

See: Minutes of Commission
9/12/69, p. 3, Vol. IX, Tapes 34 & 35

Minutes of Subcommittee No. 3
9/30/69, p. 9, Vol. XI, Tape 36

CRIMINAL LAW REVISION COMMISSION
311 Capitol Building
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ARTICLE 5 . RESPONSIBILITY

Preliminary Draft No. 5; July 1969

Reporter: George M. Platt
Associate Professor of Law
University of Oregon

Subcommittee No. 3

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Introduction

The Commission reviewed the Responsibility Article (P. D. No. 4; December 1968) at its meeting January 18, 1969. At that time a discussion of each section took place and the Commission sent Sections 4, 5, 7, 11 and 12 back to the subcommittee for further review and changes. The Commission did not take formal action approving any of the sections of the Article.

Subcommittee No. 3 reconsidered the sections returned to it at its meetings on April 4, 1969, and June 4, 1969. As a result of those meetings Sections 4, 5, 7, 11 and 12 were amended or revised in the manner described hereinafter. In addition the subcommittee felt it necessary to revise Section 10 although the Commission had not formally requested it to do so. The revised version of Section 10 and an explanation of the revision is also included herein. For convenience the text of the other sections is set forth without commentary.

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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.

COMMENTARY

See Preliminary Draft No. 4; December 1968; pp. 1 - 8.

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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.

COMMENTARY

See Preliminary Draft No. 4; December 1968; pp. 8 - 10.

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

COMMENTARY

See Preliminary Draft No. 4; December 1968; pp. 10 - 11.

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Section 4. Notice required in defense excluding responsibility.
No evidence may be introduced by the defendant on the issue of
criminal responsibility as defined in section 1 of this Article,
unless he gives notice of his intent to do so in the manner provided
in section 6 of this Article.

COMMENTARY - NOTICE REQUIRED IN DEFENSE EXCLUDING
RESPONSIBILITY

NOTE: For a fuller explanation of Section see P.D. No. 4;
December 1968, p. 14.

The language underlined is new since the full Commission reviewed this section at its meeting on January 18, 1969. It represents no change in policy but is responsive to the Commission directive to clarify what was felt to be an inadequate cross reference to Section 6 which sets out in detail what the notice must contain. The phrase in the section in P. D. No. 4 originally read, "unless he has complied with the provisions of Section 6." (See Commission Minutes, January 18, 1969, p. 26, for discussion leading to this change.)

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Section 5. 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 gives notice of his intent to do so in the manner provided in section 6 of this Article.

COMMENTARY - NOTICE REQUIRED IN DEFENSE OF PARTIAL
RESPONSIBILITY

NOTE: For a fuller explanation of the section see P.D. No. 4;
December 1968, p. 14.

The change here, represented in the underlined language, is a change complimentary to the one made in Section 4, explained above.

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Section 6. Notice requirements. A defendant who is required under sections 4 or 5 of this Article to give notice shall file a written notice of his purpose at the time he pleads not guilty. 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

See Preliminary Draft No. 4; December 1968; p. 16.

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Section 7. Right of state to obtain mental examination of defendant; limitations. 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 at least one psychiatrist of its selection examine 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. If the defendant objects to the psychiatrist chosen by the state, the court for good cause shown may direct the state to select a different psychiatrist.

COMMENTARY - RIGHT OF STATE TO OBTAIN MENTAL
EXAMINATION OF DEFENDANT; LIMITATIONS

NOTE: For a fuller explanation of the section and its original text see P. D. No. 4; December 1968. For the Commission discussion of the section see Minutes, January 10, 1969, p. 34. See also the subsequent discussion of the section in Minutes of Subcommittee No. 3, April 4, 1969, pp. 1 - 10, and Minutes of June 4, 1969, at p. 1 - 2.

