

CRIMINAL LAW REVISION COMMISSION
311 State Capitol
Salem, Oregon

CRIMINAL PROCEDURE

PART I. GENERAL PROVISIONS

ARTICLE 1. PRELIMINARY

Time Limitations

Tentative Draft No. 1; December 1970

Reporter: Donald L. Paillette

Subcommittee No. 1

ARTICLE 1. PRELIMINARY

Time Limitations

Tentative Draft No. 1; December 1970

Section 1. Time limitations. (1) A prosecution for murder or manslaughter may be commenced at any time after the death of the person killed.

(Existing
(Law
(ORS
(131.110
(131.120
(131.130

(2) Except as provided in subsection (3) of this section or as otherwise expressly provided by law, prosecutions for other offenses must be commenced within the following periods of limitations after their commission:

- (a) For any other felony, three years;
- (b) For any misdemeanor, two years;
- (c) For a violation, six months.

(3) If the period prescribed in subsection (2) of this section has expired, a prosecution nevertheless may be commenced as follows:

(a) If the offense has as a material element either fraud or the breach of a fiduciary obligation, prosecution may be commenced within one year after discovery of the offense by an aggrieved party or by a person who has a legal duty to represent an aggrieved party and who is himself not a party to the offense, but in no case shall the period of limitation otherwise applicable be extended by more than three years; or

(b) If the offense is based upon misconduct in office by a public officer or employe, prosecution may be commenced at any time while the defendant is in public office or employment or within two years thereafter, but in no case shall the period of limitation otherwise applicable be extended by more than three years.

Section 2. Prosecution; when commenced. A prosecution is commenced when a warrant or other process is issued, provided that the warrant or other process is executed without unreasonable delay.

Section 3. Time limitations; when time starts to run; tolling of statute. (1) For the purposes of section 1 of this Article, time starts to run on the day after the offense is committed.

(2) Except as provided in section 4 of this Article, the period of limitation does not run during:

(a) Any time when the accused is not an inhabitant of or usually resident within this state; or

(b) Any time when the accused secretes himself within the state so as to prevent process being served upon him.

(3) If, when the offense is committed, the accused is out of the state, the action may be commenced within the time provided in section 1 of this Article after his coming into the state.

Section 4. Tolling of statute; three year maximum. Notwithstanding section 3 of this Article, in no case shall the period of limitation otherwise applicable be extended by more than three years.

COMMENTARY TO SECTIONS 1 TO 4

A. Summary

These sections deal with the substance and application of the statute of limitations for criminal offenses. They are made part of the procedural code in accordance with an earlier decision of the Commission.

Section 1 (1) sets no limitation at all for prosecutions for murder or manslaughter. Section 1 (2) establishes the periods of limitation for all other offenses. Section 1 (3) provides for two extended periods of time, one in which fraud or breach of fiduciary responsibility is not discovered until after the basic period has expired, and the other in which the offender has been guilty of misconduct in office. The first clause in paragraph (b), while employing the language, "if the offense is based upon misconduct in office by a public officer or employe," would include, but would not be limited to the offenses of "official misconduct" set forth in ss. 214 and 215 of the Proposed Criminal Code. Examples of other crimes that would fall within this area would be bribe receiving, misuse of confidential information and other similar conduct. Note, however, that in either (3) (a) or (3) (b), the maximum that can be added to the basic period is three years.

Section 2 provides that a prosecution is considered to be commenced when a warrant or any other process is issued, provided that the process is executed without "unreasonable delay." In determining whether the delay is reasonable, factors such as the effort made to find the accused, inability to find him, the fact that the accused was in prison and other circumstances too numerous to detail in a statute may be taken into account.

Section 3 details the circumstances in which the statute of limitations does not run, e.g., the defendant is absent from the state or cannot be found within the state.

Section 4 provides for a maximum of three years that can be added to the basic period because of circumstance set forth in section 3.

As the Model Penal Code commentary observes:

"Objectives of limitation provisions are varied:

"(1) Foremost is the desirability of requiring that prosecutions be based upon reasonably fresh evidence....

"(2) If the person refrains from further criminal activity, the likelihood increases with the passage of time that he has reformed, diminishing pro tanto the necessity for imposition of the criminal sanction....

"(3) As time goes by the retributive impulse which may have existed in the community is likely to yield place to a sense of compassion for the person prosecuted for an offense long forgotten.

"(4) Finally, it is desirable to lessen the possibility of blackmail based on a threat to prosecute or to disclose evidence to enforcement. After a period of time, a person ought to be allowed to live without fear of prosecution." (Tent. Draft No. 5 at 16 (1956)).

