See: Minutes of Subcommittee No. 3
10/31/68, p. 1, Vol. XI
No tape

CRIMINAL LAW REVISION COMMISSION
309 Capitol Building
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ARTICLE 5. RESPONSIBILITY

Preliminary Draft No. 3; October 1968

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Subcommittee No. 3

ARTICLE 5. RESPONSIBILITY

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[NOTE: This third preliminary draft contains a few sections which have been approved by the subcommittee -- sections 1, 2, 3 and 14. They are included here in order to impart a sense of continuity to the rest of the Article's sections, set out in this draft, which the subcommittee has not yet considered. The draft now presented represents, in your Reporter's view, a fairly comprehensive plan containing most, if not all, the provisions necessary for a modern responsibility statute for the criminal law of Oregon.]

Section 1. Mental disease or defect excluding responsibility. (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

(2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

[NOTE: Section tentatively approved by subcommittee. See Section 1, P.D. #1; July 1968, for comments. This is the American Law Institute formulation of the insanity test based on Section 4.01 of the Model Penal Code.]

* * *

Section 2. Partial responsibility due to impaired mental condition. Evidence that the actor suffered from a mental disease or defect is admissible whenever it is relevant to the issue of whether he did or did not have a specific intent or purpose which is an element of the crime.

[NOTE: Section tentatively approved by subcommittee. See Section 1, P.D. #2; September 1968, for comments.]

* * *

Section 3. Burden of proof in insanity defense. Mental disease or defect excluding responsibility under Section 1 of this Article is an affirmative defense which the defendant must prove by a preponderance of the evidence.

COMMENTARY - THE BURDEN OF PROOF

The language of this section has not been formally reviewed by the subcommittee, but the subcommittee has approved the policy announced in the section. The subcommittee voted to retain the policy presently embodied in ORS 136.390 which reads as follows:

> "When the commission of the act charged as a crime is proved and the defense sought to be established is the insanity of the defendant, the same must be proved by the preponderance of the evidence."

The draft section continues this policy in language believed to be more appropriately phrased. For the previously rejected draft of this section and explanatory comments, see P.D. #1, Section 2, July 1968.

* * *

Section 4. Notice required in defense excluding responsibility. The defendant may not introduce evidence that he is not criminally responsible, as defined in Section 1 of this Article, unless he has complied with the provisions of Section 6 of this Article.

COMMENTARY - REQUIREMENT OF NOTICE

ORS 135.870 now provides that a defendant may raise the defense of insanity under a simple "not guilty" plea. However, the section requires that where the defendant wishes to raise insanity as a defense under this plea he must give written notice or otherwise obtain the permission of the court where he fails to file notice. The details of filing the notice are not set out here for the reason that Section 5, the next section dealing with partial responsibility,

also requires like notice. In the interests of drafting economy, the details of the notice requirements are set out in Section 6 so as to apply to both this Section 4, and Section 5.

* * *

Section 5. [Alternative No. 1]. Notice required in defense of partial responsibility. The defendant may not introduce in his case in chief expert testimony regarding partial responsibility under Section 2 of this Article unless he has complied with the provisions of Section 6 of this Article.

Section 5. [Alternative No. 2]. Notice required in defense of partial responsibility. The defendant may not introduce in his case in chief testimony of anyone other than himself regarding partial responsibility under Section 2 of this Article unless the defendant has complied with the provisions of Section 6 of this Article.

COMMENTARY - REQUIREMENT OF NOTICE

At the direction of the subcommittee this section is drawn in the alternative. Under Alternative No. 1 the defendant without giving notice could introduce any lay evidence in an effort to show that he suffered from a mental disease or defect which rendered it impossible for him to form a specific intent or purpose where such is required as an element of the offense with which he is charged. But if the defendant wishes to introduce the testimony of psychiatrists, psychologists or other expert witnesses, he must comply with the notice requirements of Section 6.

The formulation in Alternative No. 2 is more restrictive on the defendant in that he must comply with the notice requirements if he wishes to introduce testimony by any person -- lay or expert -- other than himself. The underlying reason for the notice requirements in either alternative form for this section (and for Section 4, also) is to avoid surprising the prosecution with a highly technical and complicated issue, especially where experts are going to be used by the defense.

* * *

Section 6. Notice requirements. A defendant who is required under Sections 4 or 5 of this Article to give notice shall, at the time he pleads, file a written notice of his purpose. The defendant may file such notice at any time after he pleads but before trial when just cause for failure to file the notice at the time of making his plea is made to appear to the satisfaction of the court. If the defendant fails to file any such notice, he shall not be entitled to introduce evidence for the establishment of a defense under Section 1 or 2 of this Article unless the court, in its discretion, permits such evidence to be introduced where just cause for failure to file the notice is made to appear.

COMMENTARY - NOTICE REQUIREMENTS

This section sets out the notice requirements where defendant intends to base his defense on insanity or partial responsibility. The language closely parallels existing notice requirements set out in ORS 135.870 which reads as follows:

> "All matters of fact tending to establish a defense to the charge in the indictment or information, other than those specified in subsection (3) of ORS 135.820, and except as in this section provided, may be given in evidence under the plea of not guilty; provided, however, that where the defendant pleads not guilty and purposes to show in evidence that he was insane or mentally defective at the time of the alleged commission of the act charged, he shall, at the time he pleads, file a written notice of his purpose; and provided, further, that the defendant may file such notice at any time thereafter but before trial when just cause for failure to file the same at the time of making his plea is made to appear to the satisfaction of the court. If the defendant fails to file any such notice he shall not be entitled to introduce evidence for the establishment of such

insanity or mental defect; provided, however, that the court may, in its discretion, permit such evidence to be introduced where just cause for failure to file the notice has been made to appear."