In its original form in P. D. No. 4 Section 7 was designed basically to do two things: first, in subsection (1) it codified the holding in State v. Phillips, 245 Or 466 (1967) which established the right of the state to have a psychiatrist examine the defendant who gives notice of relying on the insanity defense; second, in subsection (2) it codified in a very broad fashion the holding in Shepard v. Bowe, 86 Or. Adv. Sh. 981 (1968) which established the rule that at the examination by the state's psychiatrist the defendant has the Fifth Amendment right not to answer questions the answers to which might be incriminating. Subsection (2) further expanded Shepard v. Bowe by giving the defendant the right to have his lawyer and a psychiatrist of his own choosing present.

Opposition to the section centered on the Fifth Amendment provisions embodied in subsection (2) and, as a result, subsection (2) was eliminated. The effect expected is that the decisional law in Shepard v. Bowe will continue to extend Fifth Amendment rights to the defendant within the confines of that decision or of future decisions as they may develop.

The codification of State v. Phillips contained in subsection (1) of the original version of Section 7 remains in the language of the draft now presented. The subcommittee retained this provision on the narrowest of margins, however. On the motion to delete the provision the vote was 2 - 2, the motion failing for want of a majority.

One other change is made in the present draft. At the Commission hearing on the section it was determined that the defendant ought to have a right to challenge the appointment of the psychiatrist the state proposes for its examination of the defendant. The language to achieve this is found in the last sentence of the section.

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~~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 trial court may initiate proceedings for commitment of the defendant to a mental institution. The trial court shall conduct such proceedings and, if warranted, order the commitment. The provisions of ORS chapter 426 shall apply, as near as may be, to the proceedings conducted by the trial court.~~

COMMENTARY

See Preliminary Draft No. 4; December 1968; pp. 23 - 24.

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Section 9. Form of verdict following successful defense excluding responsibility. When the defendant is acquitted on grounds of mental disease or defect excluding responsibility as defined in section 1 of this Article, the verdict and judgment shall so state.

COMMENTARY

See Preliminary Draft No. 4; December 1968; pp. 24 - 25.

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Section 10. Acquittal by reason of mental disease or defect excluding responsibility; 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. The [state] [defendant] has the burden of proof by a preponderance of the evidence on this issue.

(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 as are appropriate in the interests of justice and the welfare of the defendant. The [state] [defendant] has the burden of proof by a preponderance of the evidence on this issue. 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 continues to be affected by mental disease or defect and is a substantial danger to himself or the person of others but can be controlled adequately if released on supervision, the court may release him on further supervision, as provided in subsection (2) of this section. 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 release on supervision is continued, it may at that time make an order committing the person to the Superintendent of the Oregon State Hospital for custody, care and treatment. At such hearing the state shall bear the burden of proof by a preponderance of the evidence that the defendant is suffering from a mental disease or defect and is a substantial danger to himself or the person of others so as to warrant his commitment or his continued supervised release.

(b) Any person subject to the provisions of this subsection (2) may apply to the circuit court of the county from which he is on release on supervision, 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 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 of the county. The petitioner

must prove by a preponderance of the evidence his fitness for discharge or modification of the original order for supervision.

(c) If the state wishes to continue any person on supervised release beyond five years from the entry of the original order, the state must prove by a preponderance of the evidence that the person on supervised release continues to be affected by a mental disease or defect and continues to be dangerous to himself or the person of others but can be controlled and given proper care, supervision and treatment if continued on release on supervision.

(3) If the court finds that the person is affected by mental disease or defect and 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. The [state] [defendant] has the burden of proof by a preponderance of the evidence on this issue.

(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 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. If the state opposes the recommendation of the Superintendent, the state has the burden of proof by a preponderance of the evidence that the person continues to be affected by a mental disease or defect and continues to be a substantial danger to himself or the person of others and should remain in the custody of the Oregon State Hospital,

(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 from which he was committed for an order of discharge upon the grounds:

(A) That he is no longer affected by mental disease or defect;
or

(B) 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). Application under this subsection (b) shall not be filed oftener than once every six months.

