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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

August 22, 1972

Minutes

Members Present: Mr. Robert Chandler, Chairman
Senator John D. Burns
Representative George F. Cole
Mr. Bruce Spaulding

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

Others Present: Mr. Jim Hennings, Metropolitan Public Defender
Mr. Keith Kinzman, Clackamas County District Attorney's Office

Agenda: Arraignment and Related Procedures
ARRAIGNMENT PROCEEDINGS; PRELIMINARY DRAFT NO. 1

The meeting was called to order at 9:30 a.m. by Chairman Robert W. Chandler in the offices of Mr. Spaulding, Standard Plaza, Portland.

Mr. Spaulding moved that the minutes of the subcommittee meeting of July 31, 1972 be approved as submitted. Motion carried unanimously.

Arraignment Proceedings; Preliminary Draft No. 1; August 1972.

Mr. Paillette presented to the subcommittee members two separate sections, marked Exhibits A and B, and which are directed to the questions discussed at the last subcommittee meeting with respect to the motion to dismiss the accusatory instruments on the grounds of former jeopardy. He recalled the discussion was whether this was a question of fact or law. The statutes at the present time give the impression it is an issue of fact and is provided for as a type of plea which can be entered either with or without a plea of not guilty. The statutes provide for separate verdict, either for the state or the defendant, on the question of former jeopardy but at the same time the courts are disposing of it as a matter of law because the trial court will enter an order sustaining the plea of former jeopardy, he said. The proposal will necessitate some related changes in other drafts, mainly in the area of pleas, because it will not be necessary to provide for this type of plea or special verdict. If the sections are approved by the subcommittee today, they can then be incorporated into the amended draft on arraignments.

Exhibit A would apply the effect of the section to indictments, informations or complaints and provides that the court shall dismiss the accusatory instrument if, upon motion of the defendant, it appears as a matter of law that a former prosecution bars the prosecution for the offense charged. The term "former prosecution" is used because the draft on Former Jeopardy provides the circumstances under which a former prosecution bars a prosecution.

Subsection (2). Mr. Paillette explained that ORS 135.510 to 135.560 deal with the motion to set aside the indictment. ORS 135.520 provides:

> "The motion to set aside the indictment shall be made and heard at the time of arraignment unless for good cause the court postpones the hearing to a future time. If not so made the defendant is precluded from afterwards taking the objections mentioned in ORS 135.510."

ORS 135.530 reads:

> "If the motion is allowed, the court shall order that the defendant, if in custody, be discharged therefrom or, if he has given bail or deposited money in lieu thereof, that his bail be exonerated or his money refunded to him, unless it directs that the case be resubmitted to the same or another grand jury."

Representative Cole asked if it is being required that the motion to dismiss be made at the time of arraignment and Mr. Paillette answered affirmatively. Representative Cole then asked if "good cause shown" must be shown at the time or arraignment and if it would foreclose the defendant from asking for dismissal at a later time. Mr. Paillette replied that in that respect it would be similar to entering a plea. The plea is entered at the time of arraignment but if the defendant asks for additional time he will receive it.

Representative Cole declared that he did not wish to foreclose the defendant from moving to dismiss on former jeopardy at any time merely because he does not know about it at the time of arraignment. Mr. Paillette responded that at the present time the question of former jeopardy is raised at the time of pleading and the defendant either pleads former conviction or acquittal which is entered along with or without a plea of not guilty, and Representative Cole reiterated that he could elect on his plea but should not be foreclosed from moving for a dismissal at any time. The facts are not always known at the time of arraignment, he said, and may not come to the attorney's attention until a later date.

Under this proposal Mr. Kinzman wondered if there would be more defendants having counsel at arraignments than there are at present.

The defendant would need to be made aware of this rule and it is something he would not think about himself, he said. In answer to Mr. Paillette's question, he said that the defendant on a motion to set aside the indictment would state that he did not have counsel present at the time of arraignment and remarked that it seemed frivolous to make the rule and in 50% of the cases have the exception that the defendant did not have counsel present. He believed the defendant should make these motions at the time of pleading but only after he had conferred with his attorney.

Chairman Chandler observed that if the defendant is represented by counsel at the time of arraignment he can make the motion in the normal course but if he is not represented, he could not foresee the court turning down the motion on the grounds that it was not made in timely fashion. If the court did so, he believed there would be substantial grounds for appeal.

Representative Cole commented that it was his understanding that the defendant does not have to show cause for the delay in making the motion at the time of arraignment, and that any time the motion is made, the defendant can then show cause why it was not made before. Although ORS 135.520 would imply that a postponement is requested at the time of the arraignment he did not believe the defendant should be compelled to either make the motion or ask for a continuance just on the chance that there might be one.

Mr. Paillette referred to ORS 135.410 which reads:

> "If on the arraignment the defendant requires it, he shall be allowed until the next day, or until such further time as the court deems reasonable, to answer the indictment."

Representative Cole reiterated his concern in that if the defendant does not raise the question at the time of arraignment, but does so two days later, he in effect waives his right.

Mr. Spaulding believed that the courts have, as a matter or practice, considered motions to withdraw a plea in order to do something different, but he did not believe this was statutory, and Mr. Paillette reported that the withdrawal of a plea was purely discretionary with the court.

Mr. Spaulding observed that with the plea being part of the arraignment, the defendant, after obtaining his attorney, could move to withdraw the plea and in effect would then be back in the arraignment theatre. Mr. Paillette remarked that it was not his intent to change the time at which the former jeopardy question has to be raised because under existing law, if the jeopardy question is to be raised, the defendant will have to plead it; it cannot be pleaded at any time during the course of the trial but must be entered as a form of a plea.

Chairman Chandler asked if the net effect of this would be taking the grounds of former jeopardy away from the jury. Mr. Paillette said this would be true, and also changing it from a plea procedure to a motion procedure.

Subsection (3), Mr. Paillette advised, specifically spells out that it is a bar to a future prosecution. As far as the state was concerned it would be a bar unless it is reversed on an appeal.

Exhibit B. ORS 138.060. Appeal by state. Mr. Paillette explained that subsection (1) contains the deletion of "indictment" and the insertion of "accusatory instrument" and the existing language in subsection (2) is deleted.

Referring to ORS 135.520, Mr. Spaulding wondered if the meaning might be clarified by inserting the phrase "before the time of entering a plea" in lieu of "at the time of the arraignment."

Representative Cole asked if, in the plea section it is being stipulated that a plea be entered within a certain time. The arraignment procedure, he said, talks about arraignment within the first 24 hours. Mr. Paillette advised that section 4, Pleadings of Defendant, Tentative Draft No. 1 provides:

> "(1) A defendant shall not be required to plead to an offense punishable by imprisonment until he is represented by counsel, unless the defendant knowingly waives his right to counsel.
>
> "(2) A defendant with counsel may plead guilty or no contest on the day of arraignment or any time thereafter. A defendant without counsel shall not be allowed to plead guilty or no contest to a felony on the day of arraignment.
>
> "(3) Upon completion of the arraignment, unless the defendant enters a plea in the manner provided in this Article, he shall be considered to have entered a plea of not guilty.
>
> "(4) A plea of former jeopardy shall be entered within 10 days after arraignment or at such later time, prior to judgment as the court may allow upon good cause shown."

Subsection (4), Mr. Paillette reported, will have to be amended to conform to any changes adopted today.

Representative Cole was of the opinion the motion for dismissal on the basis of former jeopardy should be allowed at any time prior to trial, and Mr. Spaulding concurred, saying he could not see any legitimate reason for not listening to it at any time if he has a good faith motion, sometimes which may not be until shortly before the trial.

