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Tape 17 - Side 1 - 1 to end 8/28 (Begins p. 16) (Begins p. 64)
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OREGON CRIMINAL LAW REVISION COMMISSION

Thirty-Fourth Meeting, August 28 and 29, 1972

Minutes

August 28, 1972

Members Present: Senator Anthony Yturri, Chairman
Senator John D. Burns, Vice Chairman
Mr. Donald R. Blensly
Senator Wallace P. Carson, Jr.
Mr. Robert W. Chandler
Mr. Donald E. Clark
Representative George F. Cole
Attorney General Lee Johnson
Representative Leigh T. Johnson
Representative Norma Paulus
Mr. Bruce Spaulding
Representative Robert M. Stults

Excused: Judge Charles S. Crookham

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

Also Present: Mr. Jim Hennings, Metropolitan Public Defender, Portland
Ms. Helen Kalil, Deputy District Attorney, Multnomah County
Mr. Robert Stoll, President, Association of Criminal Defense Counsel, Portland
Ms. Melinda Woodward, Oregon State Corrections Division

Agenda:

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Senator Anthony Yturri, Chairman, called the meeting to order at 9:30 a.m. in the Vandevert Room at Sunriver Lodge.

Approval of Minutes of Previous Meetings

Mr. Chandler moved to approve the minutes of the Commission meetings of July 14 and 15, 1972, and of July 24, 1972. Motion carried unanimously.

Search and Seizure; Amendments Proposed by Subcommittee No. 2 to sections 35 to 37 of Preliminary Draft No. 3; May 1972

Mr. Paillette explained that at the Commission meeting on July 14, 1972, a number of questions were raised concerning sections 35 through 37 of Preliminary Draft No. 3 on Search and Seizure. The discussion centered principally around the court in which motions for return or restoration of things seized should be made and also the question of whether the length of time in which the motions were to be filed should be more than 30 days. The Commission's ultimate decision was to rerefer the sections to subcommittee. As a result of that action, Mr. Paillette had redrafted that portion of the draft not only to incorporate the amendments approved by the Commission but also to attempt to deal with the other problems that were discussed. On July 28 Subcommittee No. 2 met by means of a conference telephone call to discuss and approve the draft.

Section 36. Handling and disposition of things seized. Mr. Paillette reported that subsections (1), (2) and (3) were not substantially changed from Preliminary Draft No. 3. Subsection (4) was also essentially the same as the earlier draft except that the last sentence was more specific with respect to perishable items in the situation where it was not possible to return them to their rightful possessor.

Mr. Chandler asked who would make the determination as to whether it was possible to return the things and was told by Mr. Paillette that the police agency would do so. The provision was intended, he said, to avoid any implication that the seizing agency had a right to dispose of them in some way other than by returning them to their rightful possessor simply because they were perishable.

Mr. Chandler asked if there was any way to challenge the officer's decision and was told by Mr. Paillette that no remedy was specifically provided in the draft. Mr. Chandler's contention was that if an officer improperly disposed of perishable goods, he should be held personally responsible. He was assured by Chairman Yturri that a civil remedy was available under present law should an officer unlawfully convert something to his own use.

Representative Stults moved adoption of section 36. Motion carried unanimously.

Section 37. Motions for return or restoration of things seized. Mr. Paillette advised that section 37 of Preliminary Draft No. 3 had in this draft been broken into three sections and appeared here as sections 37 through 39. Subsection (1) of section 37 provided for a claim to be made by a person, from whose premises or person property had been seized, to move the court for a return of the items. The 90 day limitation contained in subsection (1) was not agreed upon by the Commission, but the subcommittee had approved it. They believed it was a reasonable amount of time and was not too short to allow a defendant ample time to file his claim. Also, the 90 day period was consistent with the Portland city ordinance on return of seized property.

Representative Paulus inquired if a totally innocent person, such as a landlord, whose property had been seized, was subject to a formal procedure in order to have his property returned. Mr. Hennings replied that in Portland they usually appeared at an informal hearing without an attorney. Representative Paulus asked if this draft would preclude such a procedure and was told by Chairman Yturri that the extent of the formality of the motion procedure was not spelled out in the draft and it therefore appeared to contemplate an informal proceeding as well as a formal one. He said it might be even more clear if subsection (2) were amended to read "the appropriate court in which to move" rather than making reference to the filing of a motion which implied more formality.

Senator Burns suggested that subsection (2) be amended to read: "The appropriate court to consider such motion is:". The Chairman expressed approval of that language and Representative Paulus moved its adoption. Motion carried unanimously.

With respect to subsection (2) (c), Mr. Chandler pointed out that in the situation where no arrest had been made and no crime charged, goods seized could be held past the 90 day period. Mr. Paillette explained that the district attorney would be required to make a showing to the court before he would be permitted to hold the goods longer than 90 days. Senator Burns maintained that there could well be cases where time would be needed beyond the 90 day period and it was therefore imperative to give the court discretion to approve an extension of time.

Mr. Paillette reported that one of the main problems that came up during the discussion of Preliminary Draft No. 3 was the lack of guidelines as to the court in which motions for restoration of things seized were to be made. Subsection (2) attempted to answer those questions by providing for the three different kinds of circumstances outlined in paragraphs (a), (b) and (c).

Mr. Hennings noted that the provision was building in a de novo appeal by permitting the lower courts to make these determinations and

suggested that it might be preferable to require the circuit court to make all such decisions. Mr. Paillette replied that one of the criticisms at the July meeting was that everything was being channeled to the circuit court. Chairman Yturri was of the opinion that it was totally unnecessary for the circuit court to be required to make a decision on every minor situation that might arise. Mr. Paillette pointed out also that justices of the peace and municipal judges would not be involved in this section; it referred to district courts and above because of the definition of "judge."

Mr. Johnson moved to approve section 37 as amended. Motion carried unanimously.

Section 38. Grounds for motion for return or restoration of things seized. Mr. Paillette explained that the provision in subsection (5) of section 38 was new although the subject had been discussed by the Commission in July at which time it was generally agreed that provision should be made for stipulation by parties.

Mr. Hennings asked if section 38 protected the person whose goods were seized but who was unable to prove that he was the rightful possessor. He was of the opinion that the items should be returned to the possessor unless the state could show cause why they should not be. Mr. Blensly pointed out that under subsection (2) the state would have to show that the things were subject to seizure. Mr. Hennings asked whether the person whose goods were seized had some burden to show why the goods should be returned to him in the situation where, for example, the state had probable cause to believe that the things seized were stolen items. Mr. Blensly replied that in that situation the defendant would probably be protected by subsection (4) which said he was entitled to their return. Mr. Hennings contended that a person whose money was stolen should not be forced to show he had lawful possession in order to recover that money. Mr. Paillette noted that as the draft was framed, the moving party would have to make the showing and there was a presumption if he had possession.

Chairman Yturri expressed the view that the situation discussed by Mr. Hennings was adequately covered; both the court and the moving party had many options available and the individual would not even be required to show possession in order to obtain a return of the things seized.

Mr. Chandler moved approval of section 38. Motion carried without opposition.

Section 39. Postponement of return or restoration; appellate review. Mr. Paillette reported that section 39 was basically unchanged from the earlier draft and subsection (2) dealt with the situation where there was a disputed claim under section 40.

Senator Burns said he was uncertain why section 39 was necessary in view of the broad general language in section 37 requiring

restoration of things seized within 90 days or at the discretion of the court. Mr. Blensly replied that section 37 referred to the date for the motion, not the date for the return. He contended that the language of section 39 should be even stronger and suggested that "may" be changed to "shall" in subsection (1) so that the court would not be given authority to order the return of property needed for evidentiary use. He also believed that the draft should be clear that either party had the right to appeal such an order. Under existing law the state could not appeal in this situation, and he maintained that the state should have that right. He noted that ORS 138.060 listed the specific instances in which the state could appeal and it did not cover this situation.

Chairman Yturri commented that subsection (2) appeared to grant either party the right to appeal, but Mr. Blensly's contention was that in view of the provisions of ORS 138.060, the right to appeal by the state was not clear.

Senator Carson commented that an order denying return of property would be the one that would be reviewable in regular course, and it was the one that should get the speedy appeal. Chairman Yturri expressed agreement that if the court ordered that the things not be returned, then there should be a certification by the court to the effect that the items would not be required for evidentiary purposes. There was, he said, no point in requiring the certification when the court granted the motion.

Mr. Paillette indicated that the language of the section was derived from the Model Code of Pre-Arraignment Procedure. He said the only aspect of the Commission's discussion on which he had conferred with Professor Platt was the question of the regular course appeal. Professor Platt's statement was that the pre-trial appeal should be strictly a matter of necessity; otherwise most of the appellate reviews on these orders would be regular course reviews.

Mr. Chandler believed that the last sentence of the section which said that the things seized were "no longer needed for evidentiary purposes" should read that the things were "still needed" rather than "no longer needed."

Mr. Johnson explained that the subsection was directed primarily at the situation where two people were in dispute over property and where the judge ruled that he would not give it to A because it really belonged to B. That, he said, was why it was drafted in this manner.

Chairman Yturri said Mr. Johnson was correct when the subsection was viewed as speaking to the two-man situation; however, it also spoke to a one-man situation and in that context it did not read correctly. Mr. Paillette observed that the sentence was meant to say that if the items were still needed for evidentiary purposes, the

person was not entitled to a pre-trial appeal. If someone moved for a return and the court denied the motion, whether or not it was a disputed claim, the only time that order could be appealed before trial was when the court said it was not needed for evidentiary purposes.

After further discussion, Mr. Johnson moved to change "may" to "shall" in subsection (1) of section 39. Motion carried.

Mr. Blensly said that even with the amendment just adopted, it still seemed to him that the statute should contain a provision to allow the state to appeal when the appeal was not in regular course; furthermore, he could see no reason for requiring a certification by the court. He suggested that subsection (2) be amended to read: "An order granting or denying a motion for return or restoration of things seized shall be reviewable on appeal."

Mr. Paillette expressed the view that if the Commission wanted to provide for an appeal by the state, it should be written into ORS 138.060. That section, he said, was being amended anyway in connection with the draft on Former Jeopardy and the provision could easily be added.

Mr. Chandler asked Mr. Paillette if he would recommend elimination of subsection (2) of section 39 and received a negative reply.

Mr. Johnson moved to approve section 39 as amended. Motion failed.

Representative Stults moved to table section 39. Motion failed.

Chairman Yturri appointed a subcommittee consisting of Senator Burns, Senator Carson, Mr. Chandler and Mr. Blensly to resolve the questions raised regarding subsection (2) and report back to the Commission.

The following morning as the first order of business the subcommittee submitted its recommendations for amendment to section 39. Senator Carson recommended that subsection (2) of section 39 be amended to read:

> "An order granting or denying a motion for return or restoration of things seized shall be reviewable on appeal." [Delete the balance of the subsection.]

The subcommittee further recommended that ORS 138.060 be amended to add a pre-trial appeal right for the state in the situation where the court granted the motion to return or restore the things seized.

Mr. Chandler moved adoption of the report of the subcommittee. Motion carried unanimously.

