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OREGON CRIMINAL LAW REVISION COMMISSION

Twenty-Ninth Meeting, April 22, 1972

Minutes

Members Present: 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
Attorney General Lee Johnson
Representative Norma Paulus
Mr. Bruce Spaulding
Representative Robert M. Stults

Excused: Mr. Donald E. Clark
Representative Leigh T. Johnson

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

Also Present: Sheriff Jack T. Dolan, Benton County
Mr. David L. Hattrick, Deputy District Attorney, Multnomah County
Mr. James Hennings, Metropolitan Public Defender, Portland
Mr. M. Chapin Milbank, Chairman, Oregon State Bar Committee on Criminal Law and Procedure

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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 March 9 and 10, 1972

Judge Burns moved that the minutes of the Commission meeting of March 9 and 10, 1972, be approved as submitted. Motion carried unanimously.

Plea Discussions and Agreements; Preliminary Draft No. 3; April 1972

Mr. Paillette recapitulated the revisions approved by the Commission at its meeting on March 9 when Preliminary Draft No. 2 on plea discussions was considered:

Section 1. Pleading by defendant; alternatives. The "no contest" plea was added to section 1 and to all subsequent sections where reference was made to a plea of guilty.

Section 2. Time of entering plea; aid of counsel. Subsection (4) was amended in accordance with the language approved by the Commission. [See Commission Minutes, 3/9/72, p. 11.]

Section 3. Defendant to be advised by court. Subsection (2) (b) was revised for clarification only; the substance and intent was not disturbed. [See Commission Minutes, 3/9/72, p. 14.]

Section 4. Determining voluntariness of plea. Subsection (2) was amended to make the section applicable to those situations covered in section 3.

Section 5. Determining accuracy of plea. Commentary was added to section 5 to make it clear that the section was not intended to preclude an Alford type plea.

Judge Burns said the record should be clear that a plea of no contest was not one that a defendant could enter as a matter of right and that it could not be accepted without the approval of the court. Mr. Paillette advised that the premise submitted by Judge Burns was implied in the draft but was not expressly stated.

In reply to a question by Chairman Yturri as to why a defendant should not as a matter of right be allowed to enter a no contest plea, Judge Burns explained that there might be a circumstance not constituting a true Alford situation where the defendant nevertheless wished to enter a plea of no contest, and it was his opinion that he should not be allowed to do so without court approval. Traditionally, in jurisdictions where a no contest plea is permissible at the present time, it is subject to the approval of the court, and he believed this practice should be continued. In the past, he said, defendants had sought to enter no contest pleas in certain types of cases because of the desirability of the side effects or lack of side effects that followed. For example, in anti-trust and tax cases the defendant sometimes entered a no contest plea to avoid a trial and to circumvent what, for him, could be undesirable side effects. A policy question was thereby presented as to whether in a given situation he should be allowed to escape those side effects. If he were permitted to enter a no contest plea as a matter of right, the decision was placed in the wrong area, i.e., with the defendant.

Chairman Yturri agreed with Judge Burns' premise and recommended that if the intent of the Commission was to deny a no contest plea as a matter of right, that specific provision should be contained in the draft. Judge Burns believed the Chairman's recommendation was unnecessary. He thought the draft was clear that no contest pleas were essentially intended to apply to Alford situations, and it was quite evident that in any Alford situation the court was empowered to refuse to accept the plea on the ground of insufficient facts, etc.

Senator Carson was of the opinion that if Judge Burns' position were approved, the draft should set forth the criteria that the judge should use in permitting or refusing a no contest plea. Chairman Yturri expressed agreement that judges should apply uniform standards in this area.

Judge Burns observed that there was a feeling that when a defendant pleaded no contest, that was somehow less morally reprehensible than a guilty plea even though he was still convicted of the crime. He added that at the present time some judges do not accept Alford pleas and under this draft that discretion would not be disturbed because there was nothing in the proposal to force them to accept such a plea. Representative Stults commented that in instances where the defendant was convicted, he could not see that it made any difference whether he had entered a plea of guilty or a plea of no contest.

After further discussion, Judge Burns read proposed Federal Rule 11:

> "A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice."

Chairman Yturri indicated approval of including language to that effect in the proposed statute. Mr. Johnson so moved and the motion carried unanimously.

In reply to the Chairman's inquiry, Mr. Paillette stated that the amendment just adopted would probably be placed in section 1 of this Article.

Section 6. Plea discussions and plea agreements. Mr. Paillette continued with his explanation of the revisions in Preliminary Draft No. 3. Section 6 was amended to make it clear under subsection (3) that the agreements reached or entered into were not confined exclusively to those set forth therein. It also deleted "against the defendant" from paragraph (c) of subsection (3) to cover situations where a co-defendant was involved and to remove the implication that the provision was applicable only to the defendant.

Chairman Yturri asked if the Commission had adequately discussed the question of whether the person to make the final determination as to whether a negotiated plea was to be accepted should be the district attorney or the judge. Mr. Paillette replied that the Commission had decided at its last meeting that the final decision was to be made by the court.

Section 7. Criteria to be considered in plea discussions and plea agreements. Section 7 was amended in the introductory paragraph to make it clear that the section did not contain an exclusive listing of the proper considerations which may be taken into account by the district attorney in plea bargaining.

Section 8. Responsibilities of defense counsel. The only revision in section 8 was an amendment to include the no contest plea.

Section 9. Responsibilities of trial judge. Subsection (2) of section 9 was amended in accordance with the revision approved by the Commission [See Minutes, 3/9/72, pp. 23, 24] and additional commentary in explanation of subsections (2), (3) and (4) was inserted on page 26 of the draft.