Mr. Paillette suggested subsection (2) of the proposed section on the motion to dismiss be amended to contain similar language as that contained in section 4 of the draft on Pleadings of Defendant and treating it as a motion. The subsection would then read:

"A motion to dismiss shall be made within 10 days after arraignment or at such later time as the court may allow."

Mr. Kinzman referred to the time or arraignment and asked if it would also be talking about those continuances from when the defendant is first arraigned. It was his understanding that the defendant could request postponement to enter a plea and then he has 10 days from that time to enter the motion. Mr. Spaulding said that in other words, he could have 30 days in which to enter a plea and then be allowed another 10 days. Representative Cole added that some of the trial dates may commence before the 10 days, but this could be resolved by adding "and before trial."

Mr. Spaulding pointed out the wording could state that there would be 10 days from the time the case is originally called for arraignment or as such further time as the court may allow for good cause. In every case, he said, the defendant should not have the right to stall for one purpose and then for another.

At this point in the meeting Senator Burns arrived.

Mr. Paillette recapitulated the situation in that under subsection (4), section 4, Pleadings of Defendant, a plea of former jeopardy shall be entered within 10 days after arraignment or at such later time as the court may allow upon good cause shown. He said that Representative Cole's concern was that under the proposed subsection (2) of Exhibit A the defendant would not be allowed ample time to raise the question of jeopardy. The proposed motion to dismiss section would be the same type of provision that is now applied to the motion to set aside the indictment, and in effect would limit it to the same time span as the plea.

Representative Cole contended that it is easy to ask the court for a postponement for entering a plea but there is not always advance notice that he may have a motion on the basis of former jeopardy to which Senator Burns concurred, saying that the problem is that the attorney might not know of the possible jeopardy problem and therefore it would not be raised at that time. Mr. Paillette was of the opinion that this situation would be good cause for not making the motion at the time, just as it is now.

The Chairman then explained that it was suggested that subsection (2) be written to change the time so the motion can be entered at the time of pleading or 10 days thereafter, or a later time if there is good cause shown.

Mr. Hennings commented that as a practical matter a plea of not guilty is automatically entered, however by court rule in Multnomah County all motions may be raised up to the point of pre-trial which may be within 10 days but possibly longer. If a 10 day rule is established,

he said, the counties will be limited in setting up their own procedure. Mr. Paillette indicated that by stating: "or such other time as the court may allow" may resolve this problem.

Senator Burns moved that subsection (2) of Appendix A be amended to state that the motion to dismiss on grounds of former jeopardy shall be made at the time of pleading or within 10 days thereafter unless the court sees fit to grant extra time.

Motion carried.

With respect to ORS 138.060 (Appendix B), Mr. Paillette asked if there was any question as to the proposed amendment with respect to appeal by the state. The amendment would delete the existing subsection (2), and the double jeopardy motion would be dealt with as an order made prior to trial dismissing the accusatory instrument.

Senator Burns asked Mr. Paillette if subsection (1) as amended would be construed to encompass a dismissal on the basis of a demurrer and if presently the state could appeal if the defendant successfully demurs and received an affirmative reply.

Representative Cole moved the adoption of the proposed amendment to ORS 138.060, Exhibit B. The motion carried unanimously.

Section 1. ORS 135.010. Time and place. Mr. Paillette explained that the first amendment is a conforming amendment and uses the term "accusatory instrument" in place of "indictment" and new language is proposed with respect to the time of arraignment. If the defendant is in custody he must be arraigned within 24 hours except for holidays and although the need for a speedy arraignment is not as urgent if the defendant is not in custody, he felt it desirable to provide for some type of time limitation in the section.

It was the Chairman's interpretation of the section that if a man was arrested anytime between 5 p.m. and midnight on a Thursday, it would not be necessary to have him arraigned on Friday, consequently holding him until the following Monday.

Using the Chairman's example, Senator Burns asked how this would fit in with the U. S. Supreme Court cases with respect to prompt arraignment. This would go beyond the requirements of case law, Mr. Paillette reported. Senator Burns asked what the consequences would be if the defendant was in custody and not arraigned during the first 24 hours. He asked if the defendant would be released and the state precluded from pursuing it further. It is a violation of statutory due process, he added, and expressed concern as to the reason for this specific language being placed in the draft without any sanction or showing what the effect would be.

Representative Cole stated that if a violation of this 24 hour arraignment rule would be a basis for dismissal of the charge he would consider the 24 hour period to be too short. It was the Chairman's

interpretation that the wording shows this is a basis for dismissal and Mr. Paillette reported that this was not his intention, anymore than failure of a speedy arraignment under case law now is a basis for dismissal and that he would personally be opposed to writing in this type of a sanction.

Mr. Spaulding said that under existing law if the man were not arraigned within a reasonable time, he may move to dismiss. This would be a statutory definition of a reasonable time, he said.

Chairman Chandler wondered if the 24 hour time period were changed to 48 hours and the 72 hours to 96, would it then be considered a reasonable time. It was Senator Burns' belief that even 72 hours may be unreasonable in that an individual may be hunting in eastern Oregon and picked up for a hunting violation - it may work a hardship on him to get back within 72 hours for the arraignment.

Mr. Kinzman indicated that the draft talks about arrests and in this situation the man would not have to be there as this would be a misdemeanor. In answer to Senator Burns' inquiry as to when a person would be placed under arrest under the citation provisions, Mr. Paillette reported he did not believe they are ever arrested. ORS 133.055 states "A peace officer in lieu of taking the person into custody, may issue or serve a citation for the person to appear at the court . . . . " This is the reason why it was attempted to redefine "arrests" in the Arrest draft, as to whether it means custody or something else. The draft on Release of Defendants, he said, is tied in indirectly to this draft, in that it presupposes that a defendant who is not otherwise released prior to arraignment will have the opportunity for a release decision to be made by the magistrate at the time of the arraignment. This will not help the defendant much, he indicated, unless he can get to the arraignment with all practicable speed which is the intention of section 1. It is probably a rare case where the defendant who is arrested during a week day is not arraigned within 24 hours and he felt that to state that "the defendant should be arraigned within 24 hours if it is practicable" would be futile.

The Chairman suggested that perhaps the commentary should contain a further explanation that this is a guideline and that if the person is in the hospital or the district attorney is not available, it is not expected that the arraignment take place within the 24 hours.

Mr. Paillette referred to the previous discussion with respect to sanctions and stated that he was not proposing to impose any sanctions that are not now imposed. In lieu of this, he suggested the draft state that "except for good cause shown by the state, the arraignment shallbe held . . . . "

Senator Burns was of the opinion that it should be made clear that if the defendant is represented by counsel there could be an extension of the 24 or 72 hours, and Representative Cole concurred. Mr. Spaulding suggested the wording state "or good cause shown by the state or the request of the defendant."

Representative Cole moved the adoption of section 1, to be amended to state that upon good cause shown by the state or at the request of the defendant the arraignment may be held after 24 hours of custody . . . or after 72 hours following arrest.

Motion carried unanimously.

Section 2. ORS 135.020. Scope of proceedings. This section again uses the words "accusatory instrument" Mr. Paillette explained, but the language with respect to indorsements must be dealt with separately so as not to imply that these items have to be on other accusatory instruments, therefore the new language "if the accusatory instrument is an indictment."

Representative Cole moved the adoption of section 2 as amended. Motion carried.

Section 3. ORS 135.110. When presence of defendant is required; appearance by counsel. Mr. Paillette said the section is consistent in using the accusatory instrument language rather than indictment.

Senator Burns moved the adoption of section 3. Motion carried.

Section 4. ORS 135.120. Bringing in defendant who is in custody. Mr. Paillette explained that this is a restatement of the existing language.