Section 40. Disputed possession rights. Mr. Paillette indicated that the discussion at the Commission meeting in July centered around the question of what the court should do when there was a disputed claim and whether or not a means should be provided whereby the trial court could settle the disputed claim. Originally the draft provided for a civil interpleader process. That process was retained in this draft so the court would still have that option open to it, but it would also specifically allow the criminal court to settle the claim and order the return of the property.

Under paragraph (a) of subsection (1) the court may return the things seized or under paragraph (b) impound them and set a further hearing. Paragraph (b) also provided for due process requirements of notice and opportunity to be heard. Paragraph (c) provided that after the hearing, the court could order the return based upon what appeared to the court to be fair and just. Subsection (2) provided for civil interpleading.

The section, Mr. Paillette said, would permit the court to go either way and would allow the matter to be disposed of as a part of the criminal system.

Mr. Blensly stated he was bothered by the provision allowing the court to return property to the person from whose possession it was seized when he was doing so in the face of a substantial question as to whether it should be returned to that person. Chairman Yturri commented that that was only one of the options available to the court. Mr. Blensly said he was wondering whether the statute should force a hearing in disputed situations.

Mr. Johnson said he agreed with Mr. Blensly. The way the section was written it said that even though there was a substantial question, the court could return the property to the person from whom it was seized. He was of the opinion that the court should be required either to hold a hearing or to go to the civil process.

Mr. Paillette urged the Commission to bear in mind that the section was discussing a criminal proceeding. If the court under paragraph (a) returned the things to the person from whom they were taken and there was then a disputed claim, further civil remedy was not precluded even though the court might not specifically order it.

Chairman Yturri asked if the phrase in subsection (2), "remit the several claimants to appropriate civil process for the determination," anticipated that when the claimant remitted to civil process, he must then initiate a new action. Mr. Spaulding questioned the meaning of "remit." Chairman Yturri said that the provision obviously contemplated an initial action in civil court because it would make no sense for the criminal judge to transfer the entire file to another judge so

the matter could be determined civilly. Apparently the intent was to leave the claimants in their original position and let them file an action in civil court if they chose to do so. Representative Paulus suggested substituting "leave" for "remit."

Mr. Paillette advised that this section was taken from the Model Code on Pre-Arraignment Procedure and the section was scanty on commentary. He had, however, discussed the section with Professor Platt whose understanding and intent in drafting it was that the court was going to be permitted to return the things under paragraph (a). If a dispute then arose and there was another claimant, the matter would be entirely out of the criminal process and the draft did not contemplate holding the property in that instance. Subsection (2) anticipated that the court would not return the things seized but would in effect enter an order holding the property and would order that the final determination be made as a civil matter. Mr. Paillette said his understanding of the meaning of "remit" as explained to him by Professor Platt was that it was a formal kind of action by the court. The court, in effect, would say, "I am transferring this case to civil court; however, the property is being held and will not be returned until the final outcome is determined in a civil hearing."

Mr. Spaulding asked if the civil hearing would be a continuation of the criminal hearing and received an affirmative reply from Mr. Paillette. Mr. Spaulding next inquired if there would be any pleadings entered in the civil court, and Mr. Paillette answered that he believed there would be.

Chairman Yturri expressed approval of Representative Paulus' suggestion to change "remit" to "leave," assuming the section contemplated an initial action in civil court. His understanding of "remit" was that it meant the case would be transferred to another court and there would be no new pleadings. He added that frequently in the smaller counties the civil judge and the criminal judge were the same person.

Representative Paulus moved to change "remit" to "leave" in subsection (2) of section 40. Chairman Yturri suggested that a further amendment be made in that subsection by inserting "and returning or restoring the property" after "subsection (1) of this section". Representative Paulus moved to include the Chairman's suggestion in her earlier motion which would result in subsection (2) being amended to read:

> "(2) Instead of conducting the hearing provided for in paragraph (b) of subsection (1) of this section and returning or restoring the property, the court may, in its discretion, leave the several claimants to appropriate civil process for the determination of the claims."

Motion carried.

Senator Burns asked why "due notice" was used in paragraph (b) whereas section 37 used the term "actual notice." Mr. Paillette's response was that section 40 was intended to be a due process type of notice.

Mr. Hennings asked why "fair and just" was used in paragraph (c) as opposed to the term, "as the law requires." Mr. Paillette said that this provision contemplated situations where the judge would have to divide up the proceeds among several claimants in an interpleader kind of situation. There might be six claimants, he said, and the court would have to decide what part of the proceeds each claimant would receive.

Mr. Hennings said that under that language if the judge decided one of the claimants was a bad person, he might not return the property to him. Mr. Blensly replied that on the other hand it also gave the judge authority to return the property to him, so the provision cut both ways.

Chairman Yturri observed that paragraph (c) could be revised to read: " . . . for the return or restoration of the things seized." The "fair and just" language could be eliminated, he said, but the meaning would be no different. Mr. Hennings commented that he would prefer the language suggested by the Chairman.

Mr. Chandler moved that paragraph (c) of subsection (1) of section 40 be amended to read:

> "(c) Upon completion of the hearing provided for in paragraph (b) of subsection (1) of this section, enter an order for the return or restoration of the things seized."

Motion carried unanimously.

Mr. Chandler moved to approve section 40 as amended. Motion carried without opposition.

On the following morning Mr. Spaulding indicated that he had received a copy of a form letter written by Gary D. Gortmaker, Marion County District Attorney. He said he understood that prior to July of 1972 there was a somewhat different and, in some respects, more objectionable policy than that indicated in this letter with respect to the handling of monies taken from persons arrested for crime. Mr. Spaulding read the letter to the Commission which is set forth on the following page:

MINT

588-5163

MARION INTERAGENCY NARCOTICS TEAM — DIRECTOR GARY D. GORTMAKER, DISTRICT ATTORNEY, MARION COUNTY
ADVISORS: JAMES F. HEENAN, SHERIFF, MARION COUNTY — THOMAS EATON, CAPT., ORE. STATE POLICE — BEN H. MEYERS, CHIEF, SALEM CITY POLICE

July 31, 1972

Dear Counselor:

Beginning July 1, 1972, a new procedure was adopted by the Marion Interagency Narcotics Team (MINT) concerning the handling of defendants' funds held as evidence in drug cases.

The procedure is basically this:

1. At the time of booking, all currency is taken from the defendant for comparison with lists of marked money in circulation by the MINT team.

2. These monies are, within 24 hours, deposited in a trust account with the Marion County Treasurer under the name of the defendant.

3. Upon completion of the case, the monies are applied first, to any fine imposed; second, to court appointed attorneys' fees; and third, the remainder is returned to the defendant in care of his attorney at his attorney's address. All of this will be done automatically by the Treasurer.

Fines are requested by this office on all convictions where the defendant is not indigent.

An exception to the above procedure is in those cases where marked money is found in the possession of a convicted drug violator. All monies are then considered proceeds of illegal drug activity and are confiscated.

Sincerely,

Gary D. Gortmaker

GARY D. GORTMAKER,
Marion County District Attorney
and
Director, Marion Interagency Narcotics Team

At a later point in the meeting, Mr. Spaulding moved that the vote by which section 40 of the Search and Seizure amendments was approved be reconsidered. Motion carried.

Mr. Spaulding then moved that section 40 be amended to read:

"If upon consideration of a motion for return or restoration of things seized, it appears to the court that the things should be returned or restored:

"(1) If there is a substantial question whether they should be returned to the person from whose possession they were seized or to some other person, or a substantial question among several claimants to rightful possession, the court may:

"(a) [No change]

"(b) [No change]

"(c) [No change from the amended version]

"(2) If there is no substantial question whether they should be returned to the person from whose possession they were seized, the property must be returned to said person upon the release of the defendant from custody.

"(3) [Insert subsection (2) as amended.]"

Motion carried to adopt the above amendment.

Mr. Spaulding moved that section 40 as amended be approved. Motion carried.

Criminal Trials; Preliminary Draft No. 2; August 1972

Section 1. Senator Carson moved approval of section 1. Motion carried unanimously.

Section 2. Jury trial. Mr. Paillette explained that subsection (1) of section 2 codified the provisions of Article I, section 11, of the Oregon Constitution with respect to the right of an individual to a public trial by an impartial jury. Subsection (2) provided for a waiver of jury. The Constitution, he said, did not allow a waiver in capital cases but Oregon didn't really have any capital cases since the abolition of the death penalty. The provision retained the present practice in Oregon to allow a waiver in a murder trial, but the waiver required the consent of the trial judge and an election in writing.

Mr. Johnson was of the opinion that the defendant should be able to waive trial if he wanted to do so. Several members agreed that there was merit to his position, but it was pointed out that it would be in direct contradiction to the Constitution which provided only for a waiver of jury with the consent of the trial judge.

Mr. Chandler moved approval of section 2. Motion carried unanimously. Mr. Johnson abstained from voting.

Section 3. Challenge to the jury panel. Mr. Paillette explained that the provision in section 3 was not contained in existing law and would allow either the district attorney or the defendant to challenge the jury panel. It would not permit the challenge of individual jurors but was directed at a challenge to the manner in which the panel was selected. Throughout the country, he said, there continued to be a great deal of litigation on the question of the proper method of selection of the jury panel with respect to proper representation of ethnic groups and whether or not the panel contained a balanced representation of the community. The concern to which section 3 was directed was whether the poll books or some other source of names had been used for establishing the jury panel. Questioning individual jurors would not be of much assistance to the defendant in securing information on the kind of grounds he would need to challenge the entire panel. Mr. Paillette noted that the draft in section 30 permitted names of jurors to be drawn not only from the voter registration list but also "any other source authorized by ORS 10.110."

Mr. Johnson moved adoption of section 3. Motion carried unanimously.

Section 4. ORS 136.010. When an issue of fact arises. Mr. Paillette explained that at the subcommittee meeting when the trial draft was discussed, the subcommittee also discussed a different way of dealing with former jeopardy rather than by plea. Under the present statutes a plea of former conviction or acquittal could be entered by the defendant either with or without a plea of not guilty and the statutes also provided for a separate verdict by the jury on a double jeopardy question. Most of those pleas, however, were disposed of by the court when the court entered an order sustaining the plea. Therefore, there was a question as to whether the plea was a question of law or a question of fact or a mixed question of law and fact. The subcommittee proposed to provide that former jeopardy would be raised not by plea but by a motion to dismiss on grounds of former jeopardy. The effect of section 4 would be to amend ORS 136.010 to provide that an issue of fact arises upon a plea of not guilty.

Mr. Spaulding asked why it was necessary to place that statement in the statute; the fact, he said, was obvious. Chairman Yturri replied that in light of the repeal of ORS 136.020, he believed it was important to retain section 4.

Mr. Johnson moved the approval of section 4. Motion carried unanimously.

ORS 136.020 would be repealed by this draft, as noted in the commentary to section 4, and the Commission approved its repeal.

Section 5. How issues are tried. Mr. Paillette advised that section 5 contained a conforming amendment.