(4) The court shall conduct a hearing upon any application for discharge, release or supervision 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 is still affected by a mental disease or defect and is a substantial danger to himself or to the person of others, but can be controlled adequately if he is released on supervision, the court shall order him released on supervision 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 is a substantial danger to himself or the person of others 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 the person 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 total period of five years shall, in any event, be discharged at the end of the five year period if he is no longer affected by mental disease or defect. He shall

also be discharged if he is affected by mental disease or defect but he does not present a substantial danger to himself or to the person of others.

If the person is in confinement in the Oregon State Hospital at the time the total five year period expires, the Superintendent shall notify the committing court of the expiration of the five year period. Such notice shall be given at least 30 days prior to the expiration of the five year period. Upon receipt of notice the court shall order a hearing.

The notice shall contain a recommendation by the Superintendent either:

(a) That the person is still affected by a mental disease or defect but is no longer a substantial danger to himself or the person of others and should be discharged; or

(b) That the person confined continues to be affected by a mental disease or defect and is a substantial danger to himself or to the person of others and should continue in confinement; or

(c) That the person confined is no longer affected by a mental disease or defect and should be discharged.

If the recommendation of the Superintendent is that the person should continue in confinement, the person seeking discharge has the burden at the hearing of proving by a preponderance of the evidence that he:

(A) Is no longer affected by a mental disease or defect; or

(B) If so affected is no longer a substantial danger to himself or to the person of others.

If the state wishes to challenge the recommendation of the Superintendent for discharge, the state has the burden of proving by a preponderance of the evidence that the person seeking release continues to be affected by a mental disease or defect and is a substantial danger to himself or to the person of others.

Any person who is confined or remains on supervised release after the hearing at the end of the five years may be discharged subsequently in the same manner as provided in paragraphs (a) and (b) of subsection (2) and paragraphs (a) and (b) of subsection (3) of this section.

COMMENTARY - ACQUITTAL BY REASON OF MENTAL DISEASE
OR DEFECT EXCLUDING RESPONSIBILITY; RELEASE OR
COMMITMENT; PETITION FOR DISCHARGE

Summary

This section is one of the most crucial in the entire Article. It is designed to cover the various situations with respect to care and custody or outright release of a defendant who has been found not guilty by reason of mental disease or defect excluding criminal responsibility. The specific provisions are summarized briefly as follows:

Following the insanity verdict the court may conduct a special hearing (or rely instead on evidence presented at the trial if sufficient) to determine what to do with the defendant.

Subsection (1). If, after the hearing, the court decides the defendant is not dangerous to himself or the person of others it shall order him released. Burden of proof on the issue of whether to release is to be determined by the full Commission. The subcommittee left this question open. In one view it ought to be the state which bears the burden of proof that the defendant is dangerous if the state seeks commitment. In another view the burden to show that he is fit for discharge should be left with the defendant

since he has borne the burden of proof of his irresponsibility by a preponderance of the evidence and should as a matter of consistency continue with the burden on the issue of release.

Subsection (2). Following the insanity verdict if the court decides against outright release under subsection (1), it can release the defendant on supervision and impose such conditions on the release as are appropriate. Again the subcommittee left open the choice between the state and the defendant on the issue of burden of proof. The decision on this matter in subsection (1) probably should decide the matter here also.

Paragraph (2) (a). The court having once granted supervised release may on notice to the state and the defendant conduct additional hearings to determine whether to continue the supervised release. The court following such a hearing can cancel the supervised release and order the person committed, or can continue or modify the release on supervision. The state is allocated the burden of proof by a preponderance at such a hearing.

Paragraph (2) (b). Any person on supervised release is granted the right to a hearing for discharge or modification of supervision. The burden of proof is placed on the person so moving.

Paragraph (2) (c). Subsection (5) establishes a mandatory review of the case of any person in the state hospital or on supervised release for a total of five years from the entry of the original court order. Paragraph (2) (c) permits the state to seek extension of the released supervision beyond this five year period. The burden of proof is placed on the state on the issue.