* * *

Section 7. Right of state to obtain mental examination of defendant; limitations. (1) Upon filing of notice or the introduction of evidence by the defendant as provided in Section 6 of this Article, the state shall have the right to have a psychiatrist of its selection examine the mental condition of the defendant. The state shall file notice with the court of its intention to have the defendant examined. Upon filing of the notice, the court, in its discretion, may order the defendant committed to a state institution or any other suitable facility for observation and examination as it may designate for a period not to exceed 30 days.

(2) The defendant when being examined by the state's psychiatrist shall not be required to answer questions concerning the defendant's conduct at or immediately near the time of the commission of the crime charged or any other question the answer to which might tend to incriminate him. A defendant being so examined is entitled to have present an attorney and a psychiatrist of the defendant's choice.

COMMENTARY - RIGHT OF THE STATE TO HAVE A PSYCHIATRIST EXAMINE THE DEFENDANT

A large number of states (Goldstein, The Insanity Defense 131 (1967), lists the number as 31) have statutes requiring court appointment of "impartial experts" in cases involving the insanity defense. The Model Penal Code and the proposed California code also have versions of the

"impartial expert" approach. See MPC Section 4.05. Proposed California Code Section 533. The policy embodied in this section rejects the "impartial expert" approach in favor of the procedures now existing in Oregon. Although the "impartial expert" statutes are said to be justified because, among other things, it puts an end to the battle of experts at the trial, such statutes are not without serious defects. Professor Goldstein sums up some of them as follows:

> "The 'impartial expert' procedure is, of course, not restricted to cases involving the indigent. It must, therefore, be appraised in order to determine whether it is generally useful, even if only incidentally and occasionally beneficial to the indigent accused. The most important and dramatic feature of the procedure is the added credibility which accrues to the 'impartial' expert appointed by the court. Judge and jury tend to believe him. Prosecutors dismiss proceedings and defense counsel forego reliance on the insanity defense in accordance with his opinion. Indeed, advocates of the procedure rely heavily upon this very fact in arguing it is needed to correct the 'partisan' battle of experts.
>
> "If this added credibility coincided with an added ability to present the 'truth,' it would be difficult to reject the method which produced it. The impartial expert does not, however, bring 'truth' with him. Certainly, the fact that he is not paid by the parties would hardly seem to warrant attaching additional weight to his testimony. There is no evidence to suggest that the ethics of the profession are so low or psychiatrists' incomes so inadequate. Nor is there very much to the more sophisticated justification - that a court-appointed expert's judgment would not be clouded by identification with one of two adversaries. The testimony of all witnesses is subject to the very same process of distortion. It hardly seems reasonable to insulate from the adversary process the psychiatrist, who is perhaps the one among them who has been trained to minimize the effect of identification upon his perception and judgment.
>
> "An impartial expert, and the added credibility he brings with him, could be justified only if there was a high degree of consensus among psychiatrists on the answers to questions likely to arise in the courtroom, on the qualifications of persons

competent to present such answers and on the techniques to be used at the various stages of examination. No such consensus can be said to exist.

"So far as disagreements among psychiatrists are concerned, there is little or no prospect that they will disappear unless they are masked over. The so-called 'battle of experts' arises because psychiatrists' diagnoses and testimony reflect the work ways, the value systems, and the tenets of differing schools of psychiatry. The organically oriented psychiatrist will often find himself eliciting and reading a patient's history and symptoms differently from the dynamically oriented psychiatrist. What is psychosis to one may be neurosis to another, what some call psychopathy may be interpreted by others as a failure of communication between a psychiatrist of a high social class and an offender from the lower rungs of society. With the best will in the world, the testimony of each cannot represent more than a series of estimates drawn from various clues - some from the patient's life history, some from his performances in clinical tests, some from the nature of the situation in which he found himself on the occasion in question. These estimates will then become the basis for inferences about a defendant who will almost invariably present a borderline case. For the jury will probably be deciding long after the offense, whether a psychotic who is often rational was not rational on a given date, and whether the act in question can properly be traced to his illness. In short, the nature of the usual situation is such that disagreement is to be expected and is quite proper.

"The impartial expert procedure is especially unsatisfactory when it is seen against the backdrop of an adversary system. For the affluent defendant, it places the imprimatur of impartiality upon a witness who is all too likely to testify against him. For the indigent, there is not even the comfort that he will have available the resources with which to place the testimony in proper perspective. Without his own expert to aid him - before and during trial - he will have to rely entirely on challenging the professional standing of the impartial experts, their competence, the thoroughness of their examination, and the bona fides of their impartiality. However artfully

> these devices may be used, they are not as likely to assure him of an effective defense as would his own expert." Goldstein, The Insanity Defense, 132-4, 136 (1967).

A further reason for not adopting the "impartial expert" approach relates to the recent Oregon decision in Shepard v. Bowe, 86 Or.Adv.Sh. 981 (June 14, 1968), where it was held that the defendant when being examined by the state's psychiatrist may not be forced to answer questions which might tend to incriminate him. This rule lessens considerably the psychiatrist's ability to make conclusions about a defendant's mental condition, whether or not the psychiatrist is an "impartial" expert.