Mr. Johnson moved adoption of section 5. Motion carried without opposition.

Section 6. ORS 136.040. When presence of defendant is necessary. Mr. Paillette pointed out that section 6 was amended to apply the provisions of ORS 136.040 to indictments, informations or complaints.

Mr. Johnson moved approval of section 6. Motion carried unanimously.

ORS 135.050 would not be affected by this draft and was approved without amendment.

Section 7. ORS 136.060. Jointly indicted defendants; separate or joint trial. Mr. Paillette reported that section 7 was submitted by the subcommittee without recommendation and changed existing law considerably. It concerned an area, he said, on which he had received a great many inquiries, particularly from judges, and provided that jointly charged defendants would be tried jointly unless there was good cause shown why they should be tried separately.

Mr. Hennings spoke at some length in opposition to section 7. Some of the objections he raised were:

(1) Every defendant deserves his individual day in court.

(2) The only argument for violating that principle was that it would cost less money and take less time to try defendants jointly. This, he said, was false economy because every single case would require a Bruton type hearing to show that there was no prejudice to the defendants by trying them together.

(3) Evidentiary and instruction problems would be exceedingly complex.

(4) An appeal would be guaranteed in every case in which the defendant was found guilty because each defendant could claim he was prejudiced by being tried jointly.

(5) Physical problems would arise as to where to place all the defendants and all the attorneys in the courtroom.

(6) An attorney frequently had enough trouble trying to control his own defendant without also having to control all the other defendants and their counsels.

(7) Oregon was one of the few states where the dockets were current and was not so badly pressed for time that it needed to try defendants jointly at the present time.

Mr. Chandler replied that joint trials were permitted in 41 of the 50 states and he found it impossible to believe that those states were encountering all the problems cited by Mr. Hennings. He said he had reported trials in California, Montana and Colorado as well as Oregon and in the two states where joint trials were permitted -- California and Montana -- there appeared to be no extraordinary problems involving a hearing prior to trial, evidentiary problems or problems with instructions to the jury. He conceded that there were a few extraordinary cases which would require extra time and involve extra problems for the attorneys and judges, but in 99% of the cases that went to trial where more than one person was indicted for the same crime, he maintained that society would be better served by trying them jointly.

Chairman Yturri indicated he had received a letter from Philip H. Lowthian indicating opposition to section 7. He read the letter to the Commission, a copy of which is attached hereto as Appendix A.

Mr. Johnson moved that the Commission disapprove compulsory joinder of defendants, and Mr. Spaulding seconded the motion.

Mr. Paillette pointed out that the ABA Standards, which most would agree were basically defense oriented standards, provided for joinder of defendants with provision for separation by the court under appropriate circumstances. Their commentary indicated:

> "Although a few states still grant defendants an absolute right to separate trial [Oregon being one] most jurisdictions allow joinder of defendants when there is some good reason for subjecting them to trial together."

The recommendations in section 7 were consistent with the ABA Standards and provision was made for the court to separate the defendants and to order separate trials. Mr. Paillette said that whether or not this would require the additional hearings suggested by Mr. Hennings was irrelevant to the issue of whether the trial itself should be joined or separate.

At the present time, Mr. Paillette continued, there were many cases that could be tried jointly without any prejudice to either defendant and could be disposed of in due course by the courts. The Peyton-Allen case, he said, furnished a good argument for joint trials where there were extremely lengthy, time consuming and very costly trials. Under the present statute there was no balancing of community

interests; it was completely defense oriented and did not take into account the interests of an efficient administration of the criminal justice system.

He disagreed with Mr. Lowthian's statements concerning black defendants and said he believed this provision would not make every black man go to trial with a jointly indicted black man. There was ample opportunity for the court to rule on whether or not a joint trial would result in prejudice to either defendant. He agreed that it was desirable to protect the interests of the defendant and pointed out that throughout the revision of the criminal code, an attempt had been made to do so, but he urged that the court be given an opportunity to also take into consideration interests other than those of the defendant in the area of joint trials.

Senator Burns asked if the paramount reason for section 7 was economy and was told by Mr. Paillette that that was certainly one reason. He added that he would disagree with Mr. Hennings that it would be more expensive than the present system to hold the necessary hearings.

Senator Burns stated that at one time he had believed it would be desirable to provide for joint trials, but his experiences in federal court had caused him to change his mind. He had, he said, tried to convince the federal court on numerous occasions that the interests of justice required a separate hearing and in 99 out of 100 cases the federal judges still required joint trials which he believed resulted in severe injustices.

Also speaking in support of the motion, Mr. Spaulding said he could not agree that the state would not have an opportunity to be involved in the question of whether or not there would be a joint trial if section 7 were adopted. The state, he said, could separately indict anyone it wanted to which gave the prosecution an unfair advantage in the determination of whether defendants should be jointly tried. His experiences in federal court coincided with those of Senator Burns in that almost every time the prosecutor wanted to try the case jointly, it was conducted in that manner.

Mr. Spaulding added that one of the principal losses of rights that a criminal defendant could suffer was his right to an effective selection of counsel of his choice because the first attorney that cross examined the state's witnesses in a line of defendants materially affected the rights of the defendants who came after him. He concluded by saying that each defendant should have his trial on his merits or the merits of his case.

After further discussion, vote was taken on Mr. Johnson's motion to eliminate the provision for compulsory joinder of defendants unless the court saw fit to separate them. Motion carried. Voting for the motion: Burns, Carson, Clark, Cole, Attorney General Johnson, Representative Johnson, Paulus, Spaulding, Stults. Voting no: Blensly, Chandler, Mr. Chairman.

The Commission recessed for lunch and reconvened at 1:00 p.m. with the same persons present as were in attendance for the morning session.

Tape 17 - Side 1

Section 8. ORS 136.070. Postponement of trial. Mr. Paillette explained that the amendment in section 8 would apply the provisions relating to postponement of trial to complaints and informations rather than just to indictments.

Mr. Spaulding called attention to a typographical error in the last sentence of section 8 which should read "Affidavits or" rather than "on."

Mr. Johnson moved to delete the last sentence as being unnecessary. Senator Burns seconded.

Mr. Paillette asked Senator Burns why he believed affidavits should not be filed when a postponement of trial was requested and was told that when a motion was made, it would have to be supported with an affidavit in any event. Representative Stults agreed that the affidavit would have to be filed with the clerk with or without this statement in the statute.

Vote was taken on the motion to delete the last sentence of section 8. Motion carried.

Mr. Chandler moved to approve section 8 as amended. Motion carried.

ORS 136.080 to 136.110 would not be affected by this draft and were approved without amendment.

Mr. Spaulding noted that the references to "bail" in ORS 136.110 would need to be changed, and Mr. Paillette indicated that the necessary amendments to that section would be made in the Release of Defendants draft.

Section 9. ORS 136.120. Dismissal of accusatory instrument when prosecution is unprepared at time for trial. Mr. Paillette reported that in addition to the amendment making ORS 136.120 applicable to accusatory instruments, the subcommittee also voted to substitute "dismissed" for "discharged."

Senator Burns moved approval of section 9. Motion carried unanimously.

Section 10. ORS 136.130. When discharge of accusatory instrument bars another prosecution for same crime; judgment of acquittal. Mr. Paillette related that with respect to barring further prosecution upon dismissal, the recommendation of the subcommittee was that the order would not be a bar when the original charge was for a felony or a Class A misdemeanor unless the court specifically directed that it was a bar.

Mr. Paillette called attention to the statutes set out in the commentary, ORS 134.110 to 134.160 which dealt with dismissal for delay in finding the indictment, and called particular attention to ORS 134.140 (2). The recommendation from the subcommittee was that these statutes would be amended under the authority of the approval of section 10 to make them consistent therewith. The reason the subcommittee had adopted this approach was that under the new criminal code many crimes which were previously indictable misdemeanors and low grade felonies were now Class A misdemeanors and they believed that the bar should therefore be lifted from Class A misdemeanors.

Senator Carson asked what the philosophy was behind the policy that if it was a small crime, it should be thrown out but if it was a more serious crime, another charge should be filed. Chairman Yturri replied that he assumed the rationale was that when a serious offense was dismissed for some technicality, it was in the public interest not to permit that technicality to throw the case out because the defendant should be tried. On the other hand, if it was a minor offense, the trial made little difference to the community. He said that seemed to him to be a reasonable approach.

Mr. Blensly said it did not seem reasonable to him that a person should not be tried, for example, on a charge involving violation of the basic rule when the officer made a mistake and placed "Highway 96" instead of "Highway 99" on the citation whereas the person who received a ticket from an officer who made no such mistake would be tried. Senator Burns said that the umbrella reached out to more and more people for those types of offenses, and the officer had a duty to do the right thing in the beginning.

Mr. Johnson moved adoption of section 10. Motion carried on a split vote.

Mr. Paillette asked if adoption of the motion indicated approval of the changes he had explained earlier to ORS 134.110 to 134.160 and received an affirmative reply from the Chairman.

Section 11. ORS 136.140. Proceedings after judgment of acquittal. Section 11, Mr. Paillette explained, added amendments to conform ORS 136.140 to sections 9 and 10 and also to the Release of Defendants draft.

Representative Cole described a letter that had recently appeared in the Letters to the Editor column of The Oregonian relating to the action of the last legislature in enacting legislation to permit the record of misdemeanants to be expunged after three years. The author said the legislature failed to take care of the circumstance where the case was dismissed and there was no procedure whereby that record could be expunged. In other words, those who were found guilty could have their record erased whereas the innocent person whose case was dismissed could not.

Representative Paulus explained that this problem was discussed in subcommittee and they were told by members of the Corrections Division who were present at the time that it was an impossibility as a practical matter to expunge a record of arrest. For that reason the subcommittee had not acted on the matter.

Mr. Chandler moved approval of section 11. Motion carried unanimously.

Section 12. ORS 136.210. Formation of jury. Mr. Paillette advised that section 12 came to the Commission without recommendation by the subcommittee and dealt with voir dire of jurors. The purpose of the section, he said, was to place the examination of the jurors under stricter control of the court although it did not eliminate nor prohibit questions by counsel. It was, he said, an attempt to speed up the process and was based on the ABA Standards on Trial by Jury. Those opposed to the section in the subcommittee believed that the court had enough control already and there was also a fear expressed that the section would be used to cut off adequate voir dire by defense counsel.

Mr. Stoll commented that the Association of Criminal Defense Counsel had met the previous evening and the members were unanimously opposed to section 12. Mr. Hennings pointed out that at the time the subcommittee met, one of the strong opponents of adoption of this section was Judge Crookham who believed the amendment was unnecessary. He said he had also talked to Judge Jones and he agreed with Judge Crookham that the court did not need more power in this area. Mr. Hennings also indicated his personal opposition to the section as drafted.

Mr. Chandler commented that the procedure contemplated by section 12 was being carried out at the present time in some of the state courts. In the courts where he had observed its use, he said the first few questions that should be asked of all jurors was asked by the judge and this eliminated approximately ten repetitive questions that would otherwise be asked of each juror individually. The attorneys were free to proceed with voir dire thereafter. He said that in Judge Foley's court this process had reduced the time necessary to empanel a jury from most of one day to about two hours.

