during the course of plea discussions. The ABA commentary as well as the commentary to section 10 in Preliminary Draft No. 1 pointed out that there was a split of opinion on the question of whether or not an offer to plead guilty or the fact of engaging in plea discussion was admissible. Neither section 10 of this draft nor section 3.4 of the ABA standards protected the defendant in all cases, and this was what he meant in subcommittee when he said he didn't read those standards to go that far in reply to Mr. Blensly's question as to whether a defendant could be impeached at trial for opposing statements made during plea discussions.

That being the case, Chairman Yturri commented that there was nothing wrong with section 10, but the question remained of whether the Commission wished the section to go farther to cover some of the situations they had been discussing.

Mr. Chandler moved that section 10 be redrafted in two subsections as stated earlier by Chairman Yturri and as set forth on page 26 of these minutes. Motion carried unanimously.

Senator Burns moved that section 10 as amended be approved. Motion carried without opposition. Voting: Blensly, Judge Burns, Senator Burns, Carson, Chandler, Cole, Paulus, Spaulding, Mr. Chairman.

Mr. Spaulding asked if the commentary would contain an explanation as to the admissibility of statements of fact. Chairman Yturri replied that unless the Commission added to the draft, it would only prohibit evidence of the use of an offer to plead guilty or of participation in plea discussions.

Judge Burns suggested that the aspect of admissibility of statements was not completely covered by the draft and proposed that the question be referred to the appropriate subcommittee.

Mr. Chandler moved that the question of whether section 10 should be broadened to exclude the disability of statements made during the course of negotiations be referred to Subcommittee No. 3 for further study. Motion carried.

Section 11. Withdrawn plea not admissible. Senator Burns asked why civil actions and administrative proceedings were not included in section 11 as they were in section 10. Mr. Paillette replied that in section 11 the plea itself had been entered and the case was beyond the negotiation stage. Section 11, he said, reflected the Oregon criminal case law in State v. Thompson, 203 Or 1, 278 P2d 142 (1954), which held that evidence of a withdrawn guilty plea was reversible error. The ABA standards limited cases involving a withdrawn guilty plea to criminal proceedings. Mr. Spaulding pointed out that a withdrawn guilty plea would seldom be admissible in a civil action in any event.

Mr. Chandler moved to adopt section 11 with an amendment to include no contest pleas. Motion carried unanimously. Voting: Blensly, Judge Burns, Senator Burns, Carson, Chandler, Cole, Paulus, Spaulding, Mr. Chairman.

Section 12. Pleading to other offenses. Mr. Paillette explained that section 12 was added by Subcommittee No. 3 at the request of the Bar Committee on Criminal Law and Procedure and apparently had broad support from prosecutors and defense attorneys alike. It would permit defense counsel to request permission to combine several charges or potential charges against a single defendant into one proceeding even though the charges were in different counties. The district attorney of the county in which the plea was to be entered would have to agree

and would also have to have written approval of the district attorneys in the other counties in which the crimes were, or could be, charged. The procedure would constitute a waiver of venue as to crimes committed in other counties as well as a waiver of any formal charge.

Chairman Yturri asked if subsection (1) would include crimes the defendant had committed about which the authorities had no knowledge and Judge Burns replied that if the district attorney did not know of the crime, he could not give his consent to have it tried and such crimes would not therefore be covered by section 12.

Chairman Yturri next asked the meaning of "coordinate courts." Mr. Paillette answered that the term was intended to mean a court of equal jurisdiction. Because of the Oregon court structure, it might not be necessary to include it here, he said, but he had been unable to think of a better term. A defendant could not go into district court, for example, to plead guilty to a felony because the district court would not have jurisdiction in that situation.

Mr. Spaulding asked if the circuit court could try a misdemeanor case even though it would have been brought in a lower court in another jurisdiction. Mr. Paillette replied that there would be no problem with the defendant pleading guilty to a misdemeanor in circuit court, but it could not be done the other way around, i.e., he could not plead guilty to a felony in district court.