Senator Burns was of the opinion this was surplus language and moved the deletion of section 4. Motion carried.

ORS 135.130. This statute would be repealed by the draft on Release of Defendants, Mr. Paillette advised.

Section 5. ORS 135.140. Bringing in defendant not yet arrested or held to answer. Mr. Paillette explained that pages 6, 7 and 8 of the draft contain a number of statutes dealing with bench warrants and all are directed towards indictments. He was of the opinion that all the sections on bench warrants are unnecessary in view of the Article on Arrests and which provides for warrants of arrest to be issued by the court. The court, he said, can issue a warrant if satisfied that reasonable cause exists. The draft proposes to amend section 5 to delete the reference to a bench warrant and issue an arrest warrant as provided in ORS chapter 133, and repeal ORS 135.150 to 135.180.

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Representative Cole moved that section 5 be renumbered as section 4 and the adoption of the section as amended. Motion carried.

Representative Cole moved ORS 135.150 to 135.180 be repealed. Motion carried.

ORS 135.190 to 135.210. These sections, Mr. Paillette pointed out, would be repealed by the draft on Release of Defendants.

Senator Burns moved ORS 135.190 to 135.210 be repealed as recommended. The motion carried.

ORS 135.310. Right of counsel. The section is set out for the information of the subcommittee and is not affected by the draft, Mr. Paillette explained.

Section 6. ORS 135.320. Court appointment of counsel; waiver. The amendment, Mr. Paillette pointed out, takes out the reference to the circuit court. He said the subcommittee may wish to reserve judgment on the section until section 7 is examined.

Section 7. ORS 133.625. Court appointment of counsel. The section is an important one with respect to counsel and extensive changes are being recommended in this area, largely based on the ABA Standards with respect to whether or not a defendant is unable to obtain counsel. ORS 133.625 is amended to delete the reference to circuit court and this would then apply the provisions of these sections to any magistrate with respect to appointment of counsel, rather than having it all geared into the circuit court as is now the case.

Paragraph (c) of subsection (1) deletes the reference to lack of ability to obtain counsel. Senator Burns was of the opinion the new language in the paragraph should state "financial inability" and "substantial financial hardship." He believed this particular area is greatly abused by the courts and Multnomah County has been too lax in this respect.

Mr. Hennings observed that this is true at the misdemeanor area and not necessarily at the felony level. Senator Burns remarked that the working man with a steady job and earning $10,000 yearly will be the one caught in the squeeze, and would be the one who must hire the attorney. He inquired as to the definition of "substantial hardship."

Mr. Hennings reported that the words "adequate representation" are taken direction from the ABA Standards and used for the purpose of avoiding the "5th Street lawyer" shopping type of situation. "Substantial hardship," he believed, would mean any kind of hardship, not necessarily financial, although this would basically be the case. It would be his observation that it meant that it would be unnecessary to require anyone to become a pauper in order to afford an attorney and meets the standards of James v. Strange.

Mr. Paillette said that subsection (6) would be a constitutional means through civil process for the state to attempt to recover the costs. Mr. Hennings reported that in Multnomah County most of his clients who are put on probation are required to repay the county for the attorney fees over a three to nine month period of time. This is set up as a bill through the county and is working voluntarily, he said. On a criminal matter, basically no attorney will walk into the court unless he has some money, so this means the defendant must come up with a large amount very quickly.

Mr. Kinzman referred to the situation regarding the financial statement under oath in a non-support case. Mr. Paillette stated that the draft does not respond to this problem; it deals only with eligibility for appointment of counsel and for recoupment through civil proceedings by the state. The main issue is whether the subcommittee believes the ABA Standards are too broad and whether it expands the eligibility for court appointed counsel too far, or whether the present eligibility criteria is better. This seems to him a reasonable approach and is realistic as to what it costs to defend a case, particularly a serious felony case. This is a problem recognized by the ABA and the Uniform Commissioners Act on Defense of Needy Persons.

It is also a public problem, Chairman Chandler stated, in that there is a great deal of public dissatisfaction in it where neighbor A goes into court and pays his own bills and neighbor B, who works at a similar type job, tells the court he is unable to pay his bills and the court accepts his statement.

Representative Cole referred to subsection (7) and asked if the words "The civil proceeding shall be the exclusive remedy" would foreclose the court from imposing this payment as part of probation. Mr. Paillette answered in the affirmative.

The subcommittee again returned to its discussion of section 6.

Representative Cole moved the word "crime" be deleted and "offense" inserted in lieu thereof. Mr. Paillette reported that "offense" as defined in the Criminal Code includes violations as well as crimes, and violations are punishable only by fines.

Mr. Kinzman disagreed with the proposed amendment as he did not believe the draft should go as far as appointing counsel for a violation where there is no jail term.

Representative Cole withdrew his motion.

Mr. Spaulding moved the adoption of section 6 as amended. Motion carried.

Section 7. Subsection (1) changes "circuit court" to "magistrate"; paragraph (c) contains the inability statement discussed earlier.

Subsection (2). Mr. Paillette advised that merely because the defendant can obtain money from another source or because he is able to post bail, it will not be grounds to deny appointment of counsel.

Senator Burns spoke with reservation to this subsection. Somehow, he said, the message has to be made clear to those judges who are less than protective to the public pocketbook, and for this reason he did not particularly agree with the language.

Chairman Chandler commented that judges now have to defend themselves between April 15 and July 1 when they submit their budgets to the county courts and county commissioners and there is a great variety of difference as to how county courts and commissions look upon this.

Mr. Hennings reported the cost of $400,000 in Multnomah County for court appointed attorneys and the Chairman referred to one case in his county costing approximately $50,000. Mr. Hennings pointed out the results of a New York study wherein it was found that the cost of the investigation of financial statements was greater than the amount they would have made by not appointing counsel in those few cases.

In Multnomah County, Mr. Hennings said, and especially at the district court level, the judges are not appointing attorneys if the defendant can make bail. He reported that a large number of emancipated children are also being denied counsel if the parents have funds. Once this gets to the circuit court level they quite often are allowed the appointed counsel, he said.

The Chairman asked what the effect would be if the judge would not allow appointed counsel if the defendant was able to post bail in the amount of $500,000, and was told by Mr. Hennings that this would undoubtedly require a hearing.

Subsection (3). The subsection contains existing language with the felony reference deleted in paragraph (a).

Subsection (5). The language relating to partial payment is deleted.

Subsection (6). Mr. Paillette advised that this is an attempt to provide for recovery of the funds and still meet the constitutional requirements set out in James v. Strange which was based on a Kansas statute providing for recovery of expenses incurred by the state which provided counsel for indigents.

Representative Cole asked why the court is being excluded from imposing this as a term of probation. He believed this could be an alternative remedy.

Chairman Chandler asked if paragraph (b) would prevent the state from only recovering the full amount or if a partial amount could be paid. Representative Cole believed this would be speaking about a negotiated settlement which could be made by the district attorney and would not prevent the state from recovering less than the full amount.

Senator Burns was of the opinion that in appropriate circumstances it would not be out of line to have it as a condition of probation, although Mr. Hennings expressed objection to any kind of conditions on probation. On the repayment of fees, he said, it may make the distinction between those who make probation and those who go to jail.

Senator Burns recalled the legislature permitting the court to impose time in the county jail as a condition for probation. The theory was that since the state was going more towards probation it had to give the courts more flexibility and a wider range of options in the imposition in this kind of sentence. He believed any attempt to narrow the range of options that a judge has would probably be resisted by them and if it spoke to the area of money, it would be resisted by the legislature.