Senator Burns related that one point made in subcommittee was that it was perfectly legitimate for the judge to ask a few basic questions. However, for the attorney to evaluate an individual juror, he had to have a meaningful opportunity to relate to him personally and to ask him several questions and gauge his qualifications not so much on what he answered as on how he answered. Altogether too often, he said, the attorney did not get a chance to ask even those few questions under this procedure in federal court. The present system was working well in this state and his opinion was that if the Commission's objective was to improve the system, change for the sake of change was no improvement.

There was a lengthy discussion concerning the advantages and disadvantages of adopting section 12 following which Mr. Chandler moved to approve section 12 as drafted. Motion was defeated. Voting for the motion: Chandler, Clark, Attorney General Johnson, Representative Johnson, Mr. Chairman. Voting no: Blensly, Burns, Carson, Cole, Paulus, Spaulding, Stults.

Mr. Paillette pointed out that defeat of the motion should not result in deletion of ORS 136.210, and the amendments which appeared in the draft as subsection (1) relating to the challenge of the panel should be retained. The Commission was unanimously agreed that Mr. Paillette was correct and by common consent concurred that the motion just adopted would be interpreted to mean that subsections (2) and (3) of section 12 were deleted.

With respect to the kinds of preliminary questions that could be disposed of without prejudice to anyone's rights, Mr. Paillette suggested amending section 12 to enable and require the court to do some of the type of questioning that was presently being used in certain counties. He asked the Commission to consider the possibility of revising ORS 136.210 by first restoring the bracketed material and then amending the last clause of the second sentence to read:

> " . . . provided, however, that when the full number of jurors has been called, they shall thereupon be examined as to their qualifications, first by the court, then by the defendant and then by the state."

Under that amendment, Mr. Paillette said, the court would be required to examine the jurors as to their qualifications. Chairman Yturri commented that he doubted there would be much objection to that requirement and other members agreed.

Mr. Chandler moved to adopt the amendment proposed by Mr. Paillette as set forth above. Motion carried.

Mr. Blensly moved to approve section 12 as amended. Motion carried.

Section 13. ORS 136.220. Challenge of jurors for implied bias. Mr. Paillette advised that the amendments in section 13 attempted to make ORS 136.220 parallel to ORS 17.140 with respect to grounds for challenge. He noted that the introductory paragraph of section 13 deleted "may be taken" and inserted "shall be allowed." This was done as a result of a question raised in subcommittee as to whether "may be taken" actually meant the challenge should be allowed. The Oregon cases seemed to indicate that even though there were grounds for implied bias, the court still had to make the final decision. For this reason, Mr. Paillette said, the amendment may make a change in case law.

He pointed out that subsection (7) was a new ground but was similar to a provision in ORS 17.140.

Mr. Chandler objected, as he had also done unsuccessfully in subcommittee, to the term "master and servant" in subsection (2). Chairman Yturri observed that the term had a well defined legal meaning and was broader than "employer and employe." Mr. Clark concurred with Mr. Chandler that the term should be modernized.

Mr. Stults asked if the "complainant" referred to in section 13 would be the State of Oregon when the grand jury returned the indictment and was told by Senator Burns that it would not be the state but would be the person who signed the complaint.

Senator Burns moved that section 13 be approved.

With respect to subsection (7) Mr. Blensly said he recalled a case that was reversed by a Supreme Court in which the jurors were automatically excluded because they had sat on a case involving similar facts on the grounds that in and of itself that did not disqualify them. He asked if subsection (7) might create a constitutional problem by excluding a juror automatically for that same reason. Mr. Paillette replied that the only Oregon case the staff found on this question was State v. Stigers, 122 Or 133, 256 P2d 649 (1927), which was described on page 22 of the commentary. Chairman Yturri observed that subsection (7) would change that decision and said he could see nothing wrong with doing so unless there was a constitutional objection to it.

Vote was then taken on Senator Burns' motion to approve section 13. Motion carried on a split vote.

Section 14. ORS 136.230. Peremptory challenges. Mr. Paillette explained that the amendment in subsection (2) would conform to present practice in some jurisdictions. Senator Carson asked if the ballot was intended to be secret from the jury only but not secret from the judge and received an affirmative reply from Mr. Paillette. He noted that the last sentence in the commentary to section 14 explained the subcommittee's intent in adopting the revision.

Mr. Chandler moved to approve section 14. Motion carried with two votes in opposition.

ORS 136.240 would not be affected by this draft and was approved.

Section 15. ORS 136.250. Taking of challenges; joinder by codefendants. Mr. Paillette explained that the purpose of section 15 was to provide for the exercise of peremptory challenges where two or more defendants were tried together. Its principal purpose was to tie in with the joinder of defendants provision in section 12. Even though that policy had not been adopted by the Commission, Mr. Paillette said that this provision could be retained to take care of the rare instance in which there might be jointly tried defendants.

Mr. Stoll commented that inclusion of subsection (2) in the statute might result in discouraging voluntary joinder because the number of challenges might be a factor the defense lawyer would take into consideration when he was going to trial with a number of co-defendants.

Mr. Hennings observed that he had no objection to the limit on the number of challenges, but was concerned about the requirement that a majority must join in. If there were two defendants, he said, there would be no majority. Representative Stults remarked that under the present law they all had to join.

Mr. Clark moved adoption of section 15. Motion carried.

ORS 136.260 to 136.300 would not be affected by this draft and were approved.

Section 16. ORS 136.310. Function of court; effect of judicial notice of a fact. Mr. Paillette advised that subsection (2) of section 16 specifically required the court, irrespective of whether there had been a request for such instruction, to instruct the jury on all lesser included offenses. It was based on Oregon decisions, he said, and was intended to clarify the case law.

Senator Burns said that in every burglary case trespass was a lesser included offense and he was not sure that it was appropriate to instruct on trespass in every burglary.

Representative Cole asked if an attorney could challenge by reason of failure of the court to instruct on any lesser included offense and received an affirmative reply from the Chairman who added that this was one thing that caused him to question the wisdom of including subsection (2). If the judge neglected to instruct, for example, on assault and battery in a murder case, it would be reversible error.

Mr. Johnson moved to delete subsection (2).

Chairman Yturri said he believed the judge had an obligation to instruct on lesser included offenses, but he was disturbed by the fact that it would be reversible error should he fail to instruct on some minor offense, particularly when there had been no request for instructions.

Mr. Johnson commented that the problem with the provision was that it could create reversible error without counsel having to make his record. Chairman Yturri suggested that a provision could be added saying that it would not constitute reversible error unless objection had been made.

Mr. Hennings proposed that the subsection be written to require the judge to instruct on lesser included offenses warranted by the evidence if requested by either side.

Mr. Blensly stated that the present case law was that the responsibility for requesting instruction was primarily on the parties involved, and there was still a burden on the court to give appropriate instructions in accordance with the evidence. He was in favor of continuing that policy and seconded Mr. Johnson's motion to delete subsection (2).

Chairman Yturri asked Mr. Blensly what objection he had to the suggestion made by Mr. Hennings and was told that the matter would then be left entirely to the attorneys, and he believed the court had a responsibility to exercise discretion.

Vote was taken on Mr. Johnson's motion to delete subsection (2). Motion carried on a split vote.

Mr. Chandler moved to approve section 16 as amended. Motion carried unanimously.

ORS 136.320, 136.330, 136.520, 136.530 and 136.540 would not be affected by this draft and were approved.

ORS 136.340 and 136.350 were repealed by this draft and the repeal was approved.

Section 17. ORS 136.510. Applicability of law of evidence in civil actions. Mr. Paillette explained that the subcommittee had substituted "specifically" for "specially" in section 17 to show more clearly that the statutory and case law on evidence in civil actions was also the law in criminal proceedings unless there was a specific statute to the contrary.

Senator Burns moved approval of section 17. Motion carried unanimously.

Section 18. ORS 136.545. Statement by defendant when not advised of rights. Mr. Paillette advised that the amendment in section 18 deleted the reference to evidence before the grand jury. The subcommittee's view was that evidence obtained as a result of the failure of the magistrate to give the warnings set forth in ORS 133.610 should be dealt with separately. Approval of the section, he said, would carry with it approval of a drafting change in the Grand Jury draft to write in a specific provision parallel to ORS 136.545 dealing only with evidence before the grand jury.

Senator Burns moved approval of section 18. Motion carried unanimously.

Section 19. ORS 136.550. Testimony of accomplice; corroboration. Mr. Paillette explained that subsection (2) of section 19 attempted to define an accomplice for witness purposes. The language in the subsection following the statutory references was the result of a recommendation by the subcommittee to specifically write in a provision stating that even though the accomplice might be a juvenile and not really criminally liable, he would still be an accomplice for testimonial purposes.

Ms. Kalil commented that subsection (2) was less specific than the cases on this point and placed the law in the position it was in before the cases were decided.

Mr. Blensly suggested that the phrase "criminally liable for the conduct of the defendant" be limited to the conduct for which the defendant was then being charged. Chairman Yturri replied that it appeared to him that the language suggested by Mr. Blensly was implicit in the draft.

Mr. Paillette observed that he believed it was important to refer specifically to ORS 161.155 and 161.165 because the latter statute attempted to clarify ambiguities in the case law with respect to whether or not a person was an accomplice when he might arguably be a victim of the crime, examples being a sodomy victim or the girl on whom a criminal abortion was performed. That statute was specifically written to say that the person was not an accomplice if he was a victim of that crime or when his conduct was necessarily incidental to the conduct of the defendant. Inasmuch as those definitions were contained in the criminal code, he believed it was advisable to tie that concept into this draft. Basically, he said, it was the same as the Oregon case law. Chairman Yturri added that codification of the provision continued the pattern followed throughout the Commission's endeavors by setting forth the case law in the statute when it related to a field being dealt with by the Commission.

Mr. Chandler moved approval of section 19. Motion carried unanimously.

Section 20. ORS 136.605. Acquittal before presentation of defense. Mr. Paillette explained that under present law the defendant could move before his own case-in-chief for a judgment of acquittal. The amendment in section 20 would permit him to move either after the close of the state's case or at the close of introduction of all the evidence.

Mr. Hennings asked if he could move for a judgment of acquittal twice or if he was limited to one time. Mr. Paillette replied that he could make the motion twice.

Senator Burns moved approval of section 20. Motion carried without opposition.

Section 21. ORS 136.610. General or special verdict; verdict to be unanimous; exceptions. Mr. Paillette indicated that section 13 clarified the verdict necessary in criminal cases as set forth in the Oregon Constitution, Article I, section 11.

Chairman Yturri asked what, if any, effect this provision would have on the measure relating to the six man jury that would be on the November ballot. Mr. Paillette expressed the view that if the amendment were approved, there would be a constitutional conflict with respect to the jury verdict requirement. The resolution would allow the legislature to provide for a six man jury in any court, but the constitutional provision with respect to jury verdicts would remain. There would, therefore, be a built in ambiguity and conflict between the jury verdict provisions and the new six man jury.