Mr. Johnson was of the opinion that section 9 contained too much detail. Mr. Chandler agreed that the draft attempted to cover a great deal of territory but at the same time, he said, the purpose was to spell out to a defendant not only what his lawyer told him but also what he could actually read and understand for himself.

Representative Cole expressed concern that the defendant might not have the right to withdraw his plea in all instances when the judge, having indicated approval of the plea bargain, later changed his mind for some reason and refused to go along with the bargain. Mr. Chandler said his understanding of the draft was that the defendant had an absolute right to withdraw his plea in those circumstances.

Chairman Yturri called attention to subsection (3) of section 9 which said "he shall so advise the defendant and allow the defendant a reasonable period of time in which to . . . withdraw his plea . . . . " Mr. Paillette confirmed that the intent was to allow the defendant to withdraw his plea and added that even if the statute were not clear on that point, under the Santobello opinion, if the defendant did not get what he bargained for, it was reversible error to refuse to allow him to withdraw his plea. Representative Cole indicated that his concern was satisfied by this explanation.

Section 10. Discussion and agreement not admissible. Mr. Paillette advised that the Commission had rereferred section 10 to Subcommittee No. 3 principally for the purpose of deciding whether statements or admissions made by a defendant during the course of plea negotiations should be admissible at trial. The subject was discussed

at great length by the subcommittee and also by the Bar Committee on Criminal Law and Procedure. As a compromise and at the recommendation of the Bar committee, Subcommittee No. 3 ultimately adopted subsection (2) of Preliminary Draft No. 3 which would allow the use of such statements or admissions for impeachment purposes at a later trial.

Mr. Hennings indicated that if section 10 were enacted, he would not allow his client to be present at any plea discussions because of the danger of the possibility of impeachment. Furthermore, he said, if the district attorney stated, "You committed this crime," and the defendant failed to deny it, that could be construed as an admission. Chairman Yturri asked how often clients were present at plea negotiations at the present time and was told by Mr. Hennings that in Multnomah County they were present in every case under the existing procedure.

Judge Burns emphasized the importance of having the client present during plea discussions because that was often the time when the defendant finally realized the seriousness of the charges and the gravity of the case the state had against him and that was when a substantial share of pleas came about.

Mr. Milbank advised that his clients were never present when he engaged in negotiations with the district attorney. The majority of the Bar committee, in considering this matter, believed that the defendant should tell his attorney the truth, and if he did not do so, he should know that the truth would come back to haunt him when he later took the witness stand. This furnished the attorney with a good lever for getting the truth from his client.

Judge Burns outlined another situation of concern to him should the proposed section 10 be adopted: the plea agreement has been disclosed in open court and the court is examining the defendant and eliciting information to determine whether a factual basis exists. The judge then refuses to accept the plea because there is not sufficient factual basis and it is not a proper Alford plea. At that point the defendant has said all manner of things and when he goes to trial, those statements may be used to impeach him. Such a circumstance, he said, would severely frustrate the court where it was a close question as to whether the plea should be accepted, and it would leave the defendant in a very poor position in any later trial.

In response to a question by Chairman Yturri, Judge Burns advised that in Multnomah County the defendant was required to be personally present at the pre-trial conference and, while he was not always actually in the room during plea bargaining discussions, he was nevertheless nearby so that he could personally ratify the deal after agreement was reached.

Mr. Johnson concurred with Mr. Hennings and Judge Burns that there should be more protection for statements made by the defendant during plea bargaining discussions than was provided in section 10. Chairman Yturri observed that it seemed wrong to him to permit the district attorney to use the defendant's statements made during plea discussions for impeachment purposes when he didn't have that information before the discussions took place, even though he was ready to go to trial, and could not have obtained it were it not for the procedure established by this section.

Mr. Johnson pointed out that the proposed section failed to define the point in time when immunity applied. It was not uncommon, he said, for the defendant at the time of arrest to make a comment to the officer that involved plea bargaining, and he contended that the proposed section was not clear that it was intended to be applicable to discussions between the district attorney, defense counsel and the defendant which took place after the arrest and prior to trial. Mr. Blensly and Representative Cole expressed agreement with Mr. Johnson and they pointed out that it was not unusual for the district attorney and the defense counsel to be working out a bargain while at the same time the defendant at the jail was trying to make a deal with the police.

Mr. Paillette outlined the provisions of subsection (1): paragraph (a) referred to "the defendant or his counsel and the district attorney" which clearly involved all three participants; paragraph (b) again included all three; paragraph (c) mentioned the defendant or his attorney. He explained that the original section 10 was drawn from section 3.4 of the ABA standards and the commentary to the ABA section said, "The above standard is limited to discussions and agreements with the prosecuting attorney."

Mr. Spaulding proposed to resolve the problem by inserting "to the district attorney" after "or his attorney" in paragraph (c).

Mr. Johnson maintained that all three paragraphs under subsection (1) should be written in terms of a discussion with the district attorney and that reference to the prosecutor should be included in the opening paragraph to make it clear that a deal made between the defendant and the police was not intended to be covered by the section. He proposed to amend the opening sentence of subsection (1) by inserting "made to the district attorney" after "none of the following."

Representative Stults posed the following hypothetical situation: a plea discussion takes place between the defendant, his attorney and the district attorney. The prosecutor is short one element of the crime and agrees to a lesser charge. The defendant goes back to jail to await his appearance before the judge and says to the jailer, "I'm glad I made that deal because I actually committed the crime that the district attorney wanted to charge me with in the beginning." The

jailer repeats the defendant's admission to the district attorney who then withdraws from the deal. Representative Stults asked if the district attorney in that situation could use the defendant's statement against him. Mr. Chandler replied affirmatively and Mr. Spaulding agreed that such an admission should be admissible. Mr. Paillette pointed out that the statement was not part of the plea agreement in that instance, and Judge Burns concurred that there was nothing in section 10 to bar its admission into evidence.

