Tape #70
Both sides

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 3

Sixth Meeting, April 4, 1969

Minutes

Members Present: Judge James M. Burns, Chairman
Representative David G. Frost
Mr. Frank D. Knight
Mr. Donald E. Clark

Staff: Mr. Donald L. Paillette, Project Director

Reporter: Professor George M. Platt, University of Oregon School of Law

The meeting was called to order by Chairman Burns at 1:15 p.m., Rooms 44-45 Agriculture Building, Salem.

Amendments to Responsibility; P.D. No. 4; as proposed by the Commission at its meeting on January 18, 1969. (Article 5)

Chairman Burns asked Professor Platt to explain the amendments drawn and their effect.

Amendments to Section 4. Notice required in defense excluding responsibility.
Amendments to Section 5. Notice required in defense of partial responsibility.

Professor Platt explained that the amendments to sections 4 and 5 were strictly technical adjustments in language suggested by the Commission because it was felt that it was not clear that notice had to be given of intent with regard to the general provisions set out in section 6. He felt the amended sections would reflect the true intent of the notice provisions. Professor Platt recalled that while the Commission had not approved anything in the Responsibility Draft, it had not disapproved the policy. It was merely felt that the draft language was inadequate.

Amendments to Section 7. Right of state to obtain mental examination of defendant; limitations.

Professor Platt indicated that he felt this was the section which would cause most of the trouble in the subcommittee and probably again with the Commission. He recalled that the feeling of the Commission was that either most of the provisions in the section should be droppe or that it should be redrafted. Upon further consideration, however, Professor Platt felt that the approach in the draft was, perhaps, the

right one. He did make some changes in subsection (2) to eliminate some extraneous language but the policy is still the same. Subsection (1), he said, reflects the Phillips case, which gives the state a right to have a psychiatrist appointed and subsection (2) reflects what Professor Platt is convinced is the more constitutional view.

Shepard v. Bowe, he stated, brought subsection (2) into prominence in Oregon with respect to the insanity hearing, the examination by the state psychiatrist to determine prior to trial what the mental state was on the issue of insanity--not the competency to proceed Shepard v. Bowe held that the psychiatrist may not ask questions about, at, or near the time of the crime on the grounds of fifth amendment, self-incrimination rights. Upon re-examination of the section, on this basis, Professor Platt decided it was appropriate to leave the language there and he would also extend it, although he had not in the draft, to the incompetency section. He admitted that Shepard v. Bowe did not involve the incompetency hearing but he felt that as a logical and reasonable extension of the self-incrimination rule, the defendant who is forced to submit to the court psychiatrist's examination on the question of incompetency may refuse to answer questions that may tend to incriminate him. Professor Platt admitted this was not the same kind of a hearing in the sense that it is an incompetency to proceed determination and there is no issue of criminality involved, but the conclusion he arrived at was based on the United States Supreme Court's cases, beginning, most recently, with Malloy v. Hogan which applies the fifth amendment through the fourteenth to the states for the first time. Malloy v. Hogan, more importantly, he said, also imposes federal standards with respect to self-incrimination. An examination of the cases on the fifth amendment over the past few years indicates, he felt, that the defendant has an almost uninhibited right to refuse to answer questions in all kinds of investigations--whether it is a criminal case, a legislative inquiry or, perhaps now, in the area of private or civil proceedings. Professor Platt was reasonably certain that the self-incrimination standards of the federally imposed rules through Malloy now have the effect in all states of enabling the defendant to refuse to answer questions which may not only incriminate him but which may link up with evidence which ultimately does incriminate him. The only question there would be, he continued, is whether the court has the right to decide whether a question asked is a "link in the chain". The United States Supreme Court cases seen by Professor Platt point out that a problem arises in that if the defendant is required to tell the court why the answer to a question is a "link in the chain", he, in effect, has to testify all the self-incriminating information in order to arrive at his conclusion.

Professor Platt noted there was no direct holding, but the result of his best judgment, by analogy of very strong cases, would lead to applying the fifth amendment, in a full panoply of rights, to the defendants in this kind of a proceeding. Shepard v. Bowe, he felt,

did this and while it was only on the insanity question, he did not see how the conclusion that it also applies to the incompetency hearing could logically be resisted.

Professor Platt stated that he felt the defendant clearly was entitled to have an attorney present. He did not believe a policy had been established regarding the right of the defendant to have a psychiatrist present but stated that the Shepard v. Bowe case clearly, by implication, acknowledges the right of the defendant to have his attorney present. In this case the trial court did prohibit the attorney from interfering with any questions and by the reversal by the Superme Court it can be inferred that the fifth amendment right means nothing unless counsel is present.

Mr. Knight could not see how Shepard v. Bowe could be read to mean that a defendant has the right to have a psychiatrist present. He disagreed also with having an attorney present, but disagreed more about having the psychiatrist present. It gets down to a courtroom battle between psychiatrists anyway, he said, and expressed the opinion that most psychiatric interviews are pretty nebulous as far as the psychiatrist being able to come up with any conclusions. If an additional psychiatrist were present, he questioned the value of the state having the right to a psychiatric examination at all.

Professor Platt replied that the section was sent back to subcommittee by the Commission because of the fifth amendment problem but the Commission was silent as to the issue of the presence of the defendant's psychiatrist. He observed, however, that the subcommittee had previously approved the presence of the defendant's psychiatrist during the examination.

Chairman Burns referred to section 7, subsection (1), to the language: "If the defendant objects to the psychiatrist chosen by the state, the defendant may raise his objection before the court and, for good cause shown, the court may direct the state to select a different psychiatrist." It seemed to him that the words "the defendant may raise his objection before the court and, for good cause shown," were unnecessary because if the defendant objects to the psychiatrist he obviously does so at a point in court and he felt it could simply read: "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."

Professor Platt had no objection to the language change and no objections were raised by subcommittee members to the recommended change.

Representative Frost asked why the draft locked in the "psychiatrist". He asked if a clinical psychologist could not give an opinion as to competency.

Professor Platt replied that there was some legislative history on this point in the commentary and it is stated that the term "psychiatrist" is meant to include all related, scientific fields.

Representative Frost was of the opinion that the entire provision for the state's psychiatric examination was completely impractical. He thought the defendant's attorney would be able to make a complete farce out of the psychiatric examination and felt that if the attorney and the psychiatrist were both to be present the examination might just as well take place in the courtroom. There would be constant objections he contended, as to "the links", getting to the ultimate facts, etc., making the procedure unworkable.

Mr. Knight advised that before Phillips his office could not even get a psychiatric examination--some counties could get them, but not his. He cited a case in which his office had requested a psychiatric examination and a motion was filed directing that the defendant's attorney be present, that he be allowed to tape the examination and that no self-incriminating questions be answered. The judge would not allow the tape recording and ordered that the attorney could be near and when the psychiatrist began asking about the day in question, the attorney had the right to be present. The examination gave some weight to the state's psychiatric testimony in that the psychiatrist had actually talked to the defendant but in that the attorney instructed the defendant not to answer the questions relating to the act, as far as the actual commission of the crime was concerned, the state was back to the hypothetical question.

Mr. Knight referred to the language in section 7, subsection (2), "The defendant when being examined by the state's psychiatrist shall not be required to answer questions the answer to which might tend to incriminate him" and said that any answer given the psychiatrist at all might tend to incriminate the defendant by proving sanity.

Professor Platt agreed, in principle, with Mr. Knight. He felt this was, in fact, what the United States Supreme Court has said. Commenting on Representative Frost's statements, Professor Platt said