Mr. Blensly remarked that even if the constitutional amendment failed to pass, there was still a statute permitting a defendant to waive a 12 man jury and go to a six man jury. He suggested that the statute should contain a statement as to whether the verdict should require a concurrence of six or five members in order to make the provision uniform throughout the state. Mr. Chandler suggested that the problem could be resolved by requiring a concurrence of five-sixths of the jury.

Mr. Paillette recommended that the Commission wait until the November election to see if the constitutional amendment was approved. Should it pass, the Commission could then consider providing by statute for some other type of formula for jury verdicts. The Commission concurred with his recommendation.

Mr. Johnson objected to the practice of treating murder differently than other felonies. Throughout the statutes, he said, murder was always treated as an exception to the rule, and he believed that society devoted entirely too much attention to the crime of murder. To illustrate, he said that the armed robber was a greater threat to society than was the man who killed his wife in a fit of passion. Mr. Chandler replied that the subcommittee's rationale was that murder was a serious offense and, whether or not it was a capital case, it was of sufficient consequence to warrant continuance of the requirement for a unanimous verdict.

Following a brief recess, Mr. Johnson moved that the staff be instructed to go through all the procedural statutes and amend them to treat the crime of murder the same as any other felony.

Mr. Spaulding advised that the Constitution required a unanimous verdict for murder and it could not, therefore, be treated the same as other felonies. Mr. Johnson conceded that this was correct.

Mr. Clark expressed the view that there was a legitimate reason to look at murder as a different kind of crime, and Chairman Yturri agreed.

Mr. Spaulding said that a verdict of guilty in a murder case must be unanimous but a not guilty verdict could be 10 to 2. Mr. Paillette maintained that it required a unanimous verdict either way.

Mr. Spaulding contended that the Constitution had been interpreted to mean that a not guilty verdict could be 10 to 2 because he had seen cases where the court had so instructed the jury. Mr. Hennings supported Mr. Spaulding's position and said he too had seen a not guilty verdict entered in murder cases where the jury voted 10 to 2 and he had heard judges instruct the jury that the verdict must be unanimous to convict on a murder case but 10 to 2 for a not guilty verdict.

Chairman Yturri commented that if that were the case, the last sentence of section 21 would make the statute tougher on the defendant than it was at the present time.

Mr. Paillette asked if he understood Mr. Spaulding and Mr. Hennings correctly that in Multnomah County the state was required to get a 10 to 2 verdict but the defendant was not and was told that the Constitution had been so interpreted. Chairman Yturri asked if there were any cases on that aspect, and Mr. Spaulding said he believed there were.

The Chairman recalled that the Commission had earlier decided to withhold action on section 21 pending the outcome of the November election and directed that in the interim the staff research the question which was being discussed and report back on its findings.

Chairman Carson said that in order to submit a complete bill to the legislature, section 21 should be approved in some form and the Commission could later submit an amendment if it proved necessary or advisable. Mr. Paillette concurred and stated that his recommendation to postpone action until after the November election went only to the question of whether to provide for a concurrence of at least five out of six jurors.

Mr. Johnson asked if the section as drafted would mean that a unanimous verdict would be required by both the defense and prosecution and received an affirmative reply from Mr. Paillette who added that he believed it reflected the status of existing law.

Mr. Chandler moved approval of section 21 as drafted. Motion carried. Voting for the motion: Blensly, Carson, Chandler, Clark, Cole, Attorney General Johnson, Mr. Chairman. Voting no: Burns, Representative Johnson, Paulus, Spaulding, Stults.

Section 21 was subsequently amended. See page 26 of these minutes.

Section 22. ORS 136.620. General verdict on plea of not guilty. Mr. Paillette explained that the deletion of subsection (2) was consistent with the recommended change explained earlier in connection with section 4 wherein former jeopardy would be raised by motion instead of by plea.

Mr. Johnson moved the adoption of section 22. Motion carried unanimously.

ORS 136.630. Special verdict. ORS 136.640. Judgment on special verdict. Mr. Hennings indicated he had noted in the subcommittee minutes of the meeting at which this draft was discussed that no one at that meeting had ever heard of using special verdicts in criminal cases. He was of the opinion that with the affirmative defenses in the new criminal code, special verdicts would be a useful tool for judges to have available in guiding the deliberations of the jury. Mr. Stoll held the opposing view and commented that special verdicts could lead to more appeals on the ground that the findings were inconsistent because some of the jurors acquitted for one reason and some for another.

Mr. Paillette indicated that the subcommittee had discussed the advisability of deleting the provisions for special verdicts altogether. Judge Crookham had outlined to the subcommittee that he had never used special verdicts in criminal cases and he was not aware that they had ever been used, but he felt they might be useful if compulsory joinder were approved by the Commission.

Mr. Chandler moved to delete ORS 136.630 and 136.640. Representative Paulus asked if those two sections were the only ones dealing with special verdicts and was told by Mr. Paillette that he believed they were except that ORS 136.610 contained a reference to a special verdict and there might be other such references.

In support of his motion Mr. Chandler explained that the subcommittee had voted to retain ORS 136.630 and 136.640 only because of the possibility that compulsory joinder would be approved by the Commission. Inasmuch as joinder was deleted, there appeared to be no further necessity to keep them.

Vote was then taken on Mr. Chandler's motion to repeal ORS 136.630 and 136.640. Motion carried with Chairman Yturri among the three who voted in opposition.

Section 21. Mr. Paillette noted that section 21 amending ORS 136.610 would require an amendment to conform it to the action just taken. The Commission approved that editorial change.

Section 23. ORS 136.650. Crimes consisting of degrees; verdict of guilty of inferior degree or attempt. Mr. Clark moved approval of section 23. Motion carried unanimously.

Mr. Spaulding pointed out that according to the discussion during the consideration of section 21, some courts required a not guilty verdict in a murder charge to be unanimous. Section 23, however, said that the "jury may find the defendant not guilty of the degree charged . . . . " He questioned whether this section was therefore inconsistent with section 21 because under section 23 the defendant could be found guilty of a lesser degree of murder by a 10 to 2 verdict. Mr. Blensly replied that there were no lesser degrees of murder. Manslaughter, for example, would be a lesser included crime and section 23 was not directed at lesser included crimes.

Section 24. ORS 136.660. Crime included in that charged; power of jury to find guilt of such offense or attempt. Section 25. ORS 136.670. Conviction or acquittal of one or more of several defendants. Section 26. ORS 136.680. Verdict as to some of several defendants; retrial of others. Mr. Paillette explained that the amendments in sections 24, 25 and 26 were all housekeeping in nature.

Mr. Johnson moved the approval of all three sections. Motion carried without opposition.

ORS 136.690, 136.700, 136.710 and 136.720 would not be affected by this draft. Mr. Paillette noted that ORS 136.700 and 136.720 would require editorial changes to conform to the deletion of the provisions relating to special verdicts. The Commission approved those revisions.

Section 27. ORS 136.810. Motion in arrest; basis and time for making. Mr. Chandler moved approval of section 27. Motion carried unanimously.

ORS 136.820, 136.830 and 136.840 would not be affected by the draft but Mr. Paillette indicated that they would require amendment to conform to the "accusatory instrument" languaged used throughout the balance of the draft. The Commission approved those revisions.

Section 28. ORS 136.851. Timing of proceedings on motion in arrest of judgment and motion for new trial. Mr. Paillette explained that the amendments in section 28 were designed to reduce the time allowed for filing, responding to and hearing motions.

Mr. Blensly pointed out that it was impossible for the court to make the determination in 10 days as required in subsection (3) because the two five day periods in subsections (1) and (2) used up the 10 days, and there was no time left for the court to rule. Mr. Paillette advised that the intention was to allow 20 days in subsection (3) instead of 10.

Mr. Johnson moved to approve section 28 with a revision changing "10" to "20" in subsection (3). Motion carried unanimously.

Section 29. ORS 10.110. Preparation of preliminary jury list, jury list and list of rejected prospective jurors in counties other than Multnomah County. Mr. Paillette reported that the balance of the draft dealt with the civil code and, while he had attempted to avoid amending the civil code wherever possible, it was necessary here because the criminal code incorporated by reference the sections that were amended. Section 29 would delete "tax roll and registration books" so the statute would refer to "the latest voter registration list and any other source which will furnish a fair cross-section of the county wherein the court convenes." The original amendment referred to a cross-section of the "community" but the subcommittee had changed it to "county."

Mr. Chandler moved to amend subsection (1) to make the procedure therein applicable to all counties rather than just to Multnomah County by deleting the following language: "which has a population of less than 300,000 and in which the judicial jurisdiction, authority, powers, functions and duties of the county court have not been transferred to the circuit court". The subsection as amended would then read:

> "The county court of each county shall at its first term of each year . . . . "

Motion carried.

Mr. Chandler then moved to delete subsection (2) of section 29 on the ground that it was no longer needed in view of the motion just adopted. Motion carried unanimously.

Mr. Johnson moved to adopt section 29 as amended. Motion carried without opposition.

Following the adoption of section 30, Senator Carson pointed out that the Commission, in amending ORS 10.110, had not taken into consideration the statute dealing specifically with Multnomah County. He said that if ORS 10.110 were enacted as amended, Multnomah County would face the problem of having both a general and a special statute relating to that county and the two would be in conflict. He also noted that under the amendments adopted, the county court would be the agency charged with the duty of making the jury list and the proposed statute was not clear as to when the county clerks would be involved in the process. At the present time they were the ones who performed this duty in the majority of the counties.

Mr. Paillette commented that Senator Carson's point was well taken and noted that ORS 10.120 was the statute that dealt specifically with Multnomah County.

Senator Carson moved to reconsider the action by which section 29 was approved. Motion carried.

After a discussion during which several possibilities for amendment were discussed, Chairman Yturri appointed a subcommittee to consider section 29 and to submit their recommendations to the Commission the following day. Members of the subcommittee were: Senator Carson, Chairman; Mr. Blensly, Senator Burns and Mr. Chandler.

The next morning Senator Carson reported that inasmuch as the county clerk was the one who would actually be making up the jury lists, the subcommittee recommended deletion of subsection (1) of section 29 and further recommended that subsection (2) be amended to read:

> "The county clerk of each county shall, at the first term of each year of the circuit court . . . . " [No further change in the subsection as drafted.]

Senator Carson explained that adoption of this recommendation would mean that all 36 county clerks would have the responsibility for preparing the jury lists. The general statute pertaining to home rule counties which did not have county clerks would give those counties authority to follow this procedure also.

The subcommittee further recommended repeal of ORS 10.120, the specific statute dealing with voter lists in Multnomah County.

Senator Carson moved adoption of the report of the subcommittee. Motion carried unanimously.

Section 30. ORS 10.135. Jurors to be from different portions of county; number of names on list. Mr. Paillette explained that section 30 was amended to conform to the revisions in ORS 10.110. The deleted language in subsection (1), he said, would be surplusage under the amendment to ORS 10.110.

Mr. Blensly asked what type of lists were referred to in the phrase, "any other source authorized by ORS 10.110." Representative Paulus replied that it would include telephone directories, city directories, etc.