Judge Burns moved to amend paragraph (c) of subsection (1) to read:

" . . . made by the defendant or his attorney <u>to the district attorney</u> and as a part of the plea agreement."

Motion carried. Mr. Blensly voted no.

With respect to paragraph (c), Mr. Blensly pointed out that it referred to a "plea agreement" and observed that this language would not cover a situation where there was a plea discussion but no agreement. He said he was also concerned about the problem raised by Mr. Johnson as to the point at which plea discussions began. Sometimes, he said, the defendant tried to make a deal even before he was arrested and the section was not clear as to whether that conversation was a part of a plea discussion. Chairman Yturri suggested that the problem might be resolved by setting the time of arrest as the starting point.

Mr. Hattrick advised that the Multnomah County district attorney's office had discussed Preliminary Draft No. 2, which would not have excluded statements made during plea discussions, and had indicated approval of that provision. Following the subcommittee's approval of section 10 as set forth in Preliminary Draft No. 3, where the statements could be used only for impeachment, the members of his office had again considered the proposal and their reaction was that the section contained a reasonable compromise. However, if the Commission were to go so far as to say that all statements made by the defendant would be excluded, he wanted the members to consider the fact that there was a distinct difference between inquiries made of the defendant by the judge, who had a duty to question him when he was entering his plea in order to determine if there was a factual basis for the plea, and the coercive atmosphere in which the defendant was placed when discussing his case with the district attorney during plea discussions. Plea bargaining with the district attorney was an entirely different type of situation because the prosecutor was under no duty to inquire of the defendant as to what he did or did not do and the defendant was under no duty to answer and had presumably been advised by his counsel of his rights.

Chairman Yturri pointed out that section 9 barred the judge from engaging in plea discussions and section 6 could be amended in subsection (1) to read, " . . . the district attorney at any time after arrest or indictment may engage in plea discussions for the purpose of reaching a plea agreement." Mr. Johnson was of the opinion that a framework should be set up for plea discussions and it should be clear that whatever took place during those discussions would not be used against the defendant. He observed that the Chairman's suggested amendment would be an improvement in the draft, but he believed it would be preferable to set up a formalized procedure for plea bargaining.

Mr. Blensly said he would object to barring plea negotiations prior to arrest. There were situations, he said, where the individual could not be arrested until he had given certain information to the prosecutor, and he would not give that information until the district attorney agreed to a particular charge.

Chairman Yturri recapitulated the choices facing the Commission:

(1) Make any statements made during plea discussions by the defendant not admissible. In his opinion, he said, this was the right thing to do.

(2) Make all statements admissible.

(3) Make statements admissible for impeachment purposes only.

The other problem to be resolved was how to define the point at which plea bargaining may begin and when the provisions of this Article apply.

Mr. Johnson moved that section 10 be amended to provide that immunity shall not apply until after arrest. No vote was taken on this motion.

Mr. Johnson next suggested that the defendant or his counsel be given written statutory notice by the district attorney as to when plea bargaining would begin. Chairman Yturri protested that there would inevitably be conversations prior to receipt of the written notice, and Mr. Spaulding concurred that such discussions were unavoidable. Mr. Blensly recommended that it might be better to place the burden on the defendant rather than the district attorney to give written notice as to when the immunity would attach. Chairman Yturri maintained that either of the proposals was far too restrictive; it was impossible, he said, to provide for every known situation that might occur in the future and furthermore, to take such an approach would raise all kinds of waiver problems.

Mr. Hennings said he would not find it objectionable to make the proposed statute applicable to the time following arrest or indictment or information with a further provision for a written agreement relating to negotiation with the district attorney which would be applicable to the time when the individual was not yet in custody. Chairman Yturri commented that in that situation anything the defendant said prior to receipt of the written notice would be admissible as to the crime charged. Mr. Hennings said admissibility would depend on the facts of the case. The statement would be admissible absent a question of voluntariness if it were made prior to arrest, indictment or an agreement to negotiate, and immunity would apply only after arrest, indictment or written agreement.

Tape 8 - Side 1

Following a brief recess, Representative Cole moved to amend paragraph (c) of subsection (1) to read:

> " . . . as a part of the plea <u>discussions or</u> agreement."

Motion carried.

Mr. Spaulding suggested that "or administrative proceeding" be added at the end of subsection (2). He noted that there was similar language in the opening paragraph of subsection (1) and he believed the exception in subsection (2) should be equally broad. Mr. Paillette advised that the Bar committee and the subcommittee had purposely limited the exception to a trial, and adoption of the motion would go beyond the recommendation of both groups.

Judge Burns commented that the "chilling effect" of the proposed statute would be present at the trial and not in any ancillary proceeding and opposed Mr. Spaulding's proposal to amend subsection (2). Mr. Spaulding pointed out that the section was changing a rule of evidence that applied to civil cases. If the plea were not withdrawn, the statement or admission could be used in "any subsequent trial." Judge Burns stated that the intent of the subsection was that it should apply only to the trial of the case involved. Mr. Spaulding stated that if that was the intent, it was not clear as worded.

Mr. Paillette read from the minutes of the Bar committee meeting on April 1 when this section was discussed:

> "After considerable discussion, the committee reached agreement that the content of the plea bargaining process including statements made by the defendant should not be admissible in later proceedings. However, the prohibition should be qualified to the extent that if the defendant later testifies, he should not be allowed to make inconsistent statements unchecked by impeachment."

In the event a plea agreement was reached wherein the defendant agreed to plead to a lesser included offense and then entered that plea, Chairman Yturri asked Mr. Spaulding if in that situation he wanted any admissions the defendant may have made to be used for impeachment purposes in any subsequent administrative proceeding or trial. Mr. Blensly interposed an example of the problem raised by Mr. Spaulding: a trial follows plea negotiations on a DUIL charge; thereafter the Department of Motor Vehicles holds a hearing on whether the defendant's license should be revoked. In that circumstance the defendant could be impeached at his criminal trial but the same evidence could not be used at the administrative proceeding.