Subsection (3). Following the insanity verdict if the court decides against outright release under subsection (1) or against release on supervision under subsection (2), it can under subsection (3) order the defendant committed to the state hospital. The question of who bears the burden of proof here is, as it was in subsections (1) and (2), left to the decision of the Commission.

Paragraph (3) (a). Following commitment the superintendent of the hospital after a minimum of 90 days may recommend discharge. If the state opposes the recommendation of the superintendent, it has the burden of proof by a preponderance of the evidence.

Paragraph (3) (b). Pursuant to this provision any person committed to the hospital is given the right to

petition for discharge after a minimum of 90 days following commitment. The petition may be filed not oftener than once every six months. The person petitioning is given the burden of proof by a preponderance.

Subsection (4). This subsection provides that the court shall conduct hearings upon the filing of the various kinds of applications authorized in the section and empowers the court to enter orders of discharge, continued or modified supervision, or commitment, whichever is appropriate as a result of any hearing. The court is authorized to appoint one or more psychiatrists to make reports to the court to assist it in reaching its decisions.

Subsection (5). Any person in the state hospital or on supervised release for a total of five years is entitled to release if no longer suffering from a mental disease or defect or, if so still afflicted, is not dangerous to himself or the person of others. The state hospital shall notify the court within 30 days of the expiration of the five year period of persons in confinement in the hospital. In this notice the hospital superintendent must make recommendations for discharge or continued confinement. If the recommendation is for discharge and the state wishes to oppose it, the state bears the burden of proof. If the superintendent's recommendation is for continued confinement (i.e., that the person continues to be afflicted with mental disease or defect and is dangerous) and the person wishes to challenge the recommendation, the burden of proof is placed on the confined person. The judge makes the final decision whether to discharge.

In the event that confinement or supervised release is continued beyond a total of five years the person may be discharged at any time as provided in subsections (2) and (3).

NOTE: See the earlier commentary on this section appearing in T. D. No. 4; December 1968. For discussion of the section see Commission Minutes, January 18, 1969, at p. 12; Subcommittee No. 3 Minutes, April 4, 1969, at p. 10, and June 4, 1969, at p. 2.

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Section 11. Mental disease or defect excluding fitness to proceed. If before or during the trial in any criminal case the court has reason to doubt the defendant's fitness to proceed by reason of incompetence, the court may order an examination in the manner provided in section 12 of this Article.

A defendant may be found incompetent if, as a result of mental disease or defect, he is unable:

- (1) To understand the nature of the proceedings against him; or
- (2) To assist and cooperate with his counsel; or
- (3) To participate in his defense.

COMMENTARY - MENTAL DISEASE OR DEFECT EXCLUDING FITNESS

TO PROCEED

NOTE: See T. D. No. 4; December, 1968, at p. 37 for a full explanation of this section. See the Commission discussion in Minutes, January 18, 1969, at p. 26.

At its January 18, 1969, meeting the Commission directed two changes in the section. In its original form the section began, "A person cannot be proceeded against while he is incompetent as defined in this section." It was the general feeling of the Commission that this language was too broad and might be construed as prohibiting an indictment. Therefore, it was dropped and in its place was inserted the present language. The first sentence is drawn from existing statutory language found in ORS 136.150.

As originally presented in T. D. No. 4, the section listed four grounds for judging the defendant's competence. The third of these appearing in the T. D. No. 4 version required that to be found incompetent it must be shown he was unable "to follow the evidence." It was the opinion of the Commission that this provision expanded existing law and was, therefore, not acceptable. The present draft eliminates this provision.

(First alternative form)

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 by reason of incompetence as defined in section 11 of this Article, 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 the defendant 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 30 days or such longer period as the court determines to be necessary for the purpose.

(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 but is not necessarily limited to the following:

- (a) A description of the nature of the examination;
- (b) A statement 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. Except where the defendant and the court both request to the contrary, the report shall not contain any findings or conclusions as to whether the defendant as a result of mental disease or defect was responsible for the criminal act charged.