Mr. Spaulding moved the approval of section 30. Motion carried unanimously.

Section 31. ORS 10.300. Methods of drawing additional jurors to augment panel or jury list. Mr. Chandler moved approval of section 31. Motion carried unanimously.

Section 32. ORS 17.115. Challenges, definition and kinds. Mr. Paillette explained that the amendment in section 32 was an attempt to avoid any ambiguity in view of the earlier amendment providing for a challenge to the panel in criminal cases.

Mr. Johnson moved to adopt section 32. Motion carried unanimously.

Arraignment Proceedings; Preliminary Draft No. 1; August 1972

Mr. Paillette advised that Subcommittee No. 1 had met the previous Tuesday to consider the Arraignment draft and the minutes of that meeting were not yet available. He was, however, prepared to discuss the draft based upon the notes he had taken of the subcommittee's action at that meeting.

All through this draft, Mr. Paillette noted, revisions had been made to conform it not only to amendments to ORS chapter 136 but also to change the terms "indictment," "information" and "complaint" to "accusatory instrument" wherever that term was applicable.

Section 1. ORS 135.010. Time and place. Mr. Paillette indicated that the subcommittee recommended that the second sentence of section 1 be revised to read:

> "Except for good cause shown or at the request of the defendant, if the defendant is in custody, the arraignment shall be held during the first 24 hours of custody . . . . "

The amendment would permit the state to make a showing to the court as to why the arraignment had not occurred within the time limitations set out in section 1. Mr. Blensly asked if the exception would also apply to "all other cases" referred to in the last sentence of the section and received an affirmative reply from Mr. Paillette.

Mr. Chandler pointed out that if a person were arrested at 12:01 a.m. on a Friday morning and then released, under section 1 he would have to be arraigned not later than 12:01 a.m. on Monday morning to fall within the 72 hour period. Therefore, if a person were in custody having been arrested at 12:01 on Friday, he would not have to be arraigned until Monday, whereas if he were not in custody, he would have to be brought into court on Sunday.

In connection with the 24 hour requirement Mr. Stoll commented that in Multnomah County about half the defendants who were arrested were released, and the great majority were arrested at night. The arresting officer in such cases would in all probability not be able to make a report of the arrest until the following afternoon. By the time the district attorney's office was able to handle the complaint, more than 24 hours from time of arrest would have elapsed. He expressed the view that 36 hours was a more reasonable and realistic time limitation. Mr. Blensly agreed and added that in the smaller counties the judges were not always available so the 24 hour period would cause a problem in those areas also.

Mr. Paillette commented that the 24 hour period was an attempt to provide a specific statutory guideline for speedy arraignment.

Senator Burns moved to change "24 hours" to "36 hours." Motion carried.

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Mr. Chandler moved to change "72 hours" to "96 hours" to take care of the problem he had posed. Motion carried.

Mr. Spaulding asked which time limitation would apply in a case where a person was in custody for less than 36 hours; for example, if he were arrested, held in custody for five hours and then released. The Commission was in agreement that in those situations where a person was arrested and released before the expiration of 36 hours, the 96 hour rule would apply and the time period would start to run from the time he was released. If the defendant were not taken into custody, the time would begin to run at the time of arrest.

Mr. Chandler moved to approve section 1 as amended, including the amendment proposed by the subcommittee. Motion carried.

Section 2. ORS 135.020. Scope of proceedings. Mr. Paillette explained that the amendatory language, "if the accusatory instrument is an indictment," referred to the delivery of an indictment. The balance of the section would relate to any of the accusatory instruments.

Mr. Chandler moved to approve section 2 and the motion carried unanimously.

Section 3. ORS 135.110. When presence of defendant is required; appearance by counsel. Mr. Clark moved the adoption of section 3 and the motion carried unanimously.

Section 4. ORS 135.120. Bringing in defendant who is in custody. Mr. Paillette advised that the subcommittee believed section 4 was unnecessary and recommended its deletion. The effect of the deletion, he said, would be to repeal the existing statute.

The Commission unanimously approved the subcommittee's recommendation to delete section 4.

ORS 135.130. Bringing in defendant admitted to bail; forfeiture of bail. Mr. Paillette explained that ORS 135.130 would be repealed by the draft relating to Release of Defendants. The Commission approved its deletion.

Section 5. ORS 135.140. Bringing in defendant not yet arrested or held to answer. Mr. Paillette advised that in addition to the conforming amendment changing "indictment" to "accusatory instrument,"

section 5 contained an amendment requiring the court to issue an arrest warrant as provided in the amended ORS chapter 133 as tentatively approved by the Commission. He advised that his recommendation to the subcommittee was that the existing statutes dealing with bench warrants were unnecessary in view of the fact that the term "accusatory instrument" was being used. There was, therefore, provision for reasonable cause for the authority to issue an arrest warrant and the specific reference to "a bench warrant" was obsolete.

Mr. Johnson moved to approve section 5 and the motion carried unanimously.

ORS 135.150 to 135.210. Mr. Paillette advised that ORS 135.150 to 135.180 relating to bench warrants would be repealed for the reasons discussed in connection with section 5. ORS 135.190 to 135.210 were unnecessary in view of the provisions of the Release of Defendants draft. Deletion of ORS 135.150 to 135.210 was approved.

ORS 135.310. Right of counsel. Mr. Clark asked if there was anything in ORS 135.310 that would preclude counsel being appointed for an indigent prior to the time he was before the court for arraignment and received a negative reply from the Chairman. ORS 135.310 was approved.

Section 6. ORS 135.320. Court appointment of counsel; waiver. Section 7. ORS 133.625. Court appointment of counsel. Mr. Paillette reported that the subcommittee had approved subsections (1) through (6) of section 7 with one amendment in paragraph (b) of subsection (6) where they had deleted "currently." Subsection (7) was submitted to the Commission without recommendation.

Subsection (1). He explained that section 7 was based on the ABA Standards and was an attempt to set out guidelines for the court to follow with respect to appointment of counsel. It made substantial changes in the existing statute, the first one being in subsection (1) where "circuit court" was deleted and "magistrate" substituted. This amendment would avoid the situation where all appointments of counsel for indigents must go through circuit court and would allow a magistrate to appoint counsel without later having to get ratification from the circuit court approving the appointment.

Another major change dealt with the time when counsel would be appointed, and the new language with respect to that question appeared first in paragraph (c) of subsection (1). It would still require a verified financial statement but instead of requiring the defendant to show lack of ability to obtain counsel, it would require him to show his "inability to obtain adequate representation without substantial hardship to himself or his family."

Chairman Yturri asked if "substantial hardship" related to financial hardship and was told by Mr. Paillette that that would be the usual case.

Mr. Johnson commented that the language of paragraph (c) could mean that almost anyone would be entitled to appointed counsel because a man with a $25,000 annual income could easily show that hiring an attorney would create a substantial hardship to himself or his family. He was of the opinion that anyone making $25,000 to $30,000 per year could easily qualify for appointed counsel under this section. Chairman Yturri agreed and advocated that if the intent of the section was to refer to financial hardship, the section should so state.

Mr. Clark observed that there were tentative plans in Multnomah County to have a "recog officer" available at the jail who would interview a defendant to determine whether he could be released on ROR. At that time the officer would also make a determination as to whether the individual was in need of appointed counsel and, if so, the officer would act as an agent of the court and would notify the public defender that the individual was in custody. He asked if this procedure would be permissible under the Arraignment draft as proposed. Both Chairman Yturri and Mr. Chandler agreed that there was nothing in this draft to prohibit such a procedure.

Returning to the question raised by Mr. Johnson, Chairman Yturri asked why the subcommittee had omitted "financial" hardship from subsection (1) (c). Senator Burns replied that it came out of subcommittee on a split vote because of the view he held that the section was loosening the standards with respect to appointment of counsel. He was of the opinion, he said, that even under the existing law the courts in Multnomah County had been too liberal in providing appointed counsel.

Mr. Chandler's view was that the very rich defendant could well afford counsel, the very poor one was given counsel free of charge and the one who was caught in the middle and who suffered the greatest hardship was the wage earner who was neither rich nor poor and for whom a $2,000 attorney fee could be devastating.

Representative Paulus asked if the subcommittee had considered language based on deprivation of basic necessities to the family. Mr. Hennings pointed out that the commentary to the ABA Standards on providing defense services was set forth on page 14 of the draft and he believed this was the criterion the subcommittee had adopted in approving the language of this draft.

After further discussion, Chairman Yturri suggested amending paragraph (c) of subsection (1) to read:

"(c) The defendant makes a verified financial statement and provides other information in writing under

oath showing his lack of financial ability to obtain counsel and provide any other information required by the court that reasonably relates to his inability to obtain counsel; and"

Senator Burns moved adoption of the amendment as stated by the Chairman and the motion carried with Mr. Chandler voting in opposition.

Subsection (2). Mr. Johnson suggested that subsection (2) be deleted. Mr. Paillette commented that subsection (2) was not inconsistent with the amendment just adopted.

Mr. Spaulding observed that some judges had a standing rule that if the defendant was able to post bail, he could hire a lawyer and he was of the opinion that there was good reason to retain subsection (2) to discourage that practice. Mr. Johnson held the opposing view and believed the section would permit a father to refuse to hire counsel for his own son even though he could well afford to do so. Mr. Spaulding pointed out that the subsection said "merely because" which he interpreted to mean that in and of itself the fact that one of his relatives was capable of depositing security was not enough reason to deny counsel.

Mr. Spaulding moved to approve subsection (2). Motion carried with Senator Burns and Mr. Johnson among those who voted against the motion.

Subsection (3). Mr. Clark moved approval of subsection (3). Motion carried without opposition.

Subsection (4). Subsection (4) was unchanged from existing law and was approved.

Subsection (5). Mr. Paillette explained that subsection (5) deleted the reference to partial payments inasmuch as subsection (6) added a provision for recovery of funds expended for legal assistance and stated in paragraph (b) of that subsection that when the defendant was financially able to reimburse the county, he must do so.

Subsection (6). Mr. Blensly was of the opinion that if a defendant were found not guilty, recoupment should not be allowed. On the other hand, when he was found guilty, he owed a duty and obligation not only to pay for his counsel but he should also be required to reimburse his victim or victims. He believed that even though he were sent to jail, he still had a duty and obligation to pay the persons who had suffered by his acts. Senator Burns expressed agreement with Mr. Blensly but said it was his understanding that such a provision would be unconstitutional because of the equal protection clause.

Mr. Paillette advised that the proposed recoupment provision in subsection (6) attempted to comply with James v. Strange, 11 Cr L 3109, ___ US ___ (June 12, 1972), as outlined on page 15 of the commentary to the draft.

Mr. Spaulding moved to delete subsection (6), one reason being that it would result in collection of a minimal amount of money in any event. Mr. Blensly commented that repayment could be made a condition of probation or parole which would probably increase recoupment.

Mr. Paillette advised that the subcommittee had discussed the fact that the counties and cities would be opposed to this draft if it failed to include some type of procedure for recoupment of monies expended for legal assistance and urged that the proposed statute include a provision which would at least offer them the possibility of recovering some of those funds.