Before voting on this section, Mr. Blensly asked that the Chairman recognize Sheriff Dolan from Benton County for the purpose of hearing his comments with respect to plea negotiations.

Sheriff Dolan said that one of the concerns in small jurisdictions was the point at which the district attorney entered into investigations and contact with the defendant and this often occurred before arrest. It would strike a blow at all small police organizations in Oregon, he said, to give the defendant immunity from any conversations he had with the police or prosecutor at that time.

Sheriff Dolan said there was a consensus among all the sheriffs that plea bargaining was only an expediency where the system was unable to appropriately handle those judicial functions. Two things had caused this: (1) Too much has been thrown into the criminal justice system; (2) The police themselves are not using enough discretion to determine whether to invoke the criminal justice process. In Benton County, he said, plea bargaining had not been accepted by the police as a legitimate function but instead they attempted to charge the defendant with an appropriate crime. At the same time the police did not feel compelled to invoke the criminal justice process in many of the less serious social problems. Sheriff Dolan said that in an adjoining county where there was a considerable amount of plea bargaining, the police traditionally had charged the defendant with a higher crime and then reduced the charge in the plea bargaining process.

Mr. Chandler said he could not see where Sheriff Dolan's concerns were applicable to the draft under consideration. Nothing the Commission had discussed today, he said, would cause any problem in Benton County so far as charging a defendant with a crime was concerned. Chairman Yturri commented that the former district attorney of Benton County, Mr. Frank Knight, had been a member of this Commission for several years, and he had never indicated that he did not resort to plea bargaining in his jurisdiction nor that he was opposed to the concept.

Mr. Blensly stated that Sheriff Dolan's second point was valid as far as the public was concerned. He said the system should be designed to convict those persons who are guilty and if a defendant makes statements freely and voluntarily of his involvement in a crime under non-coercive circumstances, the Commission should be seeking a way to use those statements against him rather than looking for a way that they cannot be used against him. Chairman Yturri's view was that it bordered on entrapment to use statements made by the defendant during the course of plea bargaining because it was certainly an invitational type of situation under which those statements were made.

Senator Burns indicated that both points Sheriff Dolan had made were valid and agreed that police and district attorneys should strive to indict for the appropriate crime rather than overindicting in order to coerce pleas and, secondly, there should be greater cooperation between the police and the district attorney.

Mr. Johnson reiterated his concern that the draft was removing the district attorney from the area of preliminary interrogations and again expressed his objection to including an immunity provision in this Article.

After further discussion, Mr. Spaulding restated his earlier motion to amend subsection (2) to read:

> " . . . is used for impeachment purposes [~~at a subsequent trial~~] in any criminal or civil action or administrative proceeding."

Motion carried.

Mr. Blensly moved to delete paragraph (c) of subsection (1) of section 10. Motion failed.

Judge Burns moved that the last two lines of subsection (2) be deleted and that a period be substituted for the comma after "withdrawn". Mr. Spaulding explained that the result of the motion would be to prohibit the district attorney from using statements or admissions made by the defendant at any trial. Vote was then taken on Judge Burns' motion and it carried. Voting for the motion: Judge Burns, Chandler, Paulus, Spaulding, Stults, Mr. Chairman. Voting no: Blensly, Senator Burns, Cole, Johnson.

Representative Paulus moved approval of section 10 as amended. Motion carried. Voting for the motion: Judge Burns, Senator Burns, Chandler, Cole, Paulus, Spaulding, Stults, Mr. Chairman. Voting no: Blensly, Johnson.

Section 11. Withdrawn plea or statement not admissible. Mr. Paillette explained that the subcommittee, although not specifically directed to do so by the Commission, had, at the recommendation of the Bar committee, amended section 11 by the addition of subsection (2) to impose the same restriction in that section as the one contained in

section 10. In view of the action just taken by the Commission, however, subsection (2) would now require a conforming amendment. Also, Mr. Paillette said, no contest pleas were not included in section 11 and should be incorporated to make it consistent with the rest of the draft.

Judge Burns moved adoption of the following amendments to section 11:

(1) In subsection (1) insert "or no contest" after "A plea of guilty".

(2) In subsection (2) insert a period after "criminal proceeding" and delete the balance of the sentence.

Motion carried.

Section 12. Pleading to other offenses. Mr. Paillette advised that section 12 had been rereferred to subcommittee by the Commission at its March meeting. It was discussed in considerable detail at the April 1 meeting of the Bar committee as well as at the meeting of Subcommittee No. 3 on April 8. The section as presented to the Commission at this time had not been approved by the subcommittee but was drafted in accordance with the directive issued at that meeting. [See pages 5 - 8 of Minutes, Subcommittee No. 3, 4/8/72, for discussion.]

Mr. Paillette explained the definitions of the two terms used in section 12, i.e., "initiating county" and "responding county," and described the procedures set forth in the balance of the section. Most of the section, he said, was original language he had drafted to carry out the subcommittee's directive.

Judge Burns noted that paragraphs (a) through (d) in subsection (2) were conjunctive and questioned whether it was intended that all four conditions must exist before the section could operate. It read, he said, as if there had been an information filed but no indictment returned. He was concerned about a situation where an indictment had been returned in, for example, Harney County while the defendant was in Marion County and wanted to clear up the charge in Harney County. He wanted to make certain that the language of the subsection would not prevent that from happening regardless of whether the case was at the pre-indictment or the post-indictment stage.