Subsection (1) of the section is intended to state explicitly the rule in Oregon since the decision in State v. Phillips, 245 Or. 466 (1967), where it was held that the state has a right to a mental examination of the defendant who raises a defense of insanity. This right of the state is also extended to cases arising under Section 2 (where the defendant raises the issue of partial responsibility requiring notice of certain kinds of evidence by Section 5).

Subsection (2) of the section reflects the restrictions on the state's right to a psychiatric examination imposed by the holding in Shepard v. Bowe, supra. Shepard v. Bowe creates serious doubt as to how effective the state's right to examine the defendant will be. The court realized this when it said,

> "We are aware that in holding the defendant cannot be compelled to answer the psychiatrist's questions we may be lessening the quality of the evidence available to the state. Psychiatrists have expressed the opinion that it is difficult, at least in some cases, to arrive at a competent opinion on the mental state of the defendant if the defendant cannot be questioned about the alleged crime. . . . We are of the opinion that this is the price that must be paid to enforce the constitutional protection." Shepard v. Bowe, 86 Or. Adv. Sh. 981, 986-7 (June 14, 1968).

* * *

TEXT OF MODEL PENAL CODE

Section 4.05. Psychiatric Examination of Defendant with Respect to Mental Disease or Defect.

(1) Whenever the defendant has filed a notice of intention to rely on the defense of mental disease or defect excluding responsibility, or there is reason to doubt his fitness to proceed, or reason to believe that mental disease or defect of the defendant will otherwise become an issue in the cause, the Court shall appoint at least one qualified psychiatrist or shall request the Superintendent of the Hospital to designate at least one qualified psychiatrist, which designation may be or include himself, to examine and report upon the mental condition of the defendant. The Court may order the defendant to be committed to a hospital or other suitable facility for the purpose of the examination for a period of not exceeding sixty days or such longer period as the Court determines to be necessary for the purpose and may direct that a qualified psychiatrist retained by the defendant be permitted to witness and participate in the examination.

(2) In such examination any method may be employed which is accepted by the medical profession for the examination of those alleged to be suffering from mental disease or defect.

(3) The report of the examination shall include the following: (a) a description of the nature of the examination; (b) a diagnosis of the mental condition of the defendant; (c) if the defendant suffers from a mental disease or defect, an opinion as to his capacity to understand the proceedings against him and to assist in his own defense; (d) when a notice of intention to rely on the defense of irresponsibility has been filed, an opinion as to the extent, if any, to which the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired at the time of the criminal conduct charged; and (e) when directed by the Court, an opinion as to the capacity of the defendant to have a particular state of mind which is an element of the offense charged.

If the examination can not be conducted by reason of the unwillingness of the defendant to participate therein, the report shall so state and shall include, if possible, an opinion as to whether such unwillingness of the defendant was the result of mental disease or defect.

The report of the examination shall be filed [in triplicate] with the clerk of the Court, who shall cause copies to be delivered to the district attorney and to counsel for the defendant.

* * *

Text of Model Penal Code (Cont'd)

Section 4.09. Statements for Purposes of Examination or Treatment Inadmissible Except on Issue of Mental Condition.

A statement made by a person subjected to psychiatric examination or treatment pursuant to Sections 4.05, 4.06 or 4.08 for the purposes of such examination or treatment shall not be admissible in evidence against him in any criminal proceeding on any issue other than that of his mental condition but it shall be admissible upon that issue, whether or not it would otherwise be deemed a privileged communication [, unless such statement constitutes an admission of guilt of the crime charged].

* * *

Section 8. Civil commitment authority of court following defense of partial responsibility. In any case in which evidence of mental disease or defect has been introduced pursuant to the provisions of Section 2 of this Article and in which the defendant is acquitted, the court may order an evaluation of his condition and initiation of proceedings pursuant to the provisions of ORS Chapter 426.

COMMENTARY - CIVIL COMMITMENT IN CERTAIN CASES INVOLVING PARTIAL RESPONSIBILITY

This section is based on Section 534 of T.D. No. 2 of the proposed California Penal Code and the following explanation of the section is taken largely from the comment to the California section.

The provision in Section 2 of this Article establishes the doctrine of partial responsibility. The effect is to permit evidence to be received as a "partial defense" for the purpose of negating the specific mental state essential to a particular crime. The inquiry to be made is whether the crime which the defendant is accused of having committed has in point of fact been committed. For this purpose whatever will fairly and legitimately lead to the discovery of his mental condition and status at the time, may be given in evidence to the jury, and may be considered by them in determining whether the defendant was in fact guilty of the crime charged against him. Ordinarily the purpose of this defense is to permit the defendant to show that because of some impairment of his mind he is not guilty of the offense charged but of a lesser degree of the offense. For example, the crime of assault with intent to kill may be shown not to have been committed if the evidence indicates that the defendant lacked the specific intent to kill because of some mental impairment; in such a case, he should be convicted of the lesser offense of assault with a deadly weapon.

It is not only conceivable, however, but highly probable that evidence pertinent to this defense might in some cases seem so persuasive to a jury that instead of returning a verdict of some lesser degree of the offense charged, they might return a verdict of acquittal. In short, they might believe that the defendant's mental impairment made it impossible for him to entertain any culpable mental state. This might very well result in the immediate release of an individual by a verdict of acquittal in a situation in which the evidence of his mental condition points strongly to the conclusion that he is dangerous and that unconditional release might threaten the public safety.