Chairman Yturri observed that even though the counties would probably not gain much money from the provision and since the likelihood was that they would use it infrequently, it would do no harm to leave it in the draft.

Representative Paulus said that if the subsection were retained, she feared that some of the district attorneys would be going after everyone to collect from them as soon as they got out of jail, had a job and were working toward rehabilitation. She agreed, however, that the statute should contain some language permitting the county to recover funds if it later turned out that the defendant was able to pay and should in fact have paid for his counsel. Mr. Johnson commented that since the statute called for a statement of financial condition, the defendant to whom Representative Paulus referred could be charged with false swearing if it were later determined that he could have afforded to pay for his counsel.

Mr. Hennings pointed out that if recoupment were made a condition of probation, an equal protection question could be raised as it was in the case of James v. Strange. He urged that the proposed statute be drafted to avoid any possibility of a constitutional issue.

Mr. Paillette indicated that Mr. Hennings had suggested specific language for amending subsection (6) to the subcommittee although they had not adopted his proposal. He asked Mr. Hennings to read that language to the Commission:

> "(6) A civil proceeding may be initiated by any public body which has expended monies for the defendant's legal assistance within two years of judgment if:"

Vote was then taken on Mr. Spaulding's motion to delete subsection (6). Motion failed.

Senator Burns moved the adoption of the language suggested by Mr. Hennings with the understanding that paragraphs (a) and (b) of subsection (6) would remain unchaged except for the deletion of "currently" in paragraph (b). Motion carried.

Subsection (7). Senator Burns moved to delete subsection (7). Mr. Blensly pointed out that the exemptions should be retained. Mr. Spaulding commented that the subcommittee in subsection (7) was attempting to eliminate the possibility that a judge could impose recoupment as a condition of probation.

Senator Burns withdrew his motion to delete subsection (7) and moved to amend it to read:

> "(7) The civil proceeding shall be subject to the exemptions from execution as provided for by law."

Speaking in opposition to the amendment, Mr. Spaulding noted that the amended subsection would permit the court to provide as a condition of probation that the defendant would repay his legal fees.

Vote was taken on the motion to amend subsection (7) as stated above and the motion carried with Mr. Spaulding among those who voted against it.

Senator Burns moved to approve subsection (7) as amended. Motion carried.

Senator Burns moved to approve section 7 as amended. Motion carried, Mr. Chandler voting no.

Section 8. ORS 135.340. Communication to defendant as to use of name in accusatory instrument. Mr. Johnson moved to approve section 8. Motion carried unanimously.

Section 9. ORS 135.350. Name used in further proceedings. Mr. Paillette recalled that the subcommittee had discussed in considerable detail the undesirability of the use of aliases in the accusatory instrument because they could be prejudicial to a defendant. The subcommittee had suggested that the use of aliases be restricted even though a question might arise as to whether the name in the accusatory instrument was in fact the defendant's true name.

Mr. Chandler reported that the discussion in subcommittee was prompted by a case described by Mr. Spaulding in which an Indian was charged with murder whose alias was "The Murderer" and the prosecuting attorney had referred to him throughout the trial as "The Murderer." Needless to say, he was convicted.

Mr. Spaulding indicated that case was merely an example of what could happen but many times district attorneys could place a defendant in a bad light by reading off two or three aliases.

Mr. Blensly stated that section 9 did not reach that problem but was designed to correct the record when the defendant had been indicted under the wrong name.

Representative Cole pointed out that the subcommittee had approved language yet to be drafted by the staff which would prohibit the use of an alias in the accusatory instrument unless it was necessary to properly identify the defendant.

Mr. Johnson asked how language could be drawn to prohibit the state from charging "Harry the Horse Yturri" instead of "Anthony Yturri." Mr. Spaulding suggested this might be accomplished by adding "and no other" after "name" in the second and last lines of section 9. Mr. Blensly asked what effect that amendment would have upon the court records where several aliases might be listed. Chairman Yturri suggested that this fault might be cured by adding a subsection stating that the defendant could only be referred to before the jury or during the trial by his true name and no other.

Mr. Paillette suggested that the question might be dealt with in ORS 135.340 by amending it to read: "When the defendant is arraigned, he shall be informed that if the name or names by which he is charged . . . . "

The Commission discussed a number of possible methods of amending the proposed statute to prohibit the use of aliases before the jury. Representative Cole's suggestion was to add a subsection to section 9 which would read:

> "Upon motion of the defendant, all names, other than the true name of the defendant, shall be stricken from any accusatory instrument submitted to the jury."

Senator Burns commented that at the outset of the trial the accusatory instrument was not submitted to the jury and the proposal could be construed to permit aliases to be read to the jury. Mr. Chandler said this could be cured by amending Representative Cole's proposal to read: " . . . any accusatory instrument read or submitted to the jury."

The Commission was in agreement that neither the judge nor the district attorney should be permitted to read aliases to the jury.

After further discussion, Representative Cole moved to add a subsection to section 9 to read:

> "Upon motion of the defendant, all names, other than the true name of the defendant, shall be stricken from any accusatory instrument read or submitted to the jury."

Motion carried.

Senator Burns moved to approve section 9 as amended. Motion carried.

ORS 135.410. Time allowed for answering. Repeal of ORS 135.410 was approved.

Section 10. ORS 135.420. Types of answer. Mr. Chandler moved approval of section 10. Motion carried.

ORS 135.430 was approved.

ORS 135.440 would be repealed by the draft and the repeal was approved.

ORS 135.450 and 135.460 were approved without amendment.

Section 11. ORS 135.510. Grounds for motion to set aside the indictment. Mr. Paillette indicated that the statutory reference added to subsection (2) of section 11 referred to the Grand Jury draft wherein the Commission had approved a provision allowing the state to make a showing to the court that the defendant was not prejudiced because a witness's name was omitted from the indictment and that the name of the witness had been furnished to the defendant at least 10 days prior to trial. Moreover, the proposed Discovery draft would take care of the situation where the names of witnesses were not shown on the indictment.

Mr. Chandler moved approval of section 11. Motion carried unanimously.

Section 12. ORS 135.520. Time of making motion; hearing. Mr. Paillette related that the subcommittee had amended the last line of section 12 to read, "to the indictment or accusatory instrument."

In reply to Senator Carson's question as to the reason for inserting "indictment or" Mr. Paillette explained that the sections dealing with a motion to set aside dealt only with indictments and the statutes referred to in subsection (1) of ORS 135.510 referred to technical questions that would arise only because the instrument was an indictment whereas ORS 135.520 dealt with the time of making motions and referred not only to a motion to set aside an indictment but also to a motion to dismiss an accusatory instrument. Section 12 was intended to provide for both situations.

Senator Carson asked if the subcommittee believed that "accusatory instrument" would not include an indictment and was told by Mr. Chandler that they were not certain it would in this instance.

Mr. Spaulding moved to approve section 12 as amended. Motion carried.

Section 13. ORS 135.530. Effect of allowance of motion. Section 14. ORS 135.540. Effect of resubmission of case to grand jury. Mr. Paillette explained that the second revision in section 13 contained a conforming amendment to delete reference to bail and to make the section consistent with the Release of Defendants draft. The same was true with respect to section 14.

Representative Cole's recollection was that the subcommittee had amended sections 13 and 14 to allow five days in which to resubmit a case to the grand jury. Mr. Paillette said his notes indicated that such an amendment had been made only in sections 18 and 19 which were the sections dealing with demurrers.

The Commission decided to move on to section 15 and return to sections 13 and 14 at the next meeting by which time the subcommittee minutes would be available for reference.

Section 15. ORS 135.620. Form; signature; filing; specification of grounds. Mr. Paillette reported that the subcommittee had deleted "or it may be disregarded" at the end of section 15.

Mr. Spaulding moved to approve section 15 as amended by the subcommittee. Motion carried without opposition.

Section 16. ORS 135.630. Grounds of demurrer. Mr. Paillette explained that subsections (1) and (2) of section 16 related to indictments only which was the reason for inserting the language, "If the accusatory instrument is an indictment."

Mr. Blensly noted that subsection (4) referred to a "crime" and asked if it would be possible to demur under that language if the defendant were charged with a violation. Chairman Yturri replied that a violation was not a crime and he therefore assumed that the section as drafted would not be applicable to a violation. Mr. Paillette suggested that "crime" be changed to "offense" to resolve the problem raised by Mr. Blensly.

Mr. Chandler moved to substitute "an offense" for "a crime" in subsection (4) of section 16. Motion carried unanimously.

Mr. Chandler moved approval of section 16 as amended. Motion carried without a dissenting vote.

Section 17. ORS 135.640. When objections which are grounds for demurrer may be taken. Mr. Chandler moved to approve section 17. Motion carried unanimously.

ORS 135.650 and 135.660 would not be affected by the draft and were approved without amendment.

Section 18. ORS 135.670. Allowance of demurrer. Mr. Paillette related that the subcommittee had amended section 18 by substituting "allows" for "directs" in the sixth line of section 18. On the same line "or refiled" was inserted after "resubmitted" and the balance of the section was deleted.

Mr. Spaulding explained that the language was removed in order that the second time the demurrer was filed the district attorney

would be permitted to proceed by information instead of by indictment so he would not have to go to the trouble of calling the grand jury back in if that were his choice.

Mr. Paillette advised that the subcommittee had also voted to insert a provision that the refiling shall be made within five days and the five day period was to refer to refiling of an information, indictment or complaint.

Chairman Yturri noted that "resubmitted" was a word of art ordinarily used to refer to indictments only. Mr. Paillette concurred and indicated that this was the reason the subcommittee had added "or refiled" after "resubmitted." The effect of the amendment, he said, was to allow five days in which to recharge the defendant. Chairman Yturri asked when the five days would start running and was told that it would be five days from the time the judge announced his order.

Mr. Blensly expressed objection to section 18. He said that in the situation where the defendant was in circuit court on an indictment, a demurrer was granted and the court ordered it to be resubmitted or refiled, an indictment could not be refiled in circuit court without a waiver of indictment. It would be necessary, he said, to start all over again in district court and it was unreasonable to impose a five day limitation in that situation.

Following a brief discussion of the question raised by Mr. Blensly, the meeting was recessed until 8:30 the following morning.

After the Commission had disposed of the balance of its agenda on the afternoon of August 29, they returned to the Arraignment draft and the discussion was picked up with the question raised by Mr. Blensly as to whether five days was adequate time to refile or resubmit a demurrer. Mr. Paillette recalled that the Commission had also discussed the question of whether the same time limitations as those in sections 18 and 19 were meant to apply to sections 13 and 14 dealing with motions. He suggested that further action on the sections relating to motions and demurrers be deferred until such time as the subcommittee minutes were available.

Mr. Blensly remarked that the time problem inherent in section 18 was taken care of under existing statutes because the defendant had to be indicted within 30 days and, when he was in custody, he had to be tried within 60 days. The district attorney, therefore, would still have to act promptly in order to stay within those time limits and if he did not, the defendant would be released.