Mr. Paillette advised that the intent was to make the section applicable to either circumstance. It was stated in the conjunctive to permit all of the conditions -- venue, notification to the court, etc. -- to be taken care of in one document.

Judge Burns asked if section 12 contemplated a guilty plea situation rather than transfer of the trial and received an

affirmative reply from Mr. Paillette. In answer to a further question by Judge Burns, Mr. Paillette confirmed that the section applied only to pending charges that had been filed.

Judge Burns moved approval of section 12 and the motion carried unanimously.

Mr. Chandler moved that the entire Article on plea discussions and agreements be approved as amended. Motion carried. Voting for the motion: Judge Burns, Senator Burns, Chandler, Cole, Paulus, Spaulding, Stults, Mr. Chairman. Voting no: Blensly, Johnson.

At this point the Commission recessed for lunch and reconvened at 1:00 p.m.

Afternoon Session

Members Present: Senator Anthony Yturri, Chairman
Senator John D. Burns, Vice Chairman
Mr. Donald R. Blensly
Judge James M. Burns
Mr. Robert W. Chandler
Representative George F. Cole
Attorney General Lee Johnson
Representative Norma Paulus
Mr. Bruce Spaulding
Representative Robert M. Stults

Staff Present: Mr. Donald L. Paillette
Mr. Bert Gustafson

Also Present: Mr. M. Chapin Milbank
Mr. David L. Hattrick

Minor Traffic Offenses; Guilty Pleas and Penalties

Mr. Paillette reviewed the action of the Commission in directing the staff to inquire of the Traffic Safety Commission their views on elimination of jail sentences for minor traffic offenses. [See Commission Minutes, 3/9/72, pp. 6-9.] He advised that he had directed an inquiry to Gil Bellamy, Administrator of the Traffic Safety Commission, and while he had not received a written reply from Mr. Bellamy, he had talked with him by telephone that morning at which time he expressed the following views:

(1) The Traffic Safety Commission is not inclined to support a "fine only" approach to minor traffic offenses; and

(2) As a practical matter, they did not feel anyone would be sentenced to serve a jail term for a minor traffic offense without his having been brought before the court, notwithstanding the fact that there is provision in the law for, in effect, pleading guilty by mail. Normally, in cases where the defendant is sent to jail, the bail posted by mail is returned and the defendant is advised to appear in court to answer the charge.

Mr. Johnson asked if Mr. Bellamy had submitted any statistics on the number of jail sentences imposed for minor traffic offenses and was told by Mr. Paillette that he had not.

Mr. Paillette advised that he had also written to Mr. Chester W. Ott, Administrator of the Motor Vehicles Division, requesting his views on confining penalties for minor traffic offenses to fines. A copy of Mr. Ott's reply dated April 17, 1972, is attached hereto as Appendix A.

Mr. Johnson favored elimination of all jail sentences for minor traffic offenses and Mr. Chandler commented that if jail sentences were not being used, it seemed unwise to retain them. Mr. Johnson suggested that Mr. Bellamy be requested to furnish the Commission with statistics on the number of jail sentences being imposed for minor traffic offenses.

Mr. Paillette pointed out that anything the Commission might do in this area so far as the draft on guilty pleas was concerned would not apply to administrative proceedings conducted by the Department of Motor Vehicles. Also, if a person's license were suspended and he was then cited for a traffic offense, it would be a major traffic offense and he would be required to appear in court.

Representative Paulus said she did not like to see the Commission's deliberations evince an attitude that fines for minor traffic offenses were sufficient in every instance. She advocated more stringent legislation against the individual involved in drunk driving charges who in a majority of cases was the same individual whose license was revoked but who continued to drive. She suggested that the next session of the legislature might want to consider revising penalties for certain violations, but if there was nothing else that could be done to keep an offender from driving, as a last resort he could be put in jail. Mr. Johnson pointed out that the proposal he supported was aimed only at minor traffic offenses; drunk driving, reckless driving and driving without a license were major offenses.

Mr. Paillette reminded the members that as a result of the passage of ORS 161.105 (2) under the Criminal Liability Article of the Criminal Code, both the legislature and the Commission were on record as supporting the position that if an offense outside the Criminal Code did not require culpability, it should be punishable as a violation.

Judge Burns commented that he was not at all sure that putting drunk drivers in jail was the panacea that many people believed it to be. In Portland, he said, an extensive federal project was being conducted that had resulted in clogging four district courts instead of the two envisioned, had not apparently resulted in any substantial reduction in fatalities, and there was no end in sight to the amount of business the police could generate for the courts every week end. Furthermore, the legislative directive to judges that everyone spend two days in jail had resulted in the Portland area in frightful conditions on Friday and Saturday nights in every possible holding facility, again with no apparent reduction or improvement in the number of traffic accidents.

Chairman Yturri directed Mr. Paillette to obtain statistics from Mr. Bellamy on the number of jail sentences imposed as a result of minor traffic violations and, if it appeared necessary, to request him to appear before the Commission to testify and to present specific recommendations.

Invitation to Attend Oregon Sentencing Institute

Judge Burns issued an invitation to all members of the Commission as well as other interested individuals to attend the second annual Oregon Sentencing Institute at the Thunderbird Motel in Portland on April 27 and 28. Panel discussions, practice sentencing techniques and two excellent speakers were on the agenda, he said.

Grand Jury; Proposed Constitutional Amendment

Mr. Paillette reported that at the Commission meeting on March 10 in discussing the optional indictment/information system and the direction the Commission would take in attempting to improve and speed up the criminal justice system with respect to charging crimes in circuit court, the subcommittee was directed to redraft HJR 12, or its equivalent, and to revise ORS chapter 132 to accomplish four specific recommendations. [See Commission Minutes, 3/10/72, pp. 43, 44.] The subcommittee was also directed to return to the Commission an alternative to the second recommendation with respect to prohibiting the district attorney from going to the grand jury after a preliminary hearing and bind over. The subcommittee at its meetings on April 8 and April 18 recommended that this provision not be included in either the constitutional amendment or the proposed statutory law. If the Commission disapproved of that course, the subcommittee further recommended that such a provision be contained in the statutory law rather than in the Constitution.