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 affecting his competency to proceed.

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.

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(Second alternative form)

Section 12. Procedure for determining issue of fitness to proceed. (1) Whenever the court has reason to doubt the defendant's fitness to proceed by reason of incompetence as defined in section 11 of this Article, the court may call to its assistance in reaching its decision any witness and may appoint a psychiatrist to examine the defendant and advise the court.

(2) If the court determines the assistance of a psychiatrist would be helpful, 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 not exceeding 30 days or such longer period as the court determines to be necessary for the purpose.

The psychiatrist may employ any method in the examination which is accepted by the medical profession for the examination of those alleged to be suffering from mental disease or defect.

The report of the examination shall include, but is not necessarily limited to the following:

- (a) A description of the nature of the examination;
- (b) A statement 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.

Except where the defendant and the court both request to the contrary, the report shall not contain any findings or conclusions as to whether the defendant as a result of mental disease or defect was responsible for the criminal act charged.

If the examination by the psychiatrist 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 affecting his competency to proceed.

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 defendant.

(3) The court, when it has ordered a psychiatric examination, shall 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 - SECTION 12

NOTE: See T. D. No. 4; December 1968, for an explanation of this section in its original form.

At its January 18, 1969, meeting the Commission directed some changes in wording when it sent this section back to Subcommittee No. 3. (See Commission Minutes, January 18, 1969, at p. 30.) These changes were made, but in reconsidering the section the subcommittee decided some broader policy changes were in order. (See the subcommittee minutes of April 4, 1969, at p. 16 and June 4, 1969, at p. 7.)

First, the following changes were made in the wording as suggested by the Commission: (1) in subsection (3), the first sentence, the phrase "but is not necessarily limited

to" was added to remove doubt that the psychiatrist's report was limited solely to the contents established in paragraphs (a), (b) and (c); (2) in paragraph (b) of subsection (3) the word "statement" now appears in place of the word "diagnosis." The psychiatrists attending the January, 1969, Commission meeting felt this was more acceptable to members of their profession.

The subcommittee remained troubled by the self-incrimination problems arising out of the forced mental examination of the defendant who pleads not guilty by reason of mental disease or defect excluding responsibility. The subcommittee concluded that it would not be appropriate to insert in this section language reflecting the Fifth Amendment rights extended in Shepard v. Bowe because it was concluded the examination on the issue of incompetency does not involve the same issues as the examination to determine criminal responsibility. The subcommittee decided to let this section remain silent on the point on the assumption that if the Fifth Amendment does apply to the incompetency examination the Oregon Supreme Court in an appropriate case can establish the right through decisional law.

Yet a practical Fifth Amendment problem still remained after the foregoing conclusion. It is the typical practice in Oregon when an incompetency examination is ordered for the psychiatrist also to examine the defendant as to his mental condition at the time of the crime. The psychiatrist then gives his opinion not only on the defendant's competency to stand trial but also his mental condition at the time of the crime. Copies of this report routinely are given to both the state and the defendant. As a practical matter this dual response of the psychiatrist is welcomed by both the state and the defendant in many cases. The defendant, apparently more often than the state, requests the competency examination knowing that he will get an opinion also on his responsibility. The indigent defendant to whom funds may not be available by this procedure gets free expert advice upon which to determine whether to pursue the insanity defense.

Prior to Shepard v. Bowe this dual response by the psychiatrist conducting the incompetency examination posed no problem. Now, however, it seems inadvisable to allow this practice to continue unless the defendant, knowing he has the right not to incriminate himself at the examination by answering questions concerning the crime, requests that the psychiatrist also examine him and give an opinion as to his mental capacity at the time of the crime. As a safeguard, however, against the harmful effects of such a request

from a defendant who is obviously not competent to understand the danger of the request on the issue of self-incrimination, the section also requires that the court join in the request for the opinion on insanity as well as competency. This permits the court to act in the best interests of a defendant where justified.