Mr. Hennings expressed doubt that the problem was solved by the statutes to which Mr. Blensly referred. The delay in section 18, he said, would be attributable to the defendant. He believed it would be safer to establish statutory limits, and he suggested a 30 day

limitation with the penalty for noncompliance being release of the defendant from custody. He contended that the statute should clearly state that the district attorney could only hold the defendant in custody for 30 days. After that time he would have to release him although release would not block the state from bringing a further action. Mr. Blensly said he would have no objection to following Mr. Hennings' recommendation.

Senator Burns moved that Mr. Hennings' proposal be adopted as the policy of the Commission and that the staff draft a proposed section to that effect for resubmission to the Commission at its next meeting. Motion carried.

Section 19. ORS 135.680. Failure to resubmit case after allowance of demurrer. Mr. Chandler moved approval of section 19. Motion carried unanimously.

ORS 135.690 would not be affected by the draft and was approved.

ORS 135.700. Disallowance of demurrer. Representative Cole recalled that the subcommittee had amended the last clause of ORS 135.700 to read:

> " . . . but if he does not plead, a plea of not guilty shall be entered."

Senator Burns moved to approve ORS 135.700 in accordance with the recommendation of the subcommittee. Motion carried unanimously.

ORS 135.810 and 135.820 would be repealed by the draft on guilty pleas and the repeal was approved.

Section 20. ORS 135.830. Presentation of plea; entry in journal; form. Mr. Paillette indicated that subsection (3) should be deleted from section 20 inasmuch as a motion to dismiss on grounds of former jeopardy was provided for in the draft. Subsection (4) would then become subsection (3).

Mr. Chandler moved approval of section 20 as described by Mr. Paillette. Motion carried unanimously.

Section 21. ORS 135.840. Special provisions relating to presentation of plea of guilty and no contest. Mr. Paillette explained that section 21 had been amended for the purpose of including no contest pleas.

Representative Stults noted that section 21 appeared to require that a person must appear in person to plead to a misdemeanor inasmuch as it said that "a plea of guilty or no contest shall in all cases be put in by the defendant in person in open court."

Mr. Paillette indicated that the draft on pleas employed the language, "in all cases in which a defendant is required to appear." Representative Stults commented that the two provisions were inconsistent.

Senator Burns raised another question concerning section 21 and asked if it should read "upon an accusatory instrument against a corporation" instead of "upon an indictment against a corporation." The Commission agreed that this amendment should be made.

Senator Burns asked if there should also be some policy consideration given to requiring the appropriate corporate officer to appear. He was of the opinion that someone representative of the entity charged should be required to appear in court. Mr. Spaulding commented that theoretically he did not believe a corporate officer could be compelled to appear.

Mr. Paillette observed that it might be possible to eliminate section 21 altogether but he requested the Commission to withhold action at this time until he had had an opportunity to check the section against the guilty plea draft. The Chairman so ordered.

Section 22. ORS 135.850. Withdrawal of plea of guilty. Mr. Paillette advised that section 22 came to the Commission without recommendation by the subcommittee and dealt with standards for the court to follow regarding withdrawal of pleas of guilty. He pointed out that the draft on guilty pleas provided that in a plea bargaining context if a defendant did not receive the concessions that were the basis for his agreement to plead guilty or no contest, the court was required to allow him an opportunity to withdraw his plea. The standards in section 22, based on ABA recommendations, went beyond that provision and set out other bases for allowing a guilty plea or a no contest plea to be withdrawn.

Mr. Paillette indicated that the crux of the standards was contained in subsection (3) which set out a list indicating when a manifest injustice had occurred.

Mr. Spaulding asserted that "or" should be placed after paragraphs (a), (b) and (c) of subsection (3).

Ms. Kalil asked if the section contemplated withdrawing a plea of guilty after the individual began serving time in the penitentiary and she also wanted to know if the section would eliminate post-conviction proceedings. Mr. Paillette acknowledged that the section dealt with the types of problems that were currently handled under post-conviction proceedings. The main reason he wanted the Commission to review these ABA recommendations, he said, was that the Oregon statute as well as the Oregon case law talked in terms of the sole discretion of the court in allowing withdrawal of a guilty plea. It seemed desirable for the Commission at least to consider something more specific to guide the court in deciding whether withdrawal of a plea should be permitted.

Mr. Johnson moved that the new language in section 22 be deleted and that the Commission adopt ORS 135.850 with an amendment adding "no contest."

Mr. Chandler held the view that there were distinct advantages to having clear guidelines in the statute for the trial courts to follow regarding withdrawal of a plea of guilty. There were, he said, no guidelines at the present time and even the case law was not very helpful because it merely said that it was a discretionary matter for the court. He pointed out that the entire section did not deal with post-conviction and suggested that if the Commission did not favor the provisions relating to post-conviction, they should be deleted and the balance of the section retained.

Mr. Johnson's opinion was that the matter should be left to the discretion of the judge, and it merely invited motions when all these standards were spelled out in the statute.

Senator Burns said he was inclined to agree with Mr. Johnson and added that there was something to be said for having a separate and objective tribunal reviewing post-conviction.

After further discussion, Mr. Chandler moved to insert a period after "therein" in subsection (2) of section 22 and delete the balance of the section. Motion was defeated.

Vote was then taken on Mr. Johnson's motion to reinstate ORS 135.850 with an amendment adding "no contest" and delete subsections (1) through (5) of section 22. Motion carried.

Section 23. ORS 135.860. Not guilty plea as denial of allegations of indictment. Mr. Chandler moved to approve section 23. Motion carried unanimously.

Section 24. ORS 135.870. Evidence admissible under plea of not guilty. Mr. Paillette indicated that the subcommittee had recommended deletion of section 24 on the grounds that it was unnecessary.

Mr. Spaulding moved to accept the recommendation of the subcommittee to delete section 24. Motion carried without opposition.

ORS 135.875. Notice prior to trial of intention to rely on alibi evidence; content of notice; effect of failure to supply notice. Representative Cole indicated that the subcommittee had discussed notice of intent to rely on alibi evidence in connection with section 24. In reply to a question by Mr. Blensly as to whether the subcommittee had discussed the fact that the state was not required to give notice of alibi witnesses, Mr. Paillette outlined that the problem had been discussed in connection with the Discovery draft and it came up again at the subcommittee meeting on this Arraignment draft. It was not contemplated, he said, that the Discovery Article would repeal the

alibi provisions. John Osburn had indicated that the biggest problem under the present alibi statute was that it did not provide for reciprocity. In Williams v. Florida the notice provisions were upheld, but the Florida discovery rule provided for reciprocal discovery whereas Oregon's did not. It was possible, therefore, that after Wardius was finally decided, the Oregon statute would be declared invalid.

Mr. Blensly asked if Mr. Paillette believed that the objections to the alibi statute would be taken care of by the discovery provisions requiring a list of witnesses and received an affirmative reply. Mr. Paillette added that if the Discovery Article were in effect at the present time, it would meet any possible objection to ORS 135.875.

Mr. Hennings commented that the case law was such that the district attorney was entitled to prove his case at any time within the statute of limitations. Mr. Blensly said he believed there was a case allowing the defense to make a motion requiring the state to elect a time. Mr. Hennings replied that only after the state had put on its case-in-chief could the state now be required to make an election. He added that his office had contemplated giving a list of places and a list of witnesses covering the entire period within the three year statute of limitations, and he urged that the statute be tightened up to protect the district attorney from that possibility and also to provide the defendant with enough specificity to enable him to give proper notice. The district attorney, he said, should be required to give the place where the crime charged took place and the date of the crime so the defendant could respond with alibi notice; otherwise, notice would not do either side any good.

Mr. Johnson suggested that Mr. Hennings' proposal be incorporated into the Discovery Article. Mr. Paillette said that was a possibility, but the feeling of the Commission apparently was that, as a practical matter, the alibi statute was probably not going to be used if the comprehensive Discovery Article were enacted into law. That type of information would come in by itself, but at the same time a specific repeal of the alibi statute was not written in.

Mr. Johnson moved to defer action on ORS 135.875 to give Mr. Paillette, Mr. Osburn and himself an opportunity to confer with respect to this problem and report back to the Commission. There being no objection, the Chairman so ordered.

Section 25. ORS 135.880. Defect in accusatory instrument as affecting acquittal on merits. Mr. Spaulding pointed out that section 25 referred to "the same crime" but the word "same" had no antecedent. Senator Burns suggested that it be amended to read: "of the same crime charged in the accusatory instrument."

Mr. Paillette said the only change that had been made in the section was to change "indictment" to "accusatory instrument." He conceded, however, that the statute was poorly worded and probably should be redrafted along the following lines:

> "When the defendant is acquitted on the merits, he is considered acquitted of the crime charged in the accusatory instrument, notwithstanding a defect in form or substance . . . . "

Mr. Johnson moved that the staff redraft section 24 substantially as stated by Mr. Paillette. Motion carried.

ORS 135.890 and 135.900 would be repealed by this draft because the subject matter was covered by the draft on Former Jeopardy. Repeal of the two statutes was approved.

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August 21, 1972

Criminal Law Revision Commission
311 State Capitol
Salem, Oregon 97310

RE: Meeting August 28-29, 1972, Sun River, Oregon
and Criminal Procedure, Part IV- Article X,
Criminal Trials

Gentlemen:

I am aghast at the proposal in Section V, Article X to revise ORS 136.060 to require defendants to be tried jointly unless the Court shares the paranoia natural to the defendant's state of mind.

If you can find one black defendant, or one lawyer with even moderate experience trying criminal cases for black clients who thinks this is an appropriate modification of the statute, I would be impressed.

It's tough enough convincing a black defendant that he is getting a fair trial without foisting upon him two or three of his brothers to share the limelight at counsel table.

One or more of those other defendants may not be willing to tell the truth. My client will not be willing to state truthfully that a codefendant was the perpetrator of the crime when that codefendant is sitting in the same room with him. Your commission cannot alter the bond of confidence which 19-year old blacks maintain in the face of criminal prosecution. I can, if I am permitted to try my case without giving my client the security of a communal lie.

I predict that if this proposal is adopted, courtroom disruption will increase as the black defendant notes that the only other blacks in the courtroom are defendants. The fact that for good cause shown the Court may order a separate trial is of no assistance. I have tried

to explain these pressure to judges in the past and with only one or two exceptions, I can assure you that in Multnomah County most of the trials with black defendants will be joint. The consequences to a search for truth are catastrophic and render me somewhat inarticulate.

Economy is a false argument as I am certain that in the trials of black defendants the costs of security alone will render these proposed procedures very expensive; expecially if my prediction of disruption and violence in the courtroom is correct. Please don't do this to the community.

Your Section IX proposing to amend ORS 136.250 to make pre-emptory challenges by majority of involuntarily joined codefendants is similarly disastrous.

I am sorry that I cannot appear to testify before your committee. Please question those who do testify to determine if they agree that the proposed changes will be especially significant to the black codefendant in a white Oregon trial.

Respectfully yours,

Philip H. Lowthian
PHL:mw

cc: Mr. James Hennings
Mr. William C. Snouffer