Mr. Hennings wondered if the repayment of the attorney's fee should be part of the punishment or should it be something that is applied uniformly to everyone with an appointed attorney, whether he is found guilty or not. This, he believed, would apply even to a person who is acquitted and Mr. Paillette reported that it would apply either way.

Representative Cole said that in the smaller counties there will not be any recovery as the district attorney will not have time to be involved in civil suits to recover the money.

Senator Burns believed this to be a very extensive policy departure and that it will be a volatile political issue in the legislature. He moved that section 7 be sent to the Commission without recommendation.

The Chairman suggested that rather than sending the entire section to the Commission, the subcommittee vote on which subsections it wished to retain.

Mr. Paillette remarked it should be specifically spelled out in the statute to allow any magistrate to appoint counsel.

Senator Burns declared that his main objections to this section are the "exclusive remedy" concept in subsection (7) and the word "currently" in paragraph (b) of subsection (6). Deletion of this word would allow for less ambiguity, he said.

Senator Burns withdrew his motion to send the section to the Commission without recommendation.

Representative Cole moved the adoption of subsection (1). Motion carried.

Subsection (2). Mr. Paillette reported that the ABA was trying to show that these should be independent considerations. The fact that a man is able to post bail should not be considered grounds for denying him the appointment of counsel.

Mr. Spaulding said that he is in favor of the concept behind subsection (2) but did not feel it to be a proper subject of legislation.

The Chairman said that the subsection says that it might be one of the grounds but if the judge wants to use it as the sole grounds he

may have to conduct a hearing on the matter. If he does have a hearing and this appears to be the only grounds, he is not going to be able to deny the appointment of counsel under the subsection, Mr. Paillette pointed out.

Chairman Chandler moved the adoption of subsection (2). Voting for the motion: Cole, Spaulding, Mr. Chairman; Voting no, Burns. Motion carried.

Subsection (3). Mr. Spaulding moved the adoption of subsection (3) as amended. Motion carried.

Subsection (4). Representative Cole moved the adoption of subsection (4). Motion carried.

Subsection (5). Representative Cole moved the adoption of subsection (5) as amended. Motion carried.

Subsection (6). Representative Cole asked if the subsection would include city attorneys and was told by Mr. Paillette that if there was a case where there had been an appointment of counsel and paid for by the city, the city attorney may initiate a civil proceeding. The words "district attorney" need not be changed as the Code will contain a definition of district attorney which includes city attorneys, he said.

Senator Burns left the meeting at this point but indicated he wished to support Representative Cole's motion on subsection (7).

The subcommittee recessed for lunch, reconvening at 1 p.m.

The subcommittee returned to its discussion of subsection (6) and Representative Cole moved the deletion of "currently" in paragraph (b). The requirements set up in (a) and (b) are merely the requirements for a suit to be initiated, he said, and believed it to be unnecessary language. The motion, he said, was made in response to Senator Burns' request. Motion carried.

Mr. Paillette referred to Representative Cole's earlier question with regard to city attorneys. He believed the subsection should be rewritten inasmuch as it refers to monies expended by the county and Mr. Hennings commented that it is possible that the state may expend monies also.

Mr. Spaulding suggested the language be changed to read: "A bill of receipt may be initiated by any public body which has expended money for a defendant's legal assistance for recovery of the same within two years."

The subcommittee voted the adoption of Mr. Spaulding's proposal and directed Mr. Paillette to insert the language in the subsection in proper form.

Representative Cole moved the adoption of subsection (6) as amended. Motion carried.

Subsection (7). Representative Cole moved to delete all language referring to the exclusive remedy concept. Voting for the motion: Burns, Cole; voting no: Spaulding, Mr. Chairman.

Speaking on his motion, Representative Cole stated that in a small county such as his, and where there is little money appropriated by the County Commission for legal appointed attorneys, any recovery they can make at all is a great deal of assistance to the county and also works as a good lever to get the county commission to budget more money.

Mr. Spaulding moved that section 7 be sent to the Commission with the notation that there was a tie vote on subsection (7) and should be considered in light of that tie vote. Motion carried.

Section 8. ORS 135.340. Communication to defendant as to use of name in accusatory instrument. Mr. Paillette reported that the section deletes reference to indictments and inserts "accusatory instrument" language.

The subcommittee approved the adoption of the section as amended.

Section 9. ORS 135.350. Name used in further proceedings. Mr. Paillette explained that all the sections are written about indictment and the words "indictment" and "information" are used for circuit court proceedings and also with respect to the journal entry.

Mr. Spaulding favored a statutory prohibition against including in the accusatory documents aliases and the words "also known as." Representative Cole was of the opinion that once the true name was established there should not be added on all the aliases. Mr. Spaulding agreed but said there was no provision for doing this and the section would use both.

Mr. Hennings commented that there is no valid way to require the defendant to give his true name and Mr. Kinzman said the court can always order the document retyped and omit all the prejudicial material in it although Mr. Paillette was not certain the court could be required to do so - there must be room left for discretion on the part of the court, he said.

Mr. Paillette asked how the state would be able to strike the aliases if it did not know the defendant's true name and Mr. Spaulding responded that it might be resolved by stating "John Doe whose true name is unknown."

The real damage, Mr. Hennings reported, is when the document goes to the jury. He said that perhaps just the charging part should go to them without the heading and name.

Mr. Paillette referred to ORS 132.720 and which was not changed in the Grand Jury draft which reads:

"When a defendant is indicted by a fictitious or erroneous name and in any stage of the proceedings his true name is discovered, it may be inserted in the subsequent proceedings, referring to the fact of his being indicted by the name mentioned in the indictment."

Mr. Spaulding questioned the need for section 9 and believed it was covered in section 8. Mr. Paillette responded that section 9 continues to give more specific directions as to what the court should do to ensure that a record reflects accurately who is being proceeded against. Section 8, he said, states that the court tells the defendant to give his true name and section 9 continues that if he does not do so the court proceeds accordingly, but if he does give a different name, then the court makes the appropriate entry into the journal and subsequent proceedings are held against him in the name he has provided the court, also referring to the original name used in the charge. Here, "accusatory instrument" is used to leave some flexibility in the statute with respect to action taken now or in the future.

Representative Cole moved that language be added to the section to give the court discretion to cause the instrument to be amended to strike the aliases and merely to show the true name or the name under which he was tried. The motion carried.

Representative Cole moved to approve section 9 as amended. The motion carried.

ORS 135.410. The statute would be repealed by section 4 of the draft on Plea Discussions and Agreements.

Mr. Spaulding moved ORS 135.410 be repealed as recommended. Motion carried.

Section 10. ORS 135.420. Types of answer. Section 10 makes the draft consistent with the provisions of section 4, Plea Discussions and Agreements.

Mr. Paillette explained that instead of stating the defendant may "move the court to set aside the indictment" which is the only statutory motion now in the Code, the draft states the defendant may move "against the accusatory instrument or demur or plead thereto."

Mr. Hennings inquired if the section is being opened for any new motions a defense attorney may bring up against the accusatory instrument and if this gives the court further discretion to entertain an equity motion, if necessary. Mr. Paillette responded that he had considered writing in statutes providing for what is already taking place, i.e., motions to dismiss or quash, but he did not feel it accomplished anything by placing them in the draft. The two statutory motions which will be provided for in the Code will be to retain the motion to set aside and the new motion to dismiss on former jeopardy and the other motions would continue to be handled just as they are. There is rarely a motion to

set aside, he said, and it is usually framed in terms of a motion to dismiss; the order of dismissal is also the result of a demurrer, but the subcommittee may wish to entertain the idea of writing in some other statutory motions.