Section 8 has been drafted to permit the court, in the event of an acquittal in such cases, to take the same action as might be taken in connection with an application for the civil commitment of a mentally disordered person. Thus, it authorizes the court, in its discretion, to initiate the procedure provided in ORS Chapter 426 for the examination, evaluation and possible custodial care that the nature of the defendant's condition indicates may be necessary.

* * *

Section 9. Form of verdict following successful defense of insanity. When the defendant is acquitted on grounds of mental disease or defect excluding responsibility, the verdict and judgment shall so state.

COMMENTARY - FORM OF VERDICT FOLLOWING SUCCESSFUL DEFENSE OF INSANITY

This section is based on the provisions on form of verdict found in MPC Section 4.03 (3). The language in this section states more economically the same policy already in existence in Oregon under that portion of ORS 136.730 dealing with form of verdict. ORS 136.730 reads as follows:

> "If the defense is the insanity of the defendant, the jury shall be instructed to state, if it finds him not guilty on that ground, that fact in the verdict, and the court shall thereupon, if it deems his being at large dangerous to the public peace or safety, order him to be committed to any hospital or institution, authorized by the state to receive and keep such persons, until he becomes sane or is otherwise discharged therefrom by authority of law."

(The portion of ORS 136.730 relating to possible commitment of the defendant is dealt with in Section 10 of this preliminary draft.)

* * *

Section 10. Acquittal by reason of insanity; release or commitment; petition for discharge. After entry of judgment of not guilty by reason of mental disease or defect excluding responsibility, the court shall, on the basis of the evidence given at the trial or at a separate hearing, make an order as follows:

(1) If the court finds that the person is no longer affected by mental disease or defect, or, if so affected, that he no longer presents a substantial danger to himself or the person of others and is not in need of care, supervision or treatment, the court shall order him discharged from custody.

(2) If the court finds that the person is affected by mental disease or defect and that he presents a substantial danger to himself or the person of others, but he can be controlled adequately and given proper care, supervision and treatment if he is released on supervision, the court shall order him released subject to such supervisory orders of the court, including supervision by the probation officers of the court, as are appropriate in the interests of justice and the welfare of the defendant. Conditions of release in such orders may be modified from time to time and supervision may be terminated by order of the court as provided in subsection (1) or (5) of this section.

(a) At any time within five years of the original entry of the order of release on supervision made pursuant to this subsection (2) the court may, upon notice to the prosecution and such person, conduct a hearing to determine if the person is affected by mental disease or defect. If the court determines that the person is affected by mental disease or defect, the court may release him on further supervision,

as provided in subsection (2) of this section, but for not longer than five years from the original entry of the order of release on supervision. If the court determines that the person is affected by mental disease or defect and presents a substantial danger to himself or to the person of others and cannot adequately be controlled if released on supervision, it may at that time make an order committing the person to the Superintendent of the Oregon State Hospital for custody, care and treatment.

(b) Any person subject to the provisions of this subsection (2) may apply to the circuit court of the county in which he is confined, or of the county from which he is committed, for a hearing upon his petition for discharge from or modification of an order upon which he was released upon the supervision of the court and the probation officer on the ground that he has recovered from his mental disease or defect or, if affected by mental disease or defect, no longer presents a substantial danger to himself or the person of others and no longer requires supervision, care or treatment. The hearing on an application for such discharge or modification shall be held on notice to the district attorney and the probation officer of the county in which the application is filed. The petitioner must prove by a preponderance of the evidence his fitness for discharge or modification of the original order for supervision.

(3) If the court finds that the person presents a substantial risk of danger to himself or the person of others and that he is not a proper subject for release on supervision, the court shall order him committed to the Superintendent of the Oregon State Hospital for custody, care and treatment.

(a) If, after at least 90 days from the commitment of any person to the custody of the Superintendent of the Oregon State Hospital, the Superintendent is of the opinion that the person is no longer affected by mental disease or defect, or, if so affected, that he no longer presents a substantial danger to himself or the person of others, the Superintendent may apply to the court which committed the person, or to the circuit court of the county in which he is confined, for an order of discharge. The application shall be accompanied by a report setting forth the facts supporting the opinion of the Superintendent. Copies of the application and the report shall be transmitted by the clerk of the court to the district attorney of the county.

(b) Any person who has been committed to the Oregon State Hospital for custody, care and treatment, after the expiration of 90 days from the date of the order of commitment, may apply to the circuit court of the county in which he is confined or of the county from which he was committed for an order of discharge upon the grounds that he is no longer affected by mental disease or defect, or, if so affected, that he no longer presents a substantial danger to himself or the person of others. Copies of the application and the report shall be transmitted by the clerk of the court to the district attorney of the county. The applicant must prove by a preponderance of the evidence his fitness for discharge under the standards of this subsection (b).

(4) The court shall conduct a hearing upon any application for release or modification filed pursuant to this section. If the court finds that the person is no longer suffering from mental disease or defect, or, if so affected, that he no longer presents a substantial

danger to himself or the person of others, the court shall order him discharged from custody or from supervision. If the court finds that the person would not be a substantial danger to himself or to the person of others, and can be controlled adequately if he is released on supervision, the court shall order him released as provided in subsection (2) of this section. If the court finds that the person has not recovered from his mental disease or defect and cannot adequately be controlled if he is released on supervision, the court shall order him remanded for care and treatment.