The Model Penal Code, supra at 17-22, also suggests that in determining the proper lengths of periods of limitation, five basic problems must be resolved:

(1) Should there be a period of limitations for all offenses? The draft continues the exceptions for murder and manslaughter now contained in ORS 131.110 (1).

(2) How many gradations in periods of limitations should there be? The draft provides for four, ranging from offenses without any limitation (s. 1 (1)) to the very minor offense of violation with a six month limitation (s. 1 (2) (c)).

(3) How long should each separate period of limitation be? Again, except for murder and manslaughter, the proposed draft provides for periods of three years, two years, and six months. These periods are largely arbitrary because, as the Model Penal Code points out, there is an absence of empirical data upon which to base a determination of appropriate amounts of time. To the extent that length of periods of limitation can be rationalized at all they, like penalty provisions, must be viewed as compromises reflecting the multiple and sometimes conflicting aims of the criminal law. For example, it might be said that (a) the more serious the offense, the greater the need for deterrence and the more undesirable it is to offer the possibility of escape from punishment after a short period of

limitation, or (b) the more serious the offense, the greater the likelihood that the perpetrator is a continuing danger to society and the greater the need to incapacitate him whenever he is caught or (c) the more serious the offense, the less likely the offender is to reform of his own accord, and thus the need for compulsory treatment whenever he is apprehended. Yet it is also true that the more serious the charge, the more there is at stake for the defendant and the greater the procedural need for the protection afforded by a limitation period.

(4) Should there be special provision for offenses which by their nature are particularly difficult to detect? The draft is based upon the same premise as the Model Penal Code approach, i.e., that it is ordinarily desirable to start the running of the period of limitation at the time a crime is committed rather than at the time the offense is detected or the offender discovered.

The assumption is that most offenses are known at least to the victim at the time of or soon after commission, or that the offense can be discovered by adequate investigation by enforcement officials. This is not likely to be true of certain offenses where the opportunity for prolonged concealment is great. These are dealt with separately by the draft in two categories:

Paragraph (a), subsection (3) of section 1, deals with cases involving fraud or a breach of fiduciary obligation and provides that a prosecution may be brought within one year after discovery of the offense. (See Note, 102 U of Pa L Rev 630, 639-640).

Paragraph (b) of subsection (3) deals with misconduct by a public officer or employee. Some states deal specifically with offenses by public officials either by providing a longer period of limitations, by providing that the time does not run while the person is holding public office, or by providing that prosecution may be within a specified period after the person leaves office. The draft provides that prosecution may be within two years after discovery of the offense.

Under both of the foregoing exceptions the period of limitations otherwise applicable is not extended more than three years.

(5) Finally, should special short periods of limitation be prescribed for offenses which by their nature are more likely to be the subject of fraudulent prosecutions? The A.L.I. believed some provision of this sort was needed, but decided it was preferable to deal with each situation specifically in the section defining the offense. The only crime in the Proposed Oregon Code in which the requirement of a prompt complaint was considered (and rejected by the Commission) was that of rape. Existing law requires that a complaint charging adultery be filed within one year of its commission or discovery (ORS 167.010).

B. Derivation

Section 1 (1) and (2) is essentially the same as ORS 131.110 with a new provision to cover violations.

Section 1 (3) is derived from Michigan Revised Criminal Code s. 130 and Model Penal Code s. 1.06.

Sections 2 and 4 are from the same source.

Section 3 is a restatement of ORS 131.120.

C. Relationship to Existing Law

ORS contains three basic statutes dealing with time limitations:

131.110 Time within which criminal action must be commenced. Unless otherwise expressly provided by law, the time within which criminal actions must be commenced is as follows:

(1) For murder or manslaughter, at any time after the death of the person killed.

(2) For any other felony, within three years after its commission.

(3) For any misdemeanor, within two years after its commission.

131.120 Effect on limitation period of absence from state and concealment preventing service of process. If, when the crime is committed, the defendant is out of the state, the action may be commenced within the time provided in ORS 131.110 after his coming into the state. No time during which the defendant is not an inhabitant of or usually resident within the state, or during which he secretes himself therein so as to prevent process being served upon him, is a part of the limitation prescribed in ORS 131.110.

131.130 When action is "commenced." An action is commenced, within the meaning of ORS 131.110 and 131.120, when the indictment is found and filed with the clerk of the court or, in cases triable without indictment, when the indictment or complaint is filed or lodged in the court or with the officer having jurisdiction of the action.

As noted before, ORS 167.010 provides for a one year limitation on criminal actions for adultery. ORS 398.216 provides special limitations for military justice offenses. (A related statute, ORS 132.610, provides that the precise time at which a crime was committed need not be stated in the indictment, but it may be alleged to have been committed at any time before the finding thereof and within the time in which an action may be commenced therefor, except where the time is a material ingredient in the crime.)