Mr. Spaulding moved the approval of section 10 as amended. Motion carried.

ORS 135.430. Types of pleading. Representative Cole questioned the absence of the motion of former jeopardy and Mr. Paillette informed him that it is not considered a type of pleading.

ORS 135.440. Refusal to demur or plead. Mr. Paillette reported the section would be repealed by section 4 of the draft on Plea Discussions and Agreements.

Representative Cole moved the adoption of the recommendation that ORS 135.440 be repealed. Motion carried.

ORS 135.450. Pleading a judgment. The section is not affected by the draft, Mr. Paillette reported.

ORS 135.460. Pleading a private statute or statutory right. Mr. Paillette reported to the subcommittee that his understanding of the Oregon Constitution was that the legislature cannot enact these kinds of statutes.

Mr. Spaulding moved the deletion of ORS 135.460. Motion carried.

Representative Cole recommended it be pointed out to the Commission that the statute is being deleted in order to bring light on the matter if someone has further knowledge of the section.

Section 11. ORS 135.510. Grounds for motion to set aside the indictment. Mr. Paillette advised that the section concerns itself with the problem of what to do when the names of the witnesses are not indorsed on the indictment. The amendment in subsection (2) makes the section consistent with the amendment to ORS 132.580 made in section 25 of the draft on Grand Jury and Indictments.

Subsection (2) states that the court will allow the motion to set aside unless the provision of the new subsection (2) of ORS 132.580 applies. Without this reference to subsection (2) of ORS 132.580, Mr. Paillette said there will be an argument that he is allowed to move to set aside the indictment because the names were not indorsed and would be contrary to what was being attempted in the other statute.

The subcommittee discussed the recommendation to insert the exception at the end of subsection (2) which Mr. Paillette remarked would be poor drafting. A new subsection (3) could be inserted, he said, and contain the language "Notwithstanding subsection (2) of this section . . . it shall not affect the application of ORS 132.580."

Mr. Spaulding moved the adoption of section 11 and Mr. Paillette was directed to amend the section to conform to the above discussion. Motion carried.

Section 12. ORS 135.520. Time of making motion; hearing. The section precludes the defendant from taking the objections to the accusatory instrument if not made and heard at the time of arraignment unless postponed by the court. Representative Cole said he did not wish to preclude the defendant from the opportunity to move as so many things turn up prior to trial and after arraignment. He proposed to insert the same 10 day and good cause conditions written into the former jeopardy section. Mr. Paillette concurred that it should be made consistent.

Mr. Paillette recalled the earlier discussion relating to the motion to dismiss. One collateral effect of this amendment would be to legitimize a motion to dismiss the indictment on grounds other than former jeopardy. The section deals with the time of making the motion and is a companion statute to ORS 135.510 which deals with the motion to set aside.

Mr. Spaulding questioned the reasoning for the "motion to set aside the indictment or dismiss the accusatory instrument." Mr. Paillette explained that the grounds for the motion to set aside the indictment, such as the names of the witnesses indorsed on it and the other requirements of ORS 132.360, 132.400, 132.430 and 132.580, all related specifically to indictments.

Mr. Spaulding next asked if once the indictment is set aside, if it is then dismissed and Mr. Paillette replied it has been dismissed only in a limited sense, because it can be presented again.

Mr. Kinzman asked what the result would be if the filing of informations was liberalized. Mr. Paillette responded that there would still be the option open and if the state should go to the grand jury, the requirement for the form of indictment and indorsement would still apply. If the information route is taken, then those particular requirements would not apply.

Mr. Hennings asked if the motion to set aside is allowed, the state could go back to the grand jury and get another indictment; if it in turn were dismissed, it could then only go by way of appeal to the Appeals Court. He said there could be two types of dismissal, one which the judge could direct the grand jury to go back and re-indict and the other which the state could take up only by appeal.

Mr. Spaulding referred to the second sentence of the section, and asked if it is meant to say that if the motion to set aside the indictment is not made at the time of arraignment the defendant can still do it later. Mr. Paillette responded that this would be the effect if language were written in consistent with what was done on the section dealing with former jeopardy.

Mr. Spaulding expressed concern that the second sentence only states that the defendant is precluded from afterwards taking the objections to the accusatory instrument, whereas the first sentence speaks to indictment and the accusatory instrument. Mr. Paillette explained that the reason the distinction was made was because motions to set aside the indictment are peculiar to indictments, whereas a motion to dismiss would apply to any accusatory instrument including indictments. He suggested that for greater clarity the second sentence include the indictment as well as the accusatory instrument and Mr. Spaulding agreed with this proposal.

Mr. Spaulding moved the adoption of section 12 to be amended to include the 10 day and good cause provision and also the insertion of "indictment" on the last line of the section. The phrase would then read: "to the indictment or other accusatory instrument." Motion carried.

Section 13. ORS 135.530. Effect of allowance of motion. The language relating to bail has been deleted to conform with the provisions in the draft on Release of Defendants, Mr. Paillette reported. Because there is a possibility of two different kinds of accusatory instruments with respect to resubmission, the language "in case of an indictment" is inserted.

Chairman Chandler believed this is one of the problems in eliminating the indictment. The district attorney can bring an indictment and if set aside, he can go back and re-indict, but if he files an information or complaint, he has no further recourse. As mentioned by Senator Carson at an earlier meeting, he said, there would still be the 100% indictments by Marion County.

Mr. Spaulding asked why an amended information was not allowed to be filed and Mr. Paillette said that in this particular statute he could not envision what the grounds for dismissal might be. On the motion to set aside, there are limited statutory grounds. Mr. Spaulding inquired about a demurrer to an information and Mr. Paillette responded that there were other sections dealing with demurrers.

Mr. Spaulding noticed that there was no provision in the section to recharge the defendant although it does not say this cannot be done. Mr. Paillette agreed but said it does not say the defendant can be held while the state is deciding, whereas in the case of an indictment the section does not allow him to be discharged from his bond or from custody if the court directs the matter to go back to the grand jury. The difference is that this would not prevent the state from refiling a complaint or information against him but it would not allow the court to keep the defendant in custody or hold him on a security release.

The Chairman suggested the section be rewritten, adding a period after "law" on line 6 and inserting additional subsections containing the exception on lines 7 and 9 and also with the proviso that in the case of an information or complaint the court shall direct the prosecuting attorney to refile an amended pleading.

Mr. Spaulding suggested the deletion of "in case of an indictment" and adding a proviso that this is not the final determination of the case, or is not jeopardy, which would then permit the district attorney to submit it to the grand jury again or bring an information.

The Chairman next suggested inserting a period after "law" and state that the court directs that the case be resubmitted to the grand jury or that a new complaint or information be filed.

Mr. Paillette explained that in the sections relating to demurrers this is dealt with separately. Section 18 provides that after the demurrer is allowed and if the accusatory instrument is an indictment, the court may direct that the indictment be submitted to the same or another grand jury and when it is an information or complaint the court may allow the district attorney to file an amended complaint or information. The difference is, he said, that with respect to demurrers there are very specific statutory grounds that the motions to dismiss do not have.

Mr. Paillette asked the wishes of the subcommittee with respect to amending section 13. Mr. Spaulding asserted that he did not like treating an indictment differently than an information because he could see no basis for it. He recommended that the section have the effect that the allowance of a motion to set aside an indictment be the same as the allowance of a motion to dismiss an information for whatever reason. In other words, he said, if it is desired to hold a defendant in custody or keep his bail up, it would not make any difference what is set aside or dismissed.

Mr. Spaulding moved section 13 be amended in accordance with the above discussion and with a proviso section added that if the court directs the case be resubmitted to the grand jury or that the case be refiled as an information, it may also direct that the person be held in custody. The motion carried.