In any hearing under this subsection (4), the court may appoint one or more psychiatrists to examine the person and to submit reports to the court. Reports filed with the court pursuant to such appointment shall include, but need not be limited to, an opinion as to the mental condition of the person and whether the person presents a substantial danger to himself or the person of others. To facilitate the psychiatrist's examination of the person, the court may order him placed in the temporary custody of any state institution or other suitable facility.

(5) Any person who, pursuant to this Section 10, has been in the custody of the Superintendent of the Oregon State Hospital or on release on supervision by the court for a period in excess of five years shall, in any event, be discharged if he does not present a substantial danger to the person of others.

COMMENTARY - ACQUITTAL BY REASON OF INSANITY; RELEASE OR COMMITMENT; PETITION FOR DISCHARGE

ORS 136.730 presently gives the trial court discretion to discharge a defendant completely following a verdict of not guilty by reason of insanity. It also provides that the court may "if it deems his being at large dangerous to the public peace or safety, order him to be committed to any hospital or institution, authorized by the state to receive and keep such persons, until he becomes sane or is otherwise discharged therefrom by authority of law." The draft section, based on Section 536 of the proposed California Penal Code, generally continues this policy. However, ORS 136.730 lacks details covering matters of extreme importance to the individual defendant, concerned with his personal rights, and the community at large, concerned with its safety in the event of the defendant's release. The draft section is designed to deal with the details essential to a complete commitment and release statute. As noted in the following comments, some Oregon law and procedure will be changed. Some of the content of the following comments on the various subsections of Section 10 is taken from the comments to Section 536 of the proposed California Penal Code.

Subsection (1). Release; Defendant Recovered or Not Dangerous. This section authorizes the release of a defendant when it appears that the person acquitted because of his mental condition is no longer mentally affected or in need of custodial treatment. A separate hearing on this issue is not mandatory. Often the matter of the defendant's mental condition is plainly apparent from the testimony given at the trial; in such cases, an additional hearing on the same issue seems unnecessary. An order for discharge may not be made if the defendant is not free from mental disease or defect unless the court is of the opinion that the defendant is not dangerous to himself or the person of others and is not in need of care, supervision or treatment. If the evidence indicates that the defendant requires and is a fit subject for community psychiatric services, the court has the authority to impose supervisory or custodial restraints as provided in the subsections which follow.

Subsection (2). Release on Supervision. ORS 136.730 presently offers the court two alternatives when a defendant has been found not guilty by reason of insanity: release or commitment to a state hospital. In actual practice, commitment is often the procedure; for understandable reasons, summary release is rarely granted. The lack of any alternative disposition through the use of local institutions, facilities and resources for the care and treatment

of the mentally ill is attributable to the fact that until recent years, local means for the mentally ill persons was inadequate. Problems still exist, but this provision allows use of existing local facilities where adequate. The draft subsection provides that administration of the release program and the supervision of persons released pursuant to its provisions may be performed by the probation department. Orders of release and the conditions of release remain within the continuing jurisdiction of the court for modification or termination.

Subsection (2) (a). Termination of Supervision and Commitment to the Superintendent of the Oregon State Hospital. This subsection together with subsection (5) establishes a provisional maximum period of release subject to supervision of five years. It authorizes commitment of a person so released to the Superintendent of the Oregon State Hospital at any time during the five year period that the person's mental condition has regressed to the point where he is dangerous to himself or to the person of others.

Subsection (2) (b). Supervisory Release; Petition for Modification or Discharge. Procedure is provided by this subsection through which the person released on supervision may initiate action for his release upon a showing that he has recovered and is a fit subject for discharge or modification of the conditions of his release.

The standard for release set up in this subsection (b) affects a change in the present Oregon law. ORS 136.730 was recently construed in Newton v. Brooks, 84 Or. Adv. Sh. 639 (April 12, 1967), where the court laid down the requirements that before a person in custody following commitment after a not guilty by reason of insanity verdict is entitled to discharge, he must prove by a preponderance of evidence (1) that he has the mental capacity to understand the difference between right and wrong, and (2) that with reasonable probability he will control his behavior so that his liberty will not be a danger to the public.

This subsection (b) (and subsection (3), also) changes the focus somewhat, although it achieves what is believed to be the goal of the holding in Newton v. Brooks. Thus, a person committed to the Oregon State Hospital following a successful defense of insanity under this subsection is entitled to release if he has "recovered" from his mental disease or defect (i.e., is sane within the definition of Section 1) which is in accord with the first part of the rule in Newton v. Brooks. Under the subsection even if the person in custody cannot prove he is sane within the definition of Section 1, if he can show he no longer presents

a substantial danger to himself or the person of others, he is entitled to discharge. This is a variation from Newton which requires the defendant to prove his sanity and that he is no longer a danger to the public. The subsection places the burden of proof of fitness for discharge or modification of order on the petitioner in accordance with the rule announced in Newton v. Brooks.

Subsection (3). Commitment to the Superintendent of the Oregon State Hospital. This subsection authorizes commitment to the Superintendent of the Oregon State Hospital of those persons acquitted by reason of insanity whose potential dangerousness indicates that release or release under supervision involves risk that the individual may be dangerous to himself or the person of others.