The draft continues the present legislative policy of having no limitation on prosecutions for murder or manslaughter.

The provisions for extending the period of limitation in fraud, fiduciary breaches and public official misconduct have no counterpart in existing statutory law.

The provisions of section 2 relating to the question of when a prosecution is commenced would change existing law now found in ORS 131.130 which states that an action is "commenced...when the indictment is found and filed with the clerk of the court or ...when the indictment or complaint is filed or lodged in the court or with the officer having jurisdiction...."

Current legislation is in the main of two types:

- (1) Statutes requiring that an indictment be found or an information filed;
- (2) Statutes requiring merely that prosecution be commenced. Under this type of statute courts have generally held that the issuance of a warrant of arrest is sufficient. See 90 ALR 452 (1934).

The draft takes the Model Penal Code view that a warrant of arrest is sufficient. In so doing, it proceeds on the assumption that the basic purpose of a statute of limitation is to insure that the accused will be informed of the decision to prosecute and the general nature of the charge with sufficient promptness to allow him to prepare his defense before evidence of his innocence becomes weakened with age. His further right to have the matter promptly disposed of by trial is not dealt with here.

Both the finding of an indictment and the issuance of a warrant of arrest require a formal decision by the prosecution as to the general nature of the charge and the identity of the accused. Both will ordinarily come to the attention of the accused.

The A.L.I. commentary notes that there is a danger that a warrant may be issued and allowed to lie around without diligent effort to execute it. The draft requires that the warrant be executed within a reasonable time. (Model Penal Code, supra at 25).

The requirement that an information be filed is rejected. Some states require that the accused be apprehended and given a preliminary examination before the period would cease to run. This view also is rejected.

Section 3 states when the time starts to run and specifies those situations in which time is not counted against the period of limitations. Except for the three year maximum limitation, the draft reflects current legislation and decisions. An extensive compilation of cases is contained in Notes, 90 ALR 452 (1934); 124 ALR 1049 (1940).

Subsection (2) deals with the situation where the defendant is outside the state or secretes himself within the state. Some courts have held that mere absence from the jurisdiction is enough. There are other cases that have held that the jury must find a purpose to avoid detection or prosecution. (See Model Penal Code, Tent. Draft No. 5 at 27).

Section 4 would change existing law which does not now put any limit on the number of years that the statute of limitations can be tolled.

Oregon cases:

Although ORS 131.130 does not mention cases commenced by filing of an information, the provision in the statute relating to indictments is held to cover the situation where indictment is waived and an information is used. State v. Miller, 89 Or Adv Sh 275, 280, 482 P2d 1017 (1969).

In case in which an indictment was returned within the time permitted by statute but was later dismissed and a new indictment returned after the allowable time had elapsed, the court held that the new indictment was barred by the statute of limitations because the statute had not been tolled by the first indictment. State v. Silver, 239 Or 459, 398 P2d 178 (1965).

See also, State v. Terry, 160 Or 308, 85 P2d 354 (1938); State v. Mannix, 133 Or 329, 288 P 507, 290 P 745 (1930); Union County v. Hyde, 26 Or 24, 37 P 76 (1894).

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

Section 1.06. Time Limitations.

(1) A prosecution for murder may be commenced at any time.

(2) Except as otherwise provided in this Section, prosecutions for other offenses are subject to the following periods of limitation:

(a) a prosecution for a felony of the first degree must be commenced within six years after it is committed;

(b) a prosecution for any other felony must be commenced within three years after it is committed;

(c) a prosecution for a misdemeanor must be commenced within two years after it is committed;

(d) a prosecution for a petty misdemeanor or a violation must be commenced within six months after it is committed.

(3) If the period prescribed in Subsection (2) has expired, a prosecution may nevertheless be commenced for:

(a) any offense a material element of which is either fraud or a breach of fiduciary obligation within one year after discovery of the offense by an aggrieved party or by a person who has legal duty to represent an aggrieved party and who is himself not a party to the offense, but in no case shall this provision extend the period of limitation otherwise applicable by more than three years; and

(b) any offense based upon misconduct in office by a public officer or employee at any time when the defendant is in public office or employment or within two years thereafter, but in no case shall this provision

Text of Model Penal Code (Cont'd.)

extend the period of limitation otherwise applicable by more than three years.

(4) An offense is committed either when every element occurs, or, if a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct or the defendant's complicity therein is terminated. Time starts to run on the day after the offense is committed.