Section 14. ORS 135.540. Effect of resubmission of case to grand jury. The section contains language to conform with the changes with respect to the draft on Release of Defendants.

The Chairman called attention to the word "resubmitted" in line 2 and stated that this would not necessarily mean resubmitted to the grand jury. He asked if "resubmitted or refiled" should be placed in the section and Mr. Paillette advised that the section would be amended to conform with the previous amendment to section 13.

Representative Cole moved the approval of section 14 as amended. Motion carried.

ORS 135.550 to 135.610. The sections are not changed, Mr. Paillette reported.

Section 15. ORS 135.620. Form; signature; filing; specification of grounds. The section contains a conforming amendment, Mr. Paillette pointed out.

The subcommittee approved the adoption of section 15 as amended.

Section 16. ORS 135.630. Grounds of demurrer. The section again contains conforming amendments. Subsections (1) and (2) refer to the accusatory instrument being an indictment, whereas in subsection (3) the grounds would apply equally to an information or complaint.

Mr. Hennings asked if subsection (7) would be taking in all the things in ORS chapter 132 which have been determined to be definite. Mr. Paillette replied that it would and all those cases would still apply. This section is again trying to be consistent and not just limit it to indictments.

Mr. Spaulding moved the adoption of section 16 as amended. The motion carried.

Section 15. Mr. Spaulding referred to the last phrase of the section "or it may be disregarded." He believed the section would read better without this language and moved section 15 be amended by placing a period after "instrument" and striking the balance of the line. Motion carried.

Section 17. ORS 135.640. When objections which are grounds for demurrer may be taken. Mr. Paillette stated that the section contains conforming amendments.

Section 17 was approved as amended.

ORS 135.650 and 135.660. The sections are not affected by the draft.

Section 18. ORS 135.670. Allowance of demurrer. Chairman Chandler asked if the district attorney files an information to which the defense demurs and which is granted by the court, could the district attorney then take it to the grand jury. Under the section he did not believe this could be done. It was the Chairman's understanding that if the district attorney indicts the first time he must indict the second time, the same being the requirements for an information and asked the reasoning for this limitation. He believed that if there was a typographical error on the indictment it would be much simpler to have the secretary retype the pleading as an information and file it as such rather than wait for another week or so when the grand jury would again meet.

Mr. Spaulding suggested the problem might be resolved by continuing the first sentence to read "directs the case be resubmitted or refiled by the proper instrument."

Mr. Hennings suggested a time limit proviso be added as to when the district attorney can make a request to the court for the order and once he has the order, how long he has to carry it out. The Chairman concurred.

Mr. Spaulding was of the opinion there was merit in allowing the district attorney to use an information the second time around and therefore the words "resubmitted or refiled" were needed. He did not believe it would make any difference whether it was stated that the court "directs" or "allows."

Mr. Paillette proposed amending the section as follows: insert after the words "accusatory instrument" on line 5, the phrase "allows the case to be resubmitted or refiled." and delete the balance of the section.

Section 18 was approved by the subcommittee to be amended in conformance with Mr. Paillette's proposal.

The Chairman referred to a statute wherein if the court states it shall be resubmitted to the grand jury there is a certain period of time in which to do so. This is not now the case and he believed some time certain should be placed upon this decision.

Mr. Hennings reported that presently there is a 30 day rule from the date of preliminary hearing to the date of indictment. The Chairman asked if the 30 day period runs also for resubmission to the grand jury or would the resubmission be included in the first 30 days. Mr. Hennings was not certain.

Mr. Spaulding believed this would imply that it is starting all over unless stated differently.

Mr. Paillette referred to ORS 135.550 which reads:

> "Unless a new indictment is found before the next grand jury of the county is discharged, the court shall, on the discharge of such grand jury, make the order prescribed by ORS 135.530."

The only limitation there is now, he said, is that it must be done before the next grand jury.

Mr. Hennings proposed that the 30 day rule be written in rather than saying the next term of court. The Chairman believed that the 30 days is too long particularly in the case of a technical flaw in a document. Mr. Spaulding concurred and said it was too long particularly in view of the fact that the district attorney is being allowed to go by way of an information. He believed that five days would be sufficient to be resubmitted or refiled, but wondered if "resubmitted" meant "re-indicted." He did not believe it did.

Representative Cole asked if it is being suggested that the district attorney move the court to refile or re-indict or if it will be part of the judge's order sustaining the demurrer. Mr. Spaulding suggested that it require a motion of the district attorney. In his county,

Representative Cole remarked, the judge will write a letter to the attorneys saying the demurrer is sustained and the district attorney is instructed to prepare and submit an order. It could be a week before it is submitted, he said.

Mr. Hennings suggested making it mandatory to use the information if the demurrer has been sustained in that it has already been considered once by one grand jury.

After a brief recess the Chairman recapitulated the situation being discussed wherein the subcommittee was attempting to include a period of time into section 18. A suggestion was made that since the district attorney is being given the right to file an information or complaint instead of resubmitting the case to the grand jury, he ought to be given five days, including Saturdays, Sundays and holidays, in which to recharge or release the defendant.

Mr. Hennings proposed the section be amended to read:"such recharging must be made within five days of the order allowing the demurrer." Mr. Spaulding suggested the section read: "within five days from the time the court announces its decision."

Chairman Chandler referred to judicial districts located in sparsely settled areas and all in single judge districts wherein the judicial business is conducted at a slow pace. He remarked that in those areas it may take from six to eight weeks before the judge signs the order and the district attorney prepares it. The Chairman wondered if under those circumstances the five day period might be too short and that by including all days instead of normal working days would create a problem.

It was the consensus of the subcommittee that section 18 be amended to state that "such refiling must be made within five days after the judge's announced decision allowing the demurrer."

Mr. Hennings asked what the penalty would be for not coming back within the five days. Representative Cole said that if the judge allows the district attorney to refile and this is not done within five days, then the defendant is released or the bail exonerated but the district attorney could still go ahead and resubmit and refile and have the defendant re-arrested.

Mr. Hennings was of the opinion the section states that the district attorney may not go the refiling route unless he does so within the five days. After that the only route he can take is by appeal.

Mr. Paillette commented that he believed section 19 was the section which should be amended, rather than section 18, as it talks about custody whereas section 18 is the allowing of the refiling.

Representative Cole thought that the five day limitation was adequate so far as the release of the defendant or the bond, but not binding on the district attorney as he may wish to resubmit later than that. Mr. Spaulding remarked that he did not have to resubmit; he could file an

information and it should not take more than five days in which to do so. It may take him longer than that to decide what he is going to do, Mr. Kinzman commented.

It was Mr. Kinzman's contention that the counties were being penalized where the grand juries meet only once every two or three weeks. Mr. Spaulding asked what was to stop the district attorneys in any county from using the information rather than the grand jury and Mr. Kinzman replied that there is nothing to stop them except that the district attorney has either the choice of the grand jury or the information and if he is being given that choice he should be able to exercise it and not limit it to an information. Mr. Spaulding commented that the district attorney has had the use of the grand jury for all the reasons he wants it, mainly for discovery. Mr. Kinzman argued that there may be many factual issues which arise because of the demurrer being sustained, for example, when the district attorney leaves out an element of the crime about which there are many factual questions. If the defense demurrer has been sustained, the district attorney must make the decision whether he has the testimony or the facts to prove that extra additional element that must be put in the indictment. The small county district attorneys are then told they have to make that decision on their own, which could mean looking up the private complainants, etc., and the larger county district attorneys are being told that they can send that kind of case back to the grand jury.

Mr. Spaulding did not believe there would be many instances in which a demurrer would have been sustained because of an element the district attorney did not think of beforehand.

Mr. Hennings believed that since the state's rights were being cut off at a point, perhaps the five days would be too brief and they should be given longer than that to study the case. He agreed that five days was satisfactory in relation to holding someone in custody. Under the draft, he said, the state's right of resubmission is being cut off and he believed that 30 days would be enough time for any district attorney in any county to properly investigate and decide whether or not they can prove the resubmitted case.

Mr. Paillette asked why the state must be barred at all from later resubmission. Mr. Chandler responded that the defendant should not have something hang over his head for several months. It could be for three years, Mr. Spaulding said, because there is nothing that says there is jeopardy and without this statute the statute of limitations would hang over his head.

Mr. Paillette did not believe the existing rule should be changed which lets the court decide whether the allowance of a demurrer is a bar to a further action. The case on its merits is not being talked about, he said, but rather a technical legal argument which has been raised to the accusatory instrument. He thought it one thing to provide a five day limitation in which to resubmit or refile the charge but a far different thing to say that even though the court says this is not a bar, if you don't refile it in 30 days, you are going to be barred.

He could not see why the state should be barred anymore than it is now as a result of the demurrer. The Chairman agreed with this assessment and said his only objection was in the dilatoriness of the order for no apparent reason.

After further discussion, the subcommittee agreed that if the district attorney wishes to refile or resubmit for clearing up a technical error, five days time is sufficient or the defendant is released or bail exonerated, and Mr. Paillette was directed to amend section 18 along these lines.

Section 19. ORS 135.680. Failure to resubmit case after allowance of demurrer. The first sentence, Mr. Paillette said, will be amended to conform to the new language in section 18. The remainder of the section contains conforming amendments relating to the bail draft.

There being no objections, section 19 was approved as amended.

ORS 135.690 and 135.700. Mr. Spaulding referred to ORS 135.700 wherein judgment can be given against the defendant if he does not plead after the demurrer is overruled. He wondered why the judge would not enter a plea of not guilty just as any other time when he refuses to plead and if this would give him the basis to appeal on his demurrer. Representative Cole stated that he would appeal on that when he was convicted. Mr. Spaulding thought the defendant should be allowed to stand trial and try to get off with the jury; if he could not, then he would still have the question to appeal as to the sufficiency of the indictment.

Mr. Kinzman stated that the defendant does not have the right to appeal on a demurrer - he can only appeal a judgment, although Representative Cole was of the opinion that the Appeals Court considers a demurrer as a part of it after he has been convicted and agreed with Mr. Spaulding that the defendant is being cut off.

Mr. Paillette reported one case, State v. Walton, 50 Or 142, wherein conviction was reversed where the record failed to show that plea was entered after the demurrer was overruled and to him would sound completely opposite as to what the statute says. Without any foundation on which to base the judgment, he did not see how, under ORS 135.700, the judgment of guilty could be entered without a guilty plea or a verdict.

> "In a criminal case defendant is not obliged to demand an opportunity to plead, but it is the imperative duty of the prosecuting officer to call upon him to do so.
>
> "Under section 1328, B. & C. Comp., requiring one charged with a crime to be arraigned and to be asked whether he pleads guilty or not guilty, and Section 1364, providing for entering the plea, it is essential to a conviction of a felony that the

defendant be arraigned and that he plead or refuse to plead, though the defendant may not be affected in any degree by failing to plead." State v. Walton, 50 Or at 143.

As a practical matter, Mr. Paillette remarked, the defendant would plead if the demurrer is overruled and this is undoubtedly why the question has never been raised.

ORS 135.700 was amended to contain language to the effect that if the defendant does not plead, a plea of not guilty shall be entered in his behalf.

Section 13. Mr. Hennings referred to the last phrase relating to resubmission to the grand jury and suggested the subcommittee consider placing a five day time limitation and have it conform with what had been done to demurrers. This amendment could also be placed in section 14, Mr. Kinzman commented and the subcommittee directed Mr. Paillette to insert the five day provision in either section 13 or 14.

ORS 135.810 and 135.820. The subcommittee adopted the recommendation to repeal these sections.

Section 20. ORS 135.830. Presentation of plea; entry in journal; form. Mr. Paillette explained that inasmuch as the motion to dismiss has been adopted, subsection (3) will be deleted and subsection (4) renumbered.

Mr. Hennings asked if the defendant could plead to a lesser included crime. For example, if he was charged with murder and believed he was guilty of manslaughter, he wondered if he could enter a plea of manslaughter. Mr. Paillette replied that if both parties were agreeable it would eliminate the mechanics of typing and filing a new information.

Mr. Kinzman indicated that the problem he would foresee is that if this would take place at arraignment, the district attorney,with perhaps 20 cases to arraign that morning, will not know whether he wants to accept the plea to a lesser included crime. There are bargaining provisions if he wishes to come in before arraignment but he believed it would be better for both parties if they had the proper charging instrument.

Section 21. ORS 135.840. Special provisions relating to presentation of plea of guilty and no contest. Mr. Paillette explained the section was a "no contest" amendment to conform with the Guilty Plea draft.

There being no objections, section 21 was adopted as amended.

Section 22. ORS 135.850. Withdrawal of plea of guilty. A vast change is contemplated in this section, Mr. Paillette reported. The Plea Discussions and Agreements draft provides for withdrawal of the plea if, in effect, the defendant did not get what he bargained for. The ABA goes beyond these limited grounds, he said. At the present time withdrawal of the plea is discretionary with the court and has been so

by statute and case law, but he believed there were other considerations which have been taken into account by the ABA and which he believed should be considered by the subcommittee. Definitive guidelines are set out by the court with respect to allowance of the withdrawal and which may or may not go directly to the question of whether the defendant obtained the type of sentence or other concessions he had bargained for.

Subsection (1) places the burden on the defendant to show by a preponderance of the evidence that withdrawal is necessary to correct a manifest injustice.

Subsection (2) concerns itself with the time of making the motion.

Subsection (3) sets out the basic criteria for withdrawal in paragraphs (a) through (d). Paragraph (d) has been provided for before, Mr. Paillette said, and a conforming amendment would be needed.

Subsection (4) should read that "he is not guilty" of the charge rather than "innocent."

Subsection (5). The latter language would apply, for example, to a discharge of witnesses and persons who have been brought in from out of state, and any number of things which the state has relied on and has taken action that would make it impossible for the state to go ahead.

The ABA believes, Mr. Paillette continued, that these guidelines are desirable primarily to deal with instances which arise under the statutes. For example, under (a), (b) and (c) you may now have to get to post-conviction before you have an effective kind of remedy.

Representative Cole asked why, after all these things are listed, it states that the court can still accept a plea for any fair and just reason.

Mr. Hennings referred to subsection (1) and reported a recent case of statutory rape where the defendant, after serving his time, married the girl. He believed that under this subsection he would be able to erase that conviction as he could go back before the court and ask to withdraw his original guilty plea because of a manifest injustice, even though he was guilty, had been sentenced and served his time.

Mr. Paillette indicated that he did not wish to turn this into an expungement provision and this is not what the section contemplated. Mr. Hennings asked if it should be limited at the time of sentence.

Mr. Paillette explained that the thrust of the ABA Standards on Pleas of Guilty deal with the plea system before judgment and does not contemplate post-judgment relief. What it does approach, he said, is trying to get at these kinds of questions before it becomes necessary to correct them later on through post conviction.

Mr. Spaulding then referred to subsection (2) wherein it states it "is not necessarily barred because it is made subsequent to judgment or sentence." and pointed out that this makes it post-conviction relief.

Mr. Kinzman reported that he would not wish to see one of the standard motions made after having been found guilty to be to withdraw his plea. This would happen every time after sentencing, he said.

Mr. Paillette was in agreement that the defendant should not be allowed to withdraw his plea just because he is dissatisfied but believed that even now, under the Santabello case, for example, if he doesn't get what he bargains for, he is entitled to withdraw the plea. This has been provided for in the Plea Bargaining draft.

Mr. Spaulding objected to the allowance of the defendant to withdraw his plea once he has been sentenced. With the Plea Bargaining draft provision he may do this but only if he has gone through the formal bargaining process, Representative Cole pointed out, and there may be cases where he was led to believe through some statements made by the district attorney or others that he would get some concessions.

Mr. Hennings suggested the insertion of "prior to sentence" before "whenever" in subsection (1).

Mr. Kinzman referred to paragraph (a) of subsection (3) and said a defendant could waive his right to counsel and plead guilty to a traffic violation but there may be an instance where he would later speak to an attorney and advised that he could have helped him get off. The defendant could then rely on paragraph (a) in that he was denied the effective assistance of counsel as provided by law and request a withdrawal of the plea. The Chairman believed that in that instance he knowingly waived his right to counsel and it would be impossible for him to come in the next day and state that he was denied that right.

Mr. Spaulding was of the opinion the section is unnecessary. The Chairman disagreed and believed it better to spell out these guidelines not only for the benefit of the judge but for the defendant as well. Mr. Paillette admitted the section was broadly stated but said that many of the ABA recommendations are purposely broad.

The Chairman stated that the Commission has already made the policy decision that the plea can be withdrawn subsequent to sentence in the Guilty Plea draft and the section is adding three other grounds, (a), (b) and (c), that could be raised by the defendant after sentence, and which are all post-conviction grounds.

Mr. Paillette observed that after reading case law, consistently the only thing it states is the allowance of the withdrawal of the plea of guilty rests in the sound judicial discretion of the court and will not be disturbed except for abuse. This draft, he said, takes the "sound judicial discretion" and boils it down into specific language which the court will have to consider. If the defendant is able to establish any of these things by a preponderance of any evidence, it

does not say it is within the discretion of the court - it says the court shall allow the defendant to withdraw his plea. ORS 135.850, he said, only states "the court may permit it to be withdrawn and a plea of not guilty is substituted therefor." It does not say how much of a showing the defendant has to make, his burden, etc.

Representative Cole moved section 22 be submitted to the Commission without recommendation.

Mr. Paillette recommended that if the subcommittee did not adopt the ABA recommendations, it should allow the defendant to withdraw his plea of guilty or no contest and substitute a plea of not guilty. Former jeopardy would not be considered because it has been eliminated and there will be a motion instead of a plea. Mr. Spaulding said the defendant may wish to withdraw his plea of guilty in order to file such a motion.

Representative Cole inquired as to what restrictions there are in the draft relating to what he does after his plea is withdrawn. There are none, Mr. Paillette replied. Existing language states that upon withdrawal of the plea of guilty, the defendant can substitute the plea of not guilty.

Mr. Hennings said the defendant may wish to withdraw the plea of guilty or no contest in order to raise a demurrer or file a motion of former jeopardy or any other motion that the court may feel proper under the circumstances. The trial may even start, he said, when something major might come up and the court felt that the plea should be withdrawn in order to allow it to be explored. Mr. Spaulding agreed and said this has been done time and time again regardless of the statute.

The subcommittee acted upon Representative Cole's prior motion to refer section 22 to the Commission without recommendation because of the policy involved. The motion carried.

Section 23. ORS 135.860. Not guilty plea as denial of allegations of indictment. The section contains a conforming amendment to change "indictment" to "accusatory instrument."

Representative Cole moved the adoption of section 23 as amended. The motion carried.

Section 24. ORS 135.870. Evidence admissible under plea of not guilty. Mr. Hennings asked if this includes affirmative defenses or if they have to be mentioned specifically. It was his understanding that an affirmative defense cannot be put on unless it is filed. There must be notice given on some of the defenses he said, and wondered if this modifies those defenses, such as alibi, insanity, etc. Mr. Paillette responded that this does not go to notice; it states that a specific type of plea does not have to be entered in order to give this type of defense in evidence. For example, the defendant does not have to plead guilty by reason of mental disease or defect, but is required to give notice.

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Mr. Hennings reported that there are some pieces of evidence that are not allowed by law to be given and suggested the draft read on the last line "may be given in evidence as otherwise provided by law under the plea of not guilty." The section seems to say, he believed, that regardless of whether a notice was filed, the defendant has entered his plea of not guilty and can put on all matters of fact tending to establish a defense to the charge.

Mr. Paillette reported that some states require special pleas such as not guilty by reason of insanity and this is what this originally was attempting.

Mr. Spaulding moved section 24 be deleted in its entirety. Motion carried.

ORS 135.875. Notice prior to trial of intention to rely on alibi evidence; content of notice; effect of failure to supply notice. Mr. Paillette believed the Wardius case may have a great impact on this statute.

Mr. Hennings wondered if this section should be transferred to the Discovery draft. He said he would not be concerned with the time and place if he has discovery of what the state will try to prove. Otherwise, he said he must take a two year period of time or he could not put on any evidence of it regardless of what date the state may elect to prove. Mr. Paillette responded that this was not disturbed in the Discovery draft because it could be argued that it is a form of unilateral discovery but at the same time it is not so much a discovery statute as it is a notice provision. The state, he said, could make that argument.

Mr. Hennings asked if, inasmuch as there was the discovery statute, this could be amended to say the "time, place and persons provided the state gives information of the time and place of the incident they intend to prove." His only information now is that it is some time within two years and in some county, he said.

Mr. Paillette remarked that even if this statute remained in its present form, if the proposed Discovery Article is adopted, he believed it would give the defendant the kind of information he needs prior to making a determination under the alibi section.

Inasmuch as all alibi witnesses must be filed before they are called, Mr. Hennings asked if this would mean that everyone must be called. Mr. Paillette replied that this was not his interpretation of the statute.

Section 25. ORS 135.880. Defect in accusatory instrument as affecting acquittal on merits. The section changes "indictment" to "accusatory instrument."

Section 25 was approved as amended.

ORS 135.890 and 135.900. The sections are replaced by section 2 of the Former Jeopardy draft.

Representative Cole moved the adoption of the draft on Arraignment Proceedings, Part III, Article 6, Preliminary Draft No. 1, as amended. The motion carried.

Mr. Paillette reported that the draft has been placed on the Agenda for the Commission meeting on August 30 and will be available for Commission action if time allows.

The meeting adjourned at 4:45 p.m.

Respectfully submitted,

Norma E. Schnider, Clerk
Criminal Law Revision Commission

Section ____. Motion to dismiss accusatory instrument on grounds of former jeopardy. (1) The court shall dismiss the accusatory instrument if, upon motion of the defendant, it appears, as a matter of law, that a former prosecution bars the prosecution for the offense charged.

(2) The time of making the motion and its effect shall be as provided for a motion to set aside the indictment in ORS 135.520 and 135.530.

(3) An order to dismiss the accusatory instrument on grounds of former jeopardy is a bar to a future prosecution of the defendant for the offense charged in the accusatory instrument.

Section _____. ORS 138.060 is amended to read:

138.060. (Appeal by state.) The state may take an appeal to the Court of Appeals from:

(1) An order made prior to trial dismissing [the indictment] an accusatory instrument;

[(2) An order sustaining a plea of former conviction or acquittal;]

[(3)] (2) An order arresting the judgment; or

[(4)] (3) An order made prior to trial suppressing evidence.