Subsection (3) (a). Procedure for Release. The Superintendent of the Oregon State Hospital, by the provisions of this subsection, may initiate proceedings for the release of a committed person, after the expiration of 90 days, if such release is consistent with the welfare of the individual and the public safety. The criteria for release changes present law as explained in the comment to subsection (2) (b), above. The subsection also changes important administrative procedures. First, the subsection requires that a person committed to the State Hospital must be held a minimum of 90 days before he can be discharged at the instance of the Superintendent. No such minimum is presently required. Second, the Superintendent may not, as under present practice, discharge a person without a court order. Under the subsection the Superintendent must now apply to the designated court for an order of discharge. This has the beneficial effect of relieving the Superintendent of the final decision on discharge. Because of this, the Superintendent might feel less reluctant to recommend release in cases where he is fairly sure in his appraisal of the person's dangerousness but might not be sure enough to take the responsibility entirely on himself. Thus, in deserving close cases more releases may result.

Subsection (3) (b). Committed Person; Procedure for Release; Petition by the Person. This provision is a companion to subsection (2) (b). It provides a means for the initiation of release proceedings by the committed person and changes the criteria of release prescribed in ORS 136.730 as construed in Newton v. Brooks, explained above in the comment to subsection (2) (b). The burden of proof is placed on the applicant in accord with Newton v. Brooks.

Subsection (4). Hearing on Petition for Release, Modification of Conditions of Release, or Discharge. This is a general procedural subsection which describes the form of the proceedings to be followed in any action for the

release or discharge of a person subject to an order of supervisory release or commitment. It restates the flexible powers of the court to make appropriate disposition of the persons subject to its orders and provides for the appointment of psychiatric experts should their assistance be needed.

Subsection (5). Release from Custody or Supervision; Maximum Period. This subsection establishes a maximum period of five years for supervised release or commitment to the Superintendent of the Oregon State Hospital and requires discharge at the end of that term unless the mentally disordered offender is found to be dangerous to others. The draft excludes danger to self and limits indefinite commitment to those found to be seriously assaultive or homicidal. (It should be remembered that under the provisions of subsection (2) (a) of this section, a person under supervisory release may be committed to the Oregon State Hospital on the last day of his maximum release period and held in custody for an additional five years. This could result in a ten year maximum period before the provisions of subsection (5) could be invoked.) It is the purpose of the draft to limit indefinite commitments only to those cases where release will give rise to problems of public safety. The choices to be made here tend to be arbitrary but the problem does not lend itself easily to solutions that will command ready acceptance. The draft attempts to minimize whatever arbitrary factors it includes by keeping the door open to continuing judicial review.

* * *

TEXT OF MODEL PENAL CODE

Section 4.08. Legal Effect of Acquittal on the Ground of Mental Disease or Defect Excluding Responsibility; Commitment; Release or Discharge.

(1) When a defendant is acquitted on the ground of mental disease or defect excluding responsibility, the Court shall order him to be committed to the custody of the Commissioner of Mental Hygiene [Public Health] to be placed in an appropriate institution for custody, care and treatment.

(2) If the Commissioner of Mental Hygiene [Public Health] is of the view that a person committed to his custody, pursuant to paragraph (1) of this Section, may be discharged or released on condition without danger to himself or to others, he shall make application for the discharge or release of such person in a report to the Court by which such person was committed and shall transmit a copy of such application and report to the prosecuting attorney of the county [parish] from which the defendant was committed. The Court shall thereupon appoint at least two qualified psychiatrists to examine such person and to report within sixty days, or such longer period as the Court determines to be necessary for the purpose, their opinion as to his mental condition. To facilitate such examination and the proceedings thereon, the Court may cause such person to be confined in any institution located near the place where the Court sits, which may hereafter be designated by the Commissioner of Mental Hygiene [Public Health] as suitable for the temporary detention of irresponsible persons.

(3) If the Court is satisfied by the report filed pursuant to paragraph (2) of this Section and such testimony of the reporting psychiatrists as the Court deems necessary that the committed person may be discharged or released on condition without danger to himself or others, the Court shall order his discharge or his release on such conditions as the Court determines to be necessary. If the Court is not so satisfied, it shall promptly order a hearing to determine whether such person may safely be discharged or released. Any such hearing shall be deemed a civil proceeding and the burden shall be upon the committed person to prove that he may safely be discharged or released. According to the determination of the Court upon the hearing, the committed person shall thereupon be discharged or released on such conditions as the Court determines to be necessary, or shall be recommitted to the custody of the Commissioner of Mental Hygiene [Public Health], subject to discharge or release only in accordance with the procedure prescribed above for a first hearing.

(4) If, within [five] years after the conditional release of a committed person, the Court shall determine, after hearing evidence, that the conditions of release have not been fulfilled and that for the safety of such person or for the safety of others his conditional release should be revoked, the Court shall forthwith order him to be

Text of Model Penal Code (Cont'd)

recommitted to the Commissioner of Mental Hygiene [Public Health], subject to discharge or release only in accordance with the procedure prescribed above for a first hearing.

(5) A committed person may make application for his discharge or release to the Court by which he was committed, and the procedure to be followed upon such application shall be the same as that prescribed above in the case of an application by the Commissioner of Mental Hygiene [Public Health]. However, no such application by a committed person need be considered until he has been confined for a period of not less than [six months] from the date of the order of commitment, and if the determination of the Court be adverse to the application, such person shall not be permitted to file a further application until [one year] has elapsed from the date of any preceding hearing on an application for his release or discharge.

* * *

Section 11. Mental disease or defect excluding fitness to proceed. A person cannot be proceeded against or sentenced after conviction while he is incompetent as defined in this section:

(1) A defendant is incompetent to be proceeded against in a criminal action if, as a result of mental disease or defect, he is unable:

(a) To understand the nature of the proceedings; or

(b) To assist and cooperate with his counsel; or

(c) To follow the evidence; or

(d) To participate in his defense.

