OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

January 13, 1972

Minutes

Members Present: Mr. Robert W. Chandler, Chairman
Mr. Bruce Spaulding

Excused: Senator John D. Burns
Representative George F. Cole

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

Agenda: FORMER JEOPARDY
Preliminary Draft No. 3; December 1971

Subcommittee No. 1 met at 1:00 p.m. by means of a conference telephone call for the purpose of discussing the revisions to Preliminary Draft No. 2 on Former Jeopardy that were directed by the full Commission at its meeting on December 16, 1971. Mr. Paillette advised that Representative Cole's schedule precluded his being available at this time. Senator Burns had intended to participate in the conference call but at the last minute found he had to be in court. Mr. Paillette suggested that the subcommittee proceed with consideration of Preliminary Draft No. 3 on Former Jeopardy with the understanding that he would relay the decisions of the members present to Senator Burns later this afternoon in order to satisfy the quorum requirement. He said he anticipated no difficulty in obtaining Senator Burns' approval of the action taken by the other members of the subcommittee inasmuch as the draft contained no policy decisions as such but were merely changes made at the direction of the Commission.

Former Jeopardy; Preliminary Draft No. 3; December 1971

Section 1. Former jeopardy; definitions. Subsection (4). Mr. Paillette called attention to the new definition of "criminal episode" in subsection (4) of section 1 which had been redefined to conform to the wishes of the Commission. [See Minutes, Criminal Law Revision Commission, December 16, 1971, pp. 7 - 12.] Mr. Paillette indicated he had discussed the revised definition with Mr. Knight on the previous day. Mr. Knight's chief concern was that the definition of "criminal episode" should not be so broad as to preclude the state from separately prosecuting for more than one crime when a defendant had in fact committed a number of crimes. Mr. Paillette was of the opinion that Mr. Knight's views were not necessarily in agreement with the concept of the draft, but at the same time it was not the purpose

of the draft to preclude the state from separately prosecuting for more than one crime when the crimes were not closely related. He reported that Mr. Knight had acknowledged that the revised definition of "criminal episode" was an improvement over the definition in Preliminary Draft No. 2, but he probably still had some reservations about the scope of the definition.

Mr. Spaulding commented that he was in agreement with Mr. Knight's position at the Commission meeting, and the revised definition met with his approval. Chairman Chandler agreed that the definition appeared to meet the objections raised by the Commission.

Mr. Gustafson noted that Senator Yturri had indicated at the Commission meeting that the words "closely related" should be included in the definition of "criminal episode." When revising the definition, the phrase "continuous and uninterrupted" was used in place of "closely related." He asked if the subcommittee would prefer to incorporate Senator Yturri's suggestion. The members were in agreement that "so joined" as used in the draft would necessarily make the crimes "closely related" and it would be redundant to add that phrase.

Mr. Paillette observed that a question might be raised as to whether the phrase "is directed to the accomplishment" might require a subjective showing that the defendant directed his conduct toward the accomplishment of a single criminal objective or whether that phrase would require an objective test. Both Mr. Gustafson and Mr. Spaulding indicated that the phrase would require an objective test.

The subcommittee approved subsection (4) of section 1.

Section 2. Previous prosecution; when a bar to second prosecution. Mr. Gustafson explained that, in accordance with the directive of the Commission, the exceptions in sections 3 and 4 were made applicable to all subsections in section 2.

Subsection (2). In the third line of subsection (2), "reasonably" had been inserted. Mr. Gustafson advised that the purpose of this addition was to indicate that the court was to make the decision as to whether the prosecutor reasonably knew or should have known at the time of the first prosecution that the several offenses were included in the same criminal episode.

In discussing subsection (2), Mr. Paillette said it should be kept in mind that this defense was to be raised by the defendant. If it was the defendant's position that jeopardy should attach in this situation, he would be the one who would be required to prove that the prosecutor should have known or did in fact know of the other offenses.

Mr. Spaulding recalled that Mr. Knight's objection to subsection (2) during the December Commission meeting was that the district attorney might have a strong suspicion that the defendant had committed a given crime but he did not have the necessary proof to prosecute at the time of the first prosecution. The district attorney, therefore, should not be required to include that crime in his indictment until and unless he felt he could prove the charge. He said he could not see how the insertion of "reasonably" in the draft helped that problem. Mr. Gustafson replied that it did not. He said Mr. Knight was in effect saying that the district attorney should not be required to join offenses until he had enough evidence to get a conviction on all of them, and Mr. Gustafson was of the opinion that it was impossible to include that type of criterion in a statute relating to the preliminary stages of a trial.