One further issue is posed for Commission consideration. The section is drafted in alternative forms. The only difference in the two forms relates to the role of the psychiatrist in the incompetency determination. The first alternative form reflects the present status of the Oregon law which requires that the court appoint at least one psychiatrist to conduct an examination and advise the court.

The second alternative form would make such appointment discretionary with the court rather than mandatory. Pursuant to this the judge, relying on his own common sense, his superior knowledge of what abilities are required of a defendant in a given case, and such lay witnesses as he might call to tell him about the defendant could make the decision unaided by psychiatric expertise.

The advantages in placing the responsibility for the competency examination entirely on the judge, as well as the decision on competency, are at least threefold. First, the judge knows what is necessary by way of a defendant's capacity to help in his defense. The judge understands in a general way how complicated the case is likely to be and what is expected of most defendants. By comparison a psychiatrist can be expected to understand very little of these matters. Second, self-incrimination can be minimized. The judge again has superior knowledge of this problem and is less likely to lead a defendant into answers which may later damage his case. Third, the county may realize a considerable saving of expense since, hopefully, far fewer psychiatric examinations will be ordered by the court.

Critics of this plan may be heard to say that the judge ought not to become involved with the defendant in this kind of proceeding for fear of destroying the judge's traditional role of umpire. Such "participation" by a judge is hardly distinguishable from other important instances where the trial judge directly examines the defendant. An example would be where the judge questions the defendant to determine whether the defendant "understands" the consequences of a plea of guilty. Critics of allowing the judge to make the decision without the aid of psychiatry also might argue that the judge is unqualified where scientific matters of mental life of a defendant may be involved. The answer here is that

the judge's common sense plus an intimate knowledge of what is expected of the defendant are more useful attributes than an understanding of the intricacies of psychiatric nosology. It will be apparent in most cases to the judge from his examination and observation of the defendant whether or not the defendant can help himself. This puts the emphasis where it properly belongs -- on questions of legal rights and due process.

One last item needs review by the Commission. Subsection (2) of section 12 relates the method to be used in the examination by the psychiatrist to that "which is accepted by the medical profession for the examination of those alleged to be suffering from mental disease or defect." This is taken from section 4.05 (2) of the Model Penal Code which in the comments (T. D. No. 4, p. 196) gives the following explanation: "Paragraph (2) clarifies the question of what methods may be used in the examination, a point which statutes in most jurisdictions do not touch upon."

Some doubt was expressed in the subcommittee that the provision adds anything useful. It was noted that psychiatrists testifying at the January 18, 1969, Commission meeting seemed to regard the provision as helpful in informing them about standards for procedure. The conclusion was that the removal of the provision would not cause serious damage, but Chairman Burns felt that the Commission ought to make the decision.

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Section 13. Determination of fitness to proceed; effect of finding of unfitness; proceedings if fitness is regained; pretrial 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 psychiatrist or psychiatrists who submitted the report and to offer evidence upon the issue. Other evidence regarding the defendant's mental condition may be introduced by either party.

(2) If the court determines that the defendant lacks fitness to proceed, the proceeding against him shall be suspended, except as provided in subsection (4) of this section, and the court shall commit him to the custody of the Superintendent of the Oregon State Hospital or shall release him on supervision as provided in subsection (3) of this section 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 either party, 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 on motion of either party 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 illness, order the defendant to be committed to an appropriate mental institution. The trial court shall conduct such proceedings in the manner provided in ORS chapter 426 or as near as may be.

(3) If the court determines that care other than commitment for incompetency to stand trial would better serve the defendant and the community, the court may release the defendant on such conditions as the court deems appropriate including requirements that the defendant regularly report to a specified institution or other facility for examination to determine if the defendant has regained his competency to stand trial.

(4) 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

See Preliminary Draft No. 4; December 1968; pp. 43 - 45.

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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.

COMMENTARY

See Preliminary Draft No. 4; December 1968; pp. 47 - 48.

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