(2) A defendant is incompetent to be sentenced if, as a result of mental disease or defect, he is unable:

(a) To understand the nature of the proceedings; or

(b) To understand the charge of which he has been convicted; or

(c) To understand the nature and extent of the sentence imposed upon him; or

(d) To assist and cooperate with his counsel.

COMMENTARY - MENTAL DISEASE OR DEFECT EXCLUDING FITNESS TO PROCEED

The tests for competency in this section, which is drawn from Section 537 of the proposed California code, are made applicable to all proceedings in order to embrace preliminary examinations and other pre-trial matters as well as the trial itself. The criteria for determining competency are more particularized than those set out presently in ORS 136.150. The incompetency criteria there reads as follows:

> "If before or during trial in any criminal case the court has reasonable ground to believe that the defendant . . . is insane or mentally defective to the extent that he is unable to understand the proceedings against him or to

assist in his defense, the court shall immediately fix a time for a hearing to determine the defendant's mental condition."

The particularization in the draft section may be legally unnecessary, but it is believed that precision in definition here will be helpful in obtaining precision in expert testimony at the hearing on the issue.

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TEXT OF MODEL PENAL CODE

Section 4.04. Mental Disease or Defect Excluding Fitness to Proceed.

No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as such incapacity endures.

* * *

Section 12. Psychiatric examination of defendant on issue of fitness to proceed. (1) Whenever the court has reason to doubt the defendant's fitness to proceed, the court shall appoint at least one qualified psychiatrist or shall request the Superintendent of the Oregon State Hospital to designate at least one qualified psychiatrist, which designation may be or include himself, to examine and report upon the mental condition of the defendant. The court may order the defendant to be committed to a hospital or other suitable facility for the purpose of the examination for a period of not exceeding 60 days or such longer period as the court determines to be necessary for the purpose and may direct that a qualified psychiatrist retained by the defendant be permitted to witness and participate in the examination.

(2) In such examination any method may be employed which is accepted by the medical profession for the examination of those alleged to be suffering from mental disease or defect.

(3) The report of the examination shall include the following:

(a) A description of the nature of the examination;

(b) A diagnosis of the mental condition of the defendant;

(c) If the defendant suffers from a mental disease or defect, an opinion as to whether he is incompetent within the definition set out in Section 11 of this Article.

If the examination cannot be conducted by reason of the unwillingness of the defendant to participate therein, the report shall so state and shall include, if possible, an opinion as to whether such unwillingness of the defendant was the result of mental disease or defect.

The report of the examination shall be filed in triplicate with the clerk of the court, who shall cause copies to be delivered to the district attorney and to counsel for the defendant.

(4) The court shall allow and order the county wherein the original proceeding was commenced to pay:

(a) A reasonable fee if the examination of the defendant is conducted by a psychiatrist in private practice; and

(b) All costs including transportation of the defendant if the examination is conducted by a psychiatrist in the employ of the Oregon State Hospital.

COMMENTARY - PSYCHIATRIC EXAMINATION OF DEFENDANT ON ISSUE OF FITNESS TO PROCEED

This section is based largely on MPC Section 4.05. In general it reflects the presently existing policies embodied in ORS 136.150 (set out immediately following this commentary.) There are differences, however. For instance, subsection (1) authorizes the court, in its discretion, to direct that a psychiatrist retained by the defendant be permitted to witness and participate in the examination. As pointed out in the MPC comment, this provision is designed to assure the defendant opportunity for an adequate psychiatric examination by an expert of his choice. This device might be found to be of considerable value in avoiding the so-called battle of the experts.

Subsection (2) clarifies the question of what methods may be used in the examination, a point on which statutes in Oregon and in most jurisdictions are silent.

Subsection (3), dealing with the contents of the psychiatric report, is considerably more explicit than existing statutory provisions which frequently give the examining expert little or no guidance as to what his report must contain, and which thus fail to assure the parties and the court that the report will be adequate for the purpose for which the examination and report were ordered.

Subsection (4) reflects the provisions on fees and costs for the examination found in subsection (3) of ORS 136.150.

* * *

TEXT OF OREGON REVISED STATUTES

136.150 Mental condition at time of trial. (1) If before or during the trial in any criminal case the court has reasonable ground to believe that the defendant, against whom an indictment has been found or an information filed, is insane or mentally defective to the extent that he is unable to understand the proceedings against him or to assist in his defense, the court shall immediately fix a time for a hearing to determine the defendant's mental condition. The court may appoint one or more disinterested qualified experts to examine the defendant with regard to his present mental condition and to testify at the hearing. Other evidence regarding the defendant's mental condition may be introduced at the hearing by either party.

(2) In the event the court determines that the services of qualified experts in private practice are not available to conduct the examinations referred to under subsection (1) of this section, the court may use the services of one of the outpatient clinics operated by institutions under the supervision of the Oregon State Board of Control. The defendant shall be transported to the proper facility at the expense of the county wherein the original proceeding was commenced. If the person in charge of the outpatient clinic determines that the present mental condition of a particular defendant can be better evaluated by the institution on an inpatient basis, he shall so notify the superintendent who shall notify the court. The defendant shall then be admitted to the institution, unless otherwise ordered by the court. In no case shall a defendant admitted to the institution for evaluation of his present mental condition be detained in excess of 30 days unless a commitment order has been executed by the court.