(5) A prosecution is commenced either when an indictment is found [or an information filed] or when a warrant or other process is issued, provided that such warrant or process is executed without unreasonable delay.

(6) The period of limitation does not run:

(a) during any time when the accused is continuously absent from the State or has no reasonably ascertainable place of abode or work within the State, but in no case shall this provision extend the period of limitation otherwise applicable by more than three years; or

(b) during any time when a prosecution against the accused for the same conduct is pending in this State.

#

Text of Illinois Criminal Code of 1961

§ 3-5. General Limitations

(a) A prosecution for murder, manslaughter, treason, arson, or forgery may be commenced at any time.

(b) Unless the statute describing the offense provides otherwise, or the period of limitation is extended by Section 3-6, a prosecution for any offense not designated in Subsection (a) must be commenced within 3 years after the commission of the offense if it is a felony, or within one year and 6 months after its commission if it is a misdemeanor. 1961, July 28, Laws 1961, p. 1983, § 3-5.

§ 3-6. Extended Limitations

The period within which a prosecution must be commenced under the provisions of Section 3-5 or other applicable statute is extended under the following conditions:

(a) A prosecution for theft involving a breach of a fiduciary obligation to the aggrieved person may be commenced as follows:

(1) If the aggrieved person is a minor or incompetent, then during the minority or incompetency or within one year after the termination thereof.

(2) In any other instance, within one year after the discovery of the offense by an aggrieved person, or by a person who has legal capacity to represent an aggrieved person or has a legal duty to report the offense, and is not himself a party to the offense; or in the absence of such discovery, within one year after the proper prosecuting officer becomes aware of the offense. However, in no such case is the period of limitation so extended more than 3 years beyond the expiration of the period otherwise applicable.

(b) A prosecution for any offense based upon misconduct in office by a public officer or employee may be commenced within one year after discovery of the offense by a person having a legal duty to report such offense, or in the absence of such discovery, within one year after the proper prosecuting officer becomes aware of the offense. However, in no such case is the period of limitation so extended more than 3 years beyond the expiration of the period otherwise applicable. 1961, July 28, Laws 1961, p. 1983, § 3-6.

Text of Illinois Criminal Code of 1961 (Cont'd.)

§ 3-7. Periods Excluded from Limitation

The period within which a prosecution must be commenced does not include any period in which:

(a) The defendant is not usually and publicly resident within this State; or

(b) The defendant is a public officer and the offense charged is theft of public funds while in public office; or

(c) A prosecution is pending against the defendant for the same conduct, even if the indictment or information which commences the prosecution is quashed or the proceedings thereon are set aside, or are reversed on appeal. 1961, July 28, Laws 1961, p. 1983, § 3-7.

§ 3-8. Limitation on Offense Based on Series of Acts

When an offense is based on a series of acts performed at different times, the period of limitation prescribed by this Article starts at the time when the last such act is committed. 1961, July 28, Laws 1961, p. 1983, § 3-8.

#

Text of Michigan Revised Criminal Code

[Time Limitations]

Sec. 130. (1) A prosecution for murder in either degree may be commenced at any time.

(2) Except as otherwise provided in this section, prosecutions for other offenses must be commenced within the following periods of limitations after their commission:

- (a) For a Class A felony, 6 years;
- (b) For a Class B or Class C felony, 3 years;
- (c) For a Class A misdemeanor, 2 years;
- (d) For a Class B or Class C misdemeanor, 1 year;
- (e) For a violation, 6 months.

(3) If the period prescribed in subsection (2) has expired, a prosecution nevertheless may be commenced in the following circumstances:

(a) If the offense has as a material element either fraud or the breach of a fiduciary obligation, prosecution may be commenced within 1 year after discovery of the offense by an aggrieved party or by a person who has a legal duty to represent an aggrieved party and who is himself not a party to the offense, but in no case shall the period of limitation otherwise applicable be extended by more than 3 years.

(b) If the offense is based upon misconduct in office by a public officer or employee, prosecution may be commenced at any time while the defendant is in public office or employment or within 2 years thereafter, but in no case shall the period of limitation otherwise applicable be extended by more than 3 years.

(4) An offense is committed either when every element occurs or, if a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time the course of conduct or the defendant's complicity therein is terminated. Time starts to run on the day after the offense is committed.

(5) A prosecution is commenced when a warrant or other process is issued, provided that the warrant or other process is executed without unnecessary delay.

(6) The period of limitation does not run:

(a) During any time when the accused is continuously absent from the state or has no reasonably ascertainable place of abode or work within the state, but in no case shall the period of limitation otherwise applicable be extended by more than 3 years;
or

(b) During any time when a prosecution against the accused for the same conduct has been commenced and is pending in this state.