Mr. Paillette called attention to the three drafts he had prepared to carry out the Commission's directive with respect to a constitutional amendment. Rough Draft No. 1, he said, was an amended version of the existing Constitution and included the prohibition against the district attorney going to the grand jury after a bind over. This draft was rejected by the subcommittee at its meeting on

April 18. Rough Draft No. 2 did not contain the restriction regarding the district attorney going to the grand jury and was a complete restructuring of section 5, Article VII, of the Constitution to more clearly set out the different elements involved. It attempted not only to improve the structure and format but also to include the optional information/indictment system contained in HJR 12.

Rough Draft No. 2 as amended, a copy of which is attached hereto as Appendix B, was approved by the subcommittee and in subsection (5) contained a revision to the original draft in the language relating to probable cause. The intent was to apply a probable cause test not only to the finding of fact that the crime had been committed but also to the finding that the defendant was the one who committed it. As in the earlier draft, it contained no restriction on the district attorney's option to go to the grand jury after a bind over.

Judge Burns indicated his preference for the drafting technique employed in the original subsection (5) of Rough Draft No. 2 and said he saw no necessity to include "probable cause" twice as in the amended version. Mr. Blensly said the revision had been made because he had questioned whether the meaning was clear under the first draft that probable caused modified the reference to the person who committed the crime. Judge Burns was confident that where probable cause was stated at the outset, it applied to both situations in the absence of grammar that would dictate a different meaning. Mr. Paillette explained that his intent when he drafted the language was that "probable cause" was to apply to both findings.

Chairman Yturri asked the reason for eliminating the prohibition against the district attorney going to the grand jury after a preliminary hearing and a bind over. Mr. Paillette stated one argument was that many times the district attorney was not able to present an adequate case at the preliminary hearing stage and his case at that early time might contain some defect that could be cured later.

Mr. Blensly pointed out that the amended draft eliminated misdemeanors from the constitutional revision, the intent being not to require indictment on a misdemeanor in circuit court. He indicated that at the subcommittee meeting Mr. Robinette, Washington County District Attorney, had questioned whether this change in language would prohibit bringing a misdemeanor charge in circuit court. Representative Paulus commented that neither she nor Mr. Blensly read that meaning into the proposal and Mr. Robinette was in doubt as to its interpretation.

Mr. Johnson was of the opinion that the grand jury was being considered in a historical setting rather than from the standpoint of its usefulness today. At the present time, he said, it served two useful purposes, both advantageous to the prosecution: (1) It was a method whereby the prosecuting attorney could "wash out" certain

cases; and (2) it was a useful discovery device. He maintained there was no benefit in the grand jury system so far as the defendant was concerned, a statement with which Mr. Spaulding disagreed. Mr. Johnson pointed out that the defendant had no right to appear, no right to counsel, no right to cross examination, virtually no control over the evidence going to the grand jury and when the grand jury charged someone, it gave that charge a dignity it did not deserve. He urged that the whole question be considered from the standpoint of the purpose the grand jury served in today's society. His personal opinion was that either the grand jury should be abolished or its use should be totally optional with the district attorney.

Representative Paulus recalled that it was pointed out at the last Commission meeting that one of the benefits of the grand jury system was the secrecy aspect wherein an individual's identity could be protected and he would not be publicly labeled as, for example, a sex offender if the grand jury failed to indict.

In response to the Chairman's request for an explanation of the Florida grand jury system, Mr. Paillette explained that the Florida law had for many years allowed the district attorney to charge a felony directly in circuit court on information without a preliminary hearing. Recently the U. S. District Court for Southern Florida had held that this system was a violation of due process and the State of Florida was directed to submit proposed new rules for requiring a probable cause hearing following the filing of an information. Those rules were submitted and had been approved. They contained the provision that following a filing of an information in circuit court, the state shall provide a probable cause hearing on the charge unless the defendant waives the hearing.

Judge Burns indicated his personal preference for the Washington system in which the grand jury was preserved only for crimes involving official malfeasance, misfeasance, etc. He said he would also approve of filing an information directly in the circuit court without a preliminary hearing and bind over but he said he was persuaded by political realities that it would be impossible to get a revision passed that did not contain a probable cause hearing before a magistrate. Chairman Yturri expressed agreement that the grand jury should be limited and said he would favor the Florida system, possibly with an extension to make it applicable to district courts as well as circuit courts.

Mr. Blensly cited a case the grand jury had considered in his county wherein an apparently innocent person was not indicted and there was consequently no blot on his record. In the absence of the grand jury to handle that type of case, he said, the individual would have been charged with the crime. Judge Burns said that problem would

be resolved if the district attorney were given subpena powers to compel witnesses to come in for the investigatory phase of the case to furnish evidence and records to the district attorney. Such a case could then be washed out by the prosecutor.

Mr. Chandler suggested that some consideration be given to recommendations that may be made by the Judicial Reform Commission. If the Criminal Law Revision Commission were to make one type of revision to the grand jury system and the Judicial Reform Commission another, it could cause a problem. Chairman Yturri expressed the view, and Mr. Spaulding agreed, that this Commission should not wait to see what the other body was going to do before proceeding.

Senator Burns admitted there was a great deal of truth in Mr. Johnson's views concerning the grand jury but at the same time the grand jury served an effective and salutary function in certain isolated cases. He proposed a middle ground between the present system and complete elimination of the grand jury: (1) Prosecution by information in circuit court after bind over on the same charge in a lower court; (2) the grand jury may be convened to consider a case if requested by the defendant; and (3) the grand jury may consider certain cases upon application by the district attorney and approval by the court.