Mr. Paillette indicated that one of the things that concerned both Mr. Knight and John Moore was that the district attorney could be charged with knowledge impugned to him through police departments or through some investigative agency when in fact he had no actual knowledge of the investigation or of a report filed in some police department. Mr. Paillette said he failed to understand why the district attorneys were so concerned about subsection (2). The whole purpose of the subsection, so far as the knowledge requirement and the jurisdictional requirement were concerned, was to protect the state and the prosecutor and to soften the impact of the joinder requirements in the draft by permitting the prosecutor to prosecute for more than one offense arising from the same criminal episode if he had no knowledge about the other crimes. He was of the opinion that the purpose of subsection (2) had been misinterpreted by the prosecutors.

Chairman Chandler expressed agreement with Mr. Paillette and added that subsection (2) was another way of saying that if the prosecutor didn't know of the other offenses, it was not a bar to multiple prosecutions.

Mr. Paillette explained that Mr. Gustafson's intent in inserting "reasonable" in subsection (2) was to say that the prosecutor was only expected to know that which seemed reasonable under the circumstances.

Chairman Chandler commented that some of the revisions Mr. Knight had favored at the December Commission meeting differed from the wishes of the majority of the Commission. The majority, he said, appeared to be in favor of moving toward maximum joinder where the defendant engaged in a course of conduct out of which several offenses arose.

Mr. Paillette pointed out that nowhere in the entire draft on Former Jeopardy did it say that the defendant could not be prosecuted for more than one offense. Rather, the concept of the draft was to

require prosecution at a single trial on multiple counts when those counts were the result of one episode; at the same time some exceptions to that policy were included in the draft.

Chairman Chandler commented that it might be difficult to justify "reasonably" as used in subsection (2) to the Commission, but he could see no problem with the concept. Mr. Spaulding agreed. Mr. Paillette recommended that subsection (2) be submitted to the Commission without further amendment so that any further change could be made at the Commission level. The members concurred.

The other change in subsection (2), Mr. Paillette said, was made to conform to the Commission's directive to require that the several offenses establish proper venue in a single court rather than that the offenses be within the jurisdiction of a single court. The members approved this revision.

Section 3. Previous prosecution; when not a bar to subsequent prosecution. Mr. Gustafson indicated that, in accordance with the Commission's directive, the clause "other than by judgment of acquittal" had been moved from the opening paragraph of section 3 to subsection (2) because the clause incorrectly modified subsection (1) in the previous draft.

The other change in section 3 was contained in subsection (1). That revision was intended to make it clear that when a defendant appealed from a judgment of conviction, he was still in jeopardy, and a remand for a new trial by the Court of Appeals would not constitute double jeopardy.

On pages 24 and 25 of the minutes of the Commission meeting of December 16, Mr. Gustafson said, there was reported a discussion concerning the advisability of making subsection (1) refer to appeals by the state as well as appeals by the defendant. This amendment had not been included in Preliminary Draft No. 3, he said, because there appeared to be no jeopardy problem in an appeal by the state inasmuch as the types of orders from which the state could appeal did not constitute jeopardy.

Mr. Spaulding recalled the case of State v. Berry, 204 Or 69, wherein the defense waited until the jury was empaneled and then objected to the introduction of further evidence on the grounds that the indictment did not state facts sufficient to constitute a crime. The trial judge entered a judgment of acquittal, the state appealed and on motion to dismiss the appeal, the Supreme Court held that the objection was tantamount to a demurrer to the indictment and denied the motion to dismiss. When the defendant appeared for his second

trial, the defense pleaded former jeopardy and the judge ruled in favor of the defense. Mr. Spaulding said that perhaps this type of situation should be covered by statute.

Mr. Paillette commented that the result should not hinge on whether the defense waited until after the jury was empaneled to raise its objections. He advised that the staff would read the case referred to by Mr. Spaulding and if it appeared that it raised a problem so far as the draft was concerned, the necessary revisions would be made before it was submitted to the Commission. He expressed the view that it would be unfair to the state to permit the defendant to wait until the jury had been empaneled before raising this kind of objection and then allow the defendant to argue that jeopardy had attached and he could not therefore be tried.

With respect to subsection (4) of section 3, Mr. Gustafson advised that it had been revised to retain only the last clause of the subsection as it appeared in Preliminary Draft No. 2. [See Minutes, Criminal Law Revision Commission, December 16, 1971, p. 24.]

Commentary to section 1. Mr. Paillette advised that Senator Yturri and other members of the Commission had requested that several specific illustrations be placed in the commentary to clarify the types of circumstances intended to be covered by the definition of "criminal episode." The staff, he said, had prepared about a dozen such hypotheticals and he asked the subcommittee if they would agree that these illustrations should be submitted to the Commission separate from the draft in order that they could be discussed and approved prior to incorporating them into the commentary. Chairman Chandler and Mr. Spaulding expressed approval of this suggestion.

There being nothing further to come before the subcommittee, the meeting was adjourned.

Approval by Senator Burns. On January 14, 1972, Mr. Paillette reported the results of this meeting to Senator Burns. Senator Burns concurred with the action of the other two members of the subcommittee.

Respectfully submitted,

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission