Tape 24 - Side 1

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

September 13, 1971

Minutes

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

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

Agenda: State Criminal Jurisdiction, Preliminary Draft No. 1; August 1971
Venue, Preliminary Draft No. 1; August 1971

The meeting was called to order by the Chairman, Mr. Robert Chandler, at 1:10 p.m., Room 315, Capitol Building, Salem, Oregon.

STATE CRIMINAL JURISDICTION, PRELIMINARY DRAFT NO. 1; AUGUST 1971

Mr. Paillette explained to the subcommittee that the drafts to be discussed were two more parts of what will ultimately be Article 1 on Preliminary Provisions. He stated six different areas were tentatively placed under Article 1 - Statute of Limitations which already is in tentative draft form; Jurisdiction and Venue, on the agenda for this meeting; Double Jeopardy; Rights of the Accused; and General Definitions, and said the first draft has been completed on search and seizure and that the Bar Committee on Criminal Law and Procedure has already started work in the areas of pre-trial discovery and negotiated pleas.

The chairman said he was informed that the Court of Appeals had been asked if it wished to appoint an ex-officio member to the Commission and the court had accepted, with Chief Justice Schwab being the appointee.

Mr. Paillette stated that the draft on Criminal Jurisdiction consists of four sections which would replace three existing statutes and represents a Model Penal Code view. He said this approach answers some questions the present statutes do not and goes quite far toward giving the state a long arm on criminal jurisdiction, and that the subcommittee may feel it goes a little too far with respect to certain types of conduct. Mr. Paillette pointed out that the draft could be altered, if desired, so that the state would not have as broad a sweep in reaching persons living outside the state.

Section 1. Jurisdiction; generally. Mr. Paillette stated that section 1 of the draft has an exception in the first clause and sets forth in subsection (6) the basis for general state criminal jurisdiction. Subsection (2) states that the state has jurisdiction if either the conduct is an element of the offense or the result that is an element occurs within this state. Mr. Paillette said that subsection (2) would be new in its language in that conduct occurring outside the state is sufficient to constitute conspiracy; that subsections (2), (3) and (4) are all concerned with inchoate crimes, with (2) and (3) concentrating on inchoate crimes occurring outside the state that are aimed at a completed offense within the state.

Chairman Spaulding asked for an example dealing with subsection (6) of this section, which is the kind of provision aimed at specific statutes where, in the statute defining the offense, there must be an element for the state to have jurisdiction and the defendant must have reason to know that the conduct he was engaged in is likely to affect the interest of the state that was protected by the statute. Mr. Paillette replied that certain kinds of transactions that would be of a fraudulent nature, such as obtaining under false pretenses, would be a good example of this.

Mr. Paillette referred to ORS 131.220 which covers situations where there are two accomplices, one within and one without the state, and said the draft would delete the words "if the defendant is afterwards found in this state". This would not be included in the draft as the defendant is not required to come into the state in order to be liable for prosecution. He said the section goes much further in its reach and as a practical matter probably covers situations that would be very unusual. The likelihood of using some of these provisions probably would be slim, but from the standpoint of providing the state with a broad based jurisdictional statute, it would seem this approach is a reasonable one. It appears to cover just about all possible situations, but contains a policy question as to how far the state should go in giving the courts jurisdiction for criminal offenses.

Section 2. Jurisdiction; exceptions. Section 2, Mr. Paillette explained, would set out exceptions to section 1 and is patterned after the Model Penal Code and the Michigan draft. He said the first exception would be in subsection (1) (a) where it is stated that subsection (1) of section 1 does not apply if:

> "Either causing a specified result or an intent to cause or danger of causing that result is an element of an offense; and
>
> "(b) The result occurs or is designed or likely to occur only in another jurisdiction where the conduct charged

would not constitute an offense, unless in the statute defining the offense a legislative intent clearly appears to declare the conduct criminal, regardless of the place of the result."

Mr. Paillette remarked that if the intent was present in the statute or if the result that is present is one that is likely to occur only in another jurisdiction, the courts would not have jurisdiction. But, by adding the words "unless in the statute defining the offense a legislative intent clearly appears to declare the conduct criminal, regardless of the place of the result", the legislature is left with broad authority.

The Michigan Code, Mr. Paillette continued, uses the language "plainly appears" whereas in the draft, it has been changed to "clearly" in an effort to be consistent with similar language used in the substantive code.

Section 2 (2), Mr. Paillette said, is again the question of trying to anticipate possible conflict issues and leaves the legislature with broad authority and that if the culpability is such that the defendant intentionally caused the result in the state, even though it is not criminal in his state, it would constitute an offense here. He did not think it would work any hardship on an innocent individual or someone who is not aware, although it would place a heavy burden on the state to prove beyond a reasonable doubt that the actor actually meant for the result to occur in Oregon.

<u>Section 3. Jurisdiction; criminal homicide.</u> Continuing with Section 3 of the draft, Mr. Paillette read ORS 131.230, stating he felt the statute was somewhat restrictive as well as being ambiguous.

Mr. Spaulding questioned the use of the words "bodily impact" in the draft and commented that there could be some other cause of death other than bodily impact, such as poisoning, and suggested inserting "the criminal conduct" in place thereof.

Representative Cole asked if any further definition of "bodily impact" would be set out somewhere else, to which Mr. Paillette replied that he had not planned on any further definition.

Representative Cole proposed using the word "act" rather than "criminal conduct". Mr. Paillette stated that all the terms and definitions in the substantive code will be incorporated by reference in the procedure code and that under the culpability article in the substantive code "act" is defined as including omissions, and that it was his opinion the word "conduct" would be more fitting because it incorporates the act plus the culpable mental state.

Chairman Chandler read from the substantive code, section 8 (1):

> "The minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which he is capable of performing."

Mr. Paillette stated "conduct" is defined as "an act or omission and its accompanying mental state."

It was the unanimous decision of the subcommittee to amend section 3 of the draft, deleting the words "bodily impact" and inserting "conduct". (Senator Burns not present.)

Section 4. Jurisdiction; definition. Section 4, Mr. Paillette indicated, is new, but he was of the opinion there is precedent for this section in civil law in defining "this state".

Mr. Spaulding inquired as to the term "legislative jurisdiction" which he stated was unfamiliar to him. Mr. Paillette replied this again was Model Penal Code language.

Mr. Spaulding asked if "legislative jurisdiction" meant in so far as the State of Oregon is not restricted by the Constitution and that the area involved is as broad as it can be without violating any constitutional limitations. Mr. Paillette replied that ORS 131.210 says something similar to this where it states "...except where such crime is by law cognizable exclusively in the courts of the United States." He said that under section 1 of the draft, where it states "...an element occurs within this state..." that "within this state" would include the air space, which he felt was desirable.

Representative Cole stated the legislature does have certain authority to extend beyond the borders of the state and it should be able to extend the authority up as well as out.

Mr. Gustafson stated that the federal jurisdiction over fishing extends 12 miles and asked if the state would have jurisdiction beyond the three mile limit. Representative Cole replied that the boundaries are subject to modification by the legislature to which Mr. Paillette added that this section is not in itself going to give jurisdiction in any given situation but will include specific situations in which the state acquires jurisdiction over territory and then its criminal laws will automatically go to those boundaries.

With all members present, the subcommittee voted unanimously its approval of Article 1, State Criminal Jurisdiction, Preliminary Draft No. 1, subject to the amendment in section 3.

VENUE, PRELIMINARY DRAFT NO. 1; AUGUST 1971

Section 1. Place of trial. Mr. Paillette stated that the draft discusses which county would be the place of trial, once it is established that the state has jurisdiction. Subsection (1) of section 1 has not been changed to any degree, but he pointed out that subsection (2) would change the statute but not the case law, and this subsection should make it clear that the defendant will have to request a change of venue. Mr. Paillette added that everything covered in the existing statutes on venue is included in the draft.

Senator Burns remarked that he was of the opinion the language in ORS 131.310 has more clarity than section 1 (1) of the draft, and inquired as to the reason for the change. Mr. Paillette replied that the word "committed" in ORS 131.310 is not all that clear, particularly in view of the fact that the words "conduct" and "results" are used in the draft on jurisdiction, which makes it more precise in that it is not always clear where a crime, consisting of several elements, is committed. He added that he felt the best argument for the language in section 1 is that, read with the rest of the draft, it makes it clearer what elements are being discussed for the purposes of venue, rather than saying "where the crime was committed".

Senator Burns stated that in case law over the years there are all kinds of cases on where the crime was committed and asked if this rationale did not fall in the face of that argument. He went on to say that if this is approved, it should be clear the case law definition which has grown over the years is not being changed by the insertion of this new language.

Mr. Spaulding commented that this new language includes ORS 131.340 and Mr. Paillette pointed out that under section 2 of the draft, some of the other existing statutes are included.

Senator Burns stated he has no disagreement with this but the question could arise on appeal.

Section 2. Place of trial; special provisions. Mr. Paillette explained that section 2, although from the standpoint of codification creates a technical drafting problem by having a longer section, he felt it is clearer than under the present framework where all of ORS chapter 131 now has to be read to know just where the venue would lie in any given situation. He added that all of this is inserted in section 2 except where there may be some doubt with respect to county lines, which is dealt with in section 3. Section 2 (1) covers conduct

occurring in two or more counties and states that trial may be held in any of the counties concerned. Mr. Paillette remarked that as a practical matter the trial would undoubtedly be held in the county which gets involved first, although present law provides that where there is doubt as to the place of the crime within one mile from either county line, trial may be held in either county.

Senator Burns asked whether this one-mile boundary provision would be perpetuated. Mr. Paillette replied it has been in subsection (6), and that where there is a doubt, he felt the defendant would be protected as he could always move for a change of venue.

Senator Burns observed that if the statute does not speak in terms of doubt, he did not feel the defendant could be protected. Mr. Paillette replied that if the defendant has other grounds and there is some reason why he is prejudiced because he is being tried in one county and not the other, then doubt would not be needed.

Mr. Spaulding pointed out there may be a doubt in both counties and the state may have to resolve it legally by proving doubt, and asked if this might create a problem. Mr. Paillette said he felt that at the present time the state, in establishing venue, would only have to have testimony from a witness such as the police officer or victim, with respect to the location of the offense.

Mr. Gustafson stated there was only one case which contained doubt that he was able to locate and this was only 900 feet from the county line, to which Mr. Spaulding stated it would be quite unusual to have a crime occur in which no one would know within one mile in which county it occurred.

Mr. Paillette remarked that perhaps the only argument concerning doubt would be the moving conveyance situation, but this is covered under subsection (5) of this section. He then asked the subcommittee if it wished the word "doubtful" reinstated to which Mr. Spaulding replied he did not feel it necessary.

Mr. Paillette, continuing with subsection (4), stated it was his opinion the language in the draft is an improvement over the present statute, ORS 131.380, showing more clarity by the insertion of the words "in or adjacent to" two or more counties.

Mr. Spaulding stated he was in doubt as to the term "nearby" in this subsection. Mr. Paillette replied that some crimes may be bordering on a body of water, but a greater distance from one county to another, thus his rationale for using the term.

Senator Burns suggested using the wording as in the Illinois Code which states that trial may be held in any county adjacent to such navigable water. Chairman Chandler thought this wording would not suffice in a case occurring on the Columbia River.

Representative Cole asked if the one-mile provision might be used in this subsection but Chairman Chandler contended that a problem could arise in establishing where the offense happened on a moving body of water.

It was the decision of the subcommittee to leave the word "nearby" in the draft until it reached the Commission and perhaps by this time an alternative term could be found.

Subsection (5), dealing with conveyances in transit in which an offense is committed, is a desirable provision to have in the statutes, Mr. Paillette pointed out. Mr. Spaulding questioned the time element in this subsection and stated that the draft does not point to the direct time the offense may have occurred. Mr. Paillette replied the last part of the sentence seemed to obviously relate back to the beginning where it states the offense was committed "in transit",but remarked that the sentence could continue to read "through or over which the conveyance passed during the commission of the offense." if this might give more clarity to the structure.

Representative Cole commented he felt the words "in transit" contained in the draft would be enough clarification as to the time element.

Subsection (10), Mr. Paillette said, is a restatement of the present law. The existing statute has been amended by Senate Bill 40, as there is no longer criminal nonsupport of the spouse, only children.

Chairman Chandler reported court cases had been held in California where the mother has been ordered to make payment to the husband, so there could be criminal nonsupport by a mother of a child who was in the custody of the father and inquired if it could create any problems if such a case occurred in this state.

Mr. Spaulding proposed using the word "parent" rather than "father" in subsection (10) and Mr. Paillette stated that the non-support statute in Senate Bill 40 talks in terms of the parent and agreed this would be a good change in the draft.

Mr. Spaulding asked whether or not the state has run into problems with regard to the 60-day residency of a child. Mr. Paillette replied it must be established the child has been a resident for at least 60 days. Mr. Spaulding said a great problem can arise if the child's parents move often within this period and suggested changing the language by deleting reference to the residency stipulation and amending subsection (10) to read:

"In criminal nonsupport actions trial of the offense shall be held in any county in which the dependent child

is found [has been an actual resident for not less than 60 days] and where the failure and neglect has continued for 60 days [while such failure and neglect has continued] irrespective of the domicile of the parent [father].

Mr. Paillette stated that by inserting "where the child is found" could result in problems for the district attorneys inasmuch as in support cases there are more migrants in some counties than in others.

Mr. Spaulding asserted that anyone who has failed to support his child for sixty days, if that child is in the county, that court should have jurisdiction to punish the parent, whether or not the child has been in the county for the 60-day period. He felt the district attorney should not have to prove the child has been a resident for the sixty days but only that that parent has not cared for him during that time.

The subcommittee then recessed at 3 p.m., reconvening at 3:10 p.m.

Mr. Paillette asked if the members wished to have subsection (10) amended to read:

> "A criminal nonsupport action may be tried in any county in which the dependent child is found, irrespective of the domicile of the parent."

Chairman Chandler inquired if this wording would also apply to a guardian and if not, asked if the subcommittee wished to include this in the draft. Mr. Paillette referred to the nonsupport section of the substantive code which reads "...parent, lawful guardian or other person lawfully charged with the support of the child..."

By a voice vote, it was the unanimous decision of the subcommittee to amend section 2 (10) of the draft as follows:

> "Criminal nonsupport actions may be tried in any county in which the dependent child is found, irrespective of the domicile of the parent, guardian, or other person lawfully charged with the support of the child."

Section 3. Place of trial; doubt as to place of crime; conduct outside of state. Section 3, Mr. Paillette explained, is based on ORS 131.320 regarding acts committed outside the state, but contains new language with respect to offenses committed within the state. Mr. Spaulding questioned if a person could be extradited to a county other than the county charging him with the crime, and said he was uncertain as to the meaning of the words "or to which he is extradited." He asked if this language would permit the state to pick the most favorable county.

Mr. Paillette replied there could be a situation where the defendant actually has residency in the county, but is outside the state at the time of the commission of the offense over which Oregon has jurisdiction and that under those circumstances the trial could be held where he resides. This, he pointed out, was intended to cover any possible situations which may not be covered under section 2 of the draft.

Mr. Spaulding contended the phrase "or if he has no fixed residence" could allow the defendant to claim this would not apply to him if he lived in another state. He stated the section assumes the fixed residence means an Oregon residence but does not state this, and the defendant would have a good argument by stating this would not apply to those having no fixed residence in Oregon.

Mr. Paillette recommended the draft be clarified by striking the comma after "residence" and insert "in this state," if the members felt this interpretation could be made.