Mr. Paillette advised that Rough Draft No. 2 would accomplish Senator Burns' first and third points but not the second. He remarked that if his second proposal were adopted, virtually every case would go before the grand jury, and Judge Burns agreed. One of the main reasons the defense attorneys were supporting the optional system, Mr. Paillette said, was that it would hopefully get their clients to trial sooner.

Mr. Blensly observed that Rough Draft No. 2 retained the advantages of the grand jury inherent in the present system and at the same time cut down the delay, the expense and the duplication. Chairman Yturri replied that it gave the district attorney the option of going either way and he was not convinced that it was absolutely right, after the defendant was bound over, to give the district attorney the option of submitting the case to the grand jury without first appearing before the court and giving some reason for doing so.

Judge Burns said that there were two problems involved. One was in connection with a case where there was a serious injury and the victim died after the bind over. The other was where there was an inappropriate magistrate who consistently bound over at a lesser level.

Mr. Spaulding commented that traditionally the preliminary hearing was not an ultimate fact finding proceeding. Many times it was held before the district attorney was prepared to make a final decision, and he could not be expected to be ready at such an early time. Chairman Yturri replied that he could always go to the court

and explain the situation. He maintained that if the case were important enough for the district attorney to submit to the grand jury following a bind over, it was important enough to have the court pass upon it. He believed the prosecutor should be required to make a showing to the court that there were sufficient grounds to justify submission of the case to the grand jury. To illustrate, he said the district attorney might show that there was a missing witness or perhaps that there was probable cause to believe that the magistrate in the lower court reached a wrong conclusion.

Mr. Blensly said if there were no grand jury to decide whether to indict an individual in a close case, he would feel obliged to take that case to a jury to decide the question of guilt or innocence because he believed they were the ones who should make that decision rather than the district attorney. The grand jury, he said, was an effective body to decide whether the state should go to the trouble and expense of having a trial and whether the defendant should be required to bear the burden of defending himself.

Chairman Yturri said the grand jury's function was to make a decision based on the evidence presented and whether that evidence was sufficient to find the defendant guilty of the crime charged. He asked Mr. Blensly why he believed the grand jury was more competent to make that decision than the district attorney and was told that the question was thereby submitted to the collective judgment of the same type of people who sat on the jury and made the ultimate decision.

Senator Burns asked if Rough Draft No. 2 contemplated that the prosecution by information after bind over would be on the charge on which the defendant was bound over. Mr. Paillette replied that the draft did not specifically speak to that point nor did HJR 12, but the draft contemplated that the defendant would be prosecuted on the same charge on which he was bound over.

Chairman Yturri asked Mr. Blensly what reaction he would have to a proposal that the defense would be entitled to access to the transcribed testimony of witnesses who appeared before the grand jury as a matter of discovery. Mr. Blensly's reply was that if discovery were dealt with in another manner, it would be unnecessary.

Mr. Johnson said that the Commission was apparently seeking to find some way to assure that the defendant was fairly charged. The grand jury, he said, did not offer that protection and he asked in what way the preliminary hearing insured it. Judge Burns replied that apart from the due process question, he was certain that the Bar generally would not support any proceeding that permitted the case to go directly to trial without some kind of a probable cause hearing before a magistrate. Mr. Milbank concurred with that statement.

Judge Burns then pointed out that subsection (2) of amended Rough Draft No. 2 did not speak to the problem raised by Gregg Lowe at the

last Commission meeting regarding the number of jurors constituting a quorum. Mr. Paillette advised that problem was being dealt with in the statutory law and would provide in effect that five would constitute a quorum and the five who voted for indictment must be the same five who heard all the evidence.

Judge Burns' next question had to do with subsection (7) dealing with three-fourths of the jury in civil cases. There was, he said, a growing tendency to move downward from the twelve member jury. The three-fourths language was written into the Constitution many years ago and he indicated his reluctance to cast the revised language in this mold when there was a possibility that future juries might consist of nine, eight or possibly six members. He believed that flexibility would be desirable.

Chairman Yturri commented that if the constitutional revision were to be submitted to the people, this provision could not be omitted, and the Commission did not have authority or jurisdiction to suggest changes in that area. Judge Burns expressed agreement but said he hoped that the legislature would give attention to that aspect.

Mr. Paillette indicated that there were two changes in Rough Draft No. 2 that he wished to emphasize. First, the reference to misdemeanors that now appears in the Constitution was deleted and "crime punishable as a felony" was substituted. Mr. Paillette expressed the view that this was a desirable revision and would not change existing practice to any great extent, but it would eliminate the existing requirement for an indictment or a waiver of indictment when going into circuit court.

Chairman Yturri asked how a misdemeanor charge would be handled in circuit court under the revision and was told by Mr. Paillette that it would be by filing an information, and a waiver would not be required. He added that the subcommittee had discussed the advisability of writing a statutory provision to clarify that aspect.

Judge Burns asked if the revision would make a change in the statute requiring a case involving a victim of a sex offense who is under 16 years of age to be initiated in circuit court. Mr. Paillette replied that that statute would have to be amended. He indicated that he had heard a number of judges express support for eliminating that provision.

The second substantial change contained in Rough Draft No. 2, Mr. Paillette said, was the probable cause language that had been added. Probable cause was not included in the present Constitution nor was it contained in HJR 12, but he believed it was important from the standpoint of the salability of the revision, and it was also consistent with the directive of the Commission.

Mr. Johnson asked if anyone had evinced any interest in eliminating grand juries from the Constitution and providing for them by statute. Chairman Yturri replied that it had been discussed at great length over a period of years by a number of groups. Mr. Johnson said he would favor that approach because it would furnish more flexibility in the future.