Mr. Spaulding asked if section 12 would violate the venue requirement in the Constitution and was told by Judge Burns that the majority of the subcommittee was satisfied that the constitutional provision was waiverable in this situation. Representative Paulus noted that the matter of venue was a constitutional right, not of the state but of the defendant. The Constitution said that the accused had the right to trial in the county in which the offense was committed. If the Commission agreed that he could waive that right and that such a statutory waiver was constitutional, she asked why the proposed statute said that he could not waive that right unless the district attorney agreed to the waiver. Mr. Spaulding believed that if venue could be waived, it could be done regardless of whether the district attorney agreed to the waiver. After further discussion, Mr. Spaulding pointed out that the right of the accused referred to the fact that he was to be tried in the county where he committed the offense, but he did not have the right to be tried in Marion County if the act was committed in Lane County. In other words, he had no right to shop around for the county in which he wanted to be tried, and by the terms of the draft he would be requesting permission to waive the right of being tried in the county in which the crime was committed.

Judge Burns asked what the language in subsection (3) (2) was intended to accomplish. Mr. Paillette replied that it was intended to take care of situations where there were numerous pleading documents

for a single defendant. The written approval of the district attorneys in the other counties would be required, but it would not require a formal information to be filed on each of those charges. Mr. Spaulding believed there should be a formal charge for everything that was going to be taken care of and Mr. Blensly agreed.

Judge Burns said that if a defendant in Yamhill County wanted to waive a Malheur check charge, there would have to be some kind of a document describing and identifying the substance of the Malheur County charge. The section, he said, assumed that he was entering a plea to the Malheur County charge.

Chairman Yturri asked who would make the determination as to the degree of the crime. If it was the intent of the draft that the defendant would be required to set forth the facts of the crime to which he wanted to plead, he asked if the court would then make the determination as to whether it was first, second or third degree. Representative Paulus inquired how the judge would determine the factual basis for the plea if there weren't any pleadings and the defendant had waived the formal charge. Mr. Blensly added that another problem would arise when the defendant tried to prove double jeopardy. He was of the opinion that a formal charge was a necessity to satisfy all these requirements.

After further discussion, Senator Carson moved that section 12 be rereferred to Subcommittee No. 3 for further study. Motion carried.

Section 13. Legal effect of plea of no contest. Representative Paulus moved that section 13 be adopted. Motion carried unanimously. Voting: Blensly, Judge Burns, Senator Burns, Carson, Chandler, Cole, Paulus, Spaulding, Mr. Chairman.

Supplementary Commentary to Preliminary Draft No. 1. Mr. Paillette called attention to page 33 of Preliminary Draft No. 1 where the supplementary commentary pointed out that there were three additional sections in the ABA standards that had not been incorporated in that draft, one of which was section 12 of Preliminary Draft No. 2, just discussed. Another was section 1.7 of the ABA standards providing for a verbatim record of proceedings. He expressed the view that this was an unnecessary addition because in a court of record, a record would be made without requiring one by statute. The Commission expressed concurrence with his position.

Plea withdrawals. The third section referred to in the supplementary commentary, Mr. Paillette said, was more important and dealt with the criteria for allowing withdrawal of pleas as set forth in section 2.1 of the ABA standards. He had not included this criteria in the draft because in Oregon it had been, and would probably continue to be, at the discretion of the court. Senator Carson suggested the subject be covered by commentary. Chairman Yturri

said he believed the criteria should be left to the discretion of the court and suggested that the commentary state that the Commission did not see fit to adopt section 2.1 of the ABA standards for the reason that criteria relating to withdrawal of a plea in Oregon had been left to the discretion of the court in the past and they believed it should continue to be handled in that manner. The members concurred with the Chairman's suggestion.

Mr. Paillette noted that there was a statute with respect to withdrawal of pleas, ORS 135.850, which would not be changed by the proposed draft.

The meeting adjourned at 4:45 p.m. and reconvened the following morning at 9:30 a.m.

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