(3) The court shall allow and order the county wherein the original proceeding was commenced to pay:

(a) A reasonable fee for any examinations made pursuant to subsection (1) of this section; or

(b) All costs connected with the examination made pursuant to subsection (2) of this section.

* * *

Section 13. Determination of fitness to proceed; effect of finding of unfitness; proceedings if fitness is regained; pre-trial legal objections by defense counsel. (1) When the defendant's fitness to proceed is drawn in question, the issue shall be determined by the court. If neither the prosecuting attorney nor counsel for the defendant contests the finding of the report filed pursuant to Section 12 of this Article, the court may make the determination on the basis of such report. If the finding is contested, the court shall hold a hearing on the issue. If the report is received in evidence upon such hearing, the party who contests the finding thereof shall have the right to summon and to cross examine the psychiatrists who joined in the report and to offer evidence upon the issue.

(2) If the court determines that the defendant lacks fitness to proceed, the proceeding against him shall be suspended, except as provided in subsection (3) of this section, and the court shall commit him to the custody of the Superintendent of the Oregon State Hospital for so long as such unfitness shall endure. When the court, on its own motion or upon the application of the Superintendent of the Oregon State Hospital or the district attorney, determines, after a hearing, if a hearing is requested, that the defendant has regained fitness to proceed, the proceeding shall be resumed. If, however, the court is of the view that so much time has elapsed since the commitment of the defendant that it would be unjust to resume the criminal proceeding, the court may dismiss the charge and may order the defendant to be discharged or, subject to the law governing the civil commitment of persons suffering from mental disease or defect, order the defendant

to be committed to an appropriate institution of the Oregon State Board of Control.

(3) The fact that the defendant is unfit to proceed does not preclude any legal objection to the prosecution which is susceptible of fair determination prior to trial and without the personal participation of the defendant.

COMMENTARY - DETERMINATION OF FITNESS OR UNFITNESS

The section is based on MPC Section 4.06. In general it reflects the same policies that presently obtain in Oregon under ORS 136.160 (set out immediately following this comment). The draft section continues the policy that the court, rather than the jury, hears the issue of fitness to proceed.

The last sentence of subsection (1) may be interpreted as creating or at least allowing for an exception to the hearsay rule in connection with receiving in evidence the report of the examining experts without requiring that they appear and testify, thus obviating the necessity for taking the testimony of these experts in every case where a report is contested. The defendant is assured, however, of the right to summon and cross examine such experts if he wishes.

Subsection (2) continues substantially the requirement that the court hold another hearing if the custodian of the person previously declared unfit indicates to the court he believes the person is fit for proceeding.

The provision in subsection (2) permitting the court to dismiss the prosecution if because of the lapse of time it would be unjust to continue it is new to Oregon and novel in American law but not in actual practice, except that the result is usually reached at the discretion of the district attorney through the entry of a nolle prosequi. There is value, however, in vesting such a power in the court, to be exercised either where because of the lapse of time a defendant is unable to produce certain witnesses or other evidence once available which is essential to his defense, or where because of the length of the intervening period which he has spent in a mental institution subsequent to the alleged wrongful conduct it seems unjust to subject him to trial and punishment.

The fact that the defendant is unfit to proceed should not preclude his counsel from making any legal objection to the prosecution which is susceptible of fair determination prior to trial and without the personal participation of the defendant. Subsection (3) so provides. This provision is aimed at motions ordinarily determined at the pre-trial stage, rather than at the trial.

Although there is much to be said for according the defendant who is unfit to proceed an opportunity to defeat an unfounded criminal charge through the determination of issues of fact ordinarily disposed of at the trial stage, it may not be feasible to give the defendant the right to put the prosecution to its proof in a proceeding which, if it results adversely to the defendant, would not be binding on him.

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TEXT OF OREGON REVISED STATUTES

136.160 Proceedings after determination of mental condition. (1) If, after the hearing, the court decides that the defendant is able to understand the proceedings and to assist in his defense, it shall proceed with the trial.

(2) If, however, the court decides that the defendant, through insanity or mental deficiency, is not able to understand the proceedings or to assist in his defense, it shall take steps to have the defendant committed to the proper institution. If, thereafter, the proper officer of such institution is of the opinion that the defendant is able to understand the proceedings and to assist in his defense, he shall report this fact to the court that conducted the hearing. If the officer so reports, the court shall fix a time for a hearing to determine whether the defendant is able to understand the proceedings and to assist in his defense. This hearing shall be conducted in all respects like the original hearing to determine defendant's mental condition. If, after this hearing, the court decides that the defendant is able to understand the proceedings against him and to assist in his defense, it shall proceed with the trial. If, however, it decides that the defendant is still not able to understand the proceedings against him or to assist in his defense, it shall recommit him to the proper institution.

(3) If the court determines that care other than that available through commitment of a mentally defective defendant would better serve the defendant and the community, the court at any time may suspend the order of commitment upon condition that the defendant comply with the directions of the court and receive such care as the court may determine and that the defendant report at specified times to the institution for an examination by the proper officer of the institution to determine if the defendant is able to understand the proceeding and to assist in his defense.

* * *

Section 14. Incapacity due to immaturity. (1) A person who is tried as an adult in a court of criminal jurisdiction is not criminally responsible for any conduct which occurred when the person was less than 14 years old.

(2) A defense under this section is an affirmative defense.

[NOTE: Section tentatively approved by subcommittee. See P.D. #1; July 1968, and P.D. #2; September 1968, for earlier rejected versions and comments.]

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