The motion to amend section 3 as stated was carried unanimously by a voice vote.

Section 4. Change of venue. As background for section 4, Mr. Paillette referred to the Oregon Constitution, Article 1, section 11 where it provides, "In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed;...", and called attention to the fact that the right is limited to the accused. Mr. Paillette then referred to ORS 131.400 which states "Either party may have the place of trial changed once..." and remarked that there was a legitimate question with respect to whether or not the state can constitutionally have a change of venue. Section 4, he stated, would limit the venue change only to the defendant rather than either party. Mr. Paillette cited the case of State v. Black, 131 Or 218 (1929), where the trial court had changed the venue upon motion of the state. The Supreme Court reversed the judgment and held that the accused has the right to trial in the place where the crime occurred. The court did not expressly void the "either party" provision in ORS 131.400 but used language that indicated the Constitution did not provide the state with the right to a change of venue over the objection of the defendant.

Senator Burns asked if this means that notwithstanding the fact that the Oregon Constitution restricts the change of venue to the accused, could the legislature thereafter broaden this by a statute to permit the state to move for a change of venue?

Mr. Spaulding remarked he was in doubt if the Constitution does this, as it says the accused has that right. He added that the Constitution states the accused has the right to trial in the county in which the crime was committed, and when the court changes the venue, he no longer is being tried in that county, to which Senator Burns replied that the statute may be at odds with the Constitution.

Mr. Paillette agreed that there is serious doubt about the constitutionality of ORS 131.400, and if the subcommittee wishes to allow the state to move for a change of venue there should be some thought given to proposing a constitutional amendment. He reported that this probably will be of concern to the District Attorneys' Association. Senator Burns stated he was concerned in this area and agreed that the state should have the right to a fair trial, but it has greater resources than does the defendant and unless some more restrictive criteria is established for the state seeking the change, there will be some district attorneys running away with their budgets by wanting to move for a change for some reason or another. Chairman Spaulding disagreed with Senator Burns' statement, saying that many of the counties do not have these resources and that in approximately one-third of the counties of the state, the defendant operating with appointed counsel is better represented than is the state.

Sections 6 to 12. Mr. Paillette stated that sections 6 and 7 of the draft were drawn from the Federal Rules of Criminal Procedure, Rule 21 and sections 8, 9, 10, 11 and 12 are almost identical wording to the existing statutes. He added that he was not aware of any problems in these sections, although section 10 may be indirectly affected as a result of the provisions on costs in SB 40 which states that costs cannot include expenses incurred in providing the defendant with a constitutionally guaranteed trial. The ability to tax the expenses against the defendant might be brought into question, but Mr. Paillette was of the opinion it should not be taken out of the statutes. Assuming the defendant is able to pay, he could argue that if he had not been granted the change of venue, he would not have been able to get a constitutionally guaranteed fair and impartial trial, and should therefore not be assessed the costs. He referred to the new Criminal Code where it states in section 80:

> "(2) Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant. They cannot include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law."

In section 12, Mr. Paillette stated the wording was changed to provide that the defendant would be delivered to the custody of the executive head of the correctional institution of the county where he is to be tried.

Senator Burns asked if this new language would make it broad enough to cover regional jails. Mr. Paillette indicated this was the reason for the change.

APPROVAL.

Senator Burns moved the approval of Preliminary Draft No. 1 on venue, subject to the changes in section 2 (10); the possibility of future change in section 2 (4) and the addition of the words "in this state" in section 3. The motion was seconded by Mr. Spaulding and carried unanimously on a voice vote.

OTHER BUSINESS.

Mr. Paillette informed the subcommittee the next item of business will be the draft on Double Jeopardy.

Senator Burns stated that future meetings of the full Commission will be held on the fourth Friday and Saturday of each month, thereby assisting all members in planning their schedules.

The meeting adjourned at 4:10 p.m.

Respectfully submitted,

Norma Schnider, Clerk
Criminal Law Revision Commission