Judge Burns moved that "probable cause" be omitted in the sixth line of subsection (5) of Rough Draft No. 2 as amended to make it read:

> " . . . upon a showing of probable cause that a crime punishable as a felony has been committed and [~~probable cause~~] that the person has committed it."

Motion carried unanimously.

Representative Paulus indicated that the record should be clear that the reason for the above amendment was not to change the intent but to improve the structure of the sentence, and all members concurred.

Judge Burns asked if the word "session" in subsection (1) (d) was preferable to the word "term." Mr. Paillette replied that "session" was used because it was in the existing Constitution.

Judge Burns moved that the amended version of Rough Draft No. 2 as further revised by the Commission be adopted. Motion carried. Voting for the motion: Blensly, Judge Burns, Senator Burns, Chandler, Cole, Paulus, Spaulding, Stults, Mr. Chairman. Voting no: Johnson.

Mr. Johnson indicated he had voted against the motion because he believed the revision did not go far enough.

Next Meeting

The date for the next meeting of the Commission was tentatively set for Monday and Tuesday, May 22 and 23. Mr. Paillette indicated that the statutory Article on grand juries and the discovery Article would be on the agenda for that meeting.

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

Respectfully submitted,

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission

MOTOR VEHICLES DIVISION

1905 LANA AVENUE N.E. • • SALEM, OREGON • • 97310

TOM McCALL
GOVERNOR

CHESTER W. OTT
Administrator

April 17, 1972

Mr. Donald L. Paillette
Project Director
Criminal Law Revision Commission
311 State Capitol
Salem, Oregon

Dear Mr. Paillette:

As I understand the question raised by you in your recent letter to Gil Bellamy, it has to do with the effects of confining the legal penalty for minor traffic offenses to fines only. This means, as I see it, that present statutory provisions for jail sentences would be eliminated.

This in itself would cause no problems so far as Motor Vehicles Division affairs are concerned. However, there are a couple of other considerations that may have a bearing on your question.

There are several charges conviction on which at present requires mandatory suspension of drivers' licenses and in some cases suspending registration of vehicles. I would presume that the offenses leading to such mandatory suspension actions would remain in the category of "crimes."

There is also statutory authorization for the court to recommend driver's license suspensions. Normally we accept and follow these recommendations. Although the action taken, strictly speaking, is an administrative action, nevertheless it contains some elements of punishment, possibly giving rise to questions as to due process.

Another area that should not be forgotten is that of discretionary suspensions. These are based upon certain accumulations of entries on the driver's record of convictions and accidents. If the convictions

upon which such actions are based include cases of pleading guilty by mail, these suspension actions too may raise some questions as to due process.

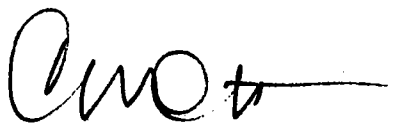
Another development in some parts of the country which I think will spread to many other states in the fairly near future is the administrative adjudication of minor traffic offenses. Such administrative adjudication process has been in effect in New York City since July 1, 1970. Since that time the Administrative Adjudication Bureau of the New York State Department of Motor Vehicles has heard all cases involving moving traffic violations issued by the City of New York. This approach to handling traffic citations has not only streamlined the administrative process and removed a severe burden from the criminal courts of New York City, but has also allowed for efficiencies in the administration of the New York Motor Vehicles Department's driver improvement efforts.

I have written to the New York State Department administrative head to ask him to send us copies of the publication describing their system. I think the subject of administrative adjudication may come up for some discussion during the 1973 legislative session.

If Oregon should go to administrative adjudication, much coordinating effort would be required among the courts, law enforcement agencies, and the agency designated to conduct adjudication hearings. Your committee would without doubt be a most useful element in achieving such coordination.

In any event, I think we should all be as well informed as possible on administrative adjudication systems in existence, and we are making every effort to be so informed.

Yours sincerely,



Chester W. Ott

CRIMINAL LAW REVISION COMMISSION

Grand Jury; Proposed Constitutional Amendment

(Rough Draft No. 2)
[As amended by Subcommittee No. 3]
April 18, 1972

Be It Resolved by the Legislative Assembly of the State of Oregon:

Paragraph 1. Section 5, Article VII (Amended), Oregon Constitution, is repealed, and the following section is adopted in lieu thereof:

Section 5. (1) The Legislative Assembly shall provide by law for:

(a) Selecting juries and the qualifications of jurors;

(b) Drawing and summoning grand jurors from the regular jury list at any time, separate from the panel of petit jurors;

(c) Empaneling more than one grand jury in a county; and

(d) The sitting of a grand jury during vacation as well as session of the court.

(2) A grand jury shall consist of seven jurors chosen by lot from the whole number of jurors in attendance at the court, five of whom must concur to find an indictment.

(3) Except as provided in subsections (4) and (5) of this section, a person shall be charged in a circuit court with the commission of any crime punishable as a felony only on indictment by a grand jury.

(4) The district attorney may charge a person on information filed in circuit court of a crime punishable as a felony if the person appears before the judge of the circuit court and knowingly waives indictment.

(5) The district attorney may charge a person on an information filed in circuit court if the person knowingly waives preliminary hearing or, if after a preliminary hearing before a magistrate, the person has been held to answer upon a showing of probable cause that a crime punishable as a felony has been committed and probable cause that the person has committed it.

(6) An information shall be substantially in the form provided by law for an indictment. The district attorney may file an amended indictment or information whenever, by a ruling of the court, it is held to be defective in form.

(7) In civil cases three-fourths of the jury may render a verdict.

Paragraph 2. The amendment proposed by this resolution shall be submitted to the people for their approval or rejection at the next regular general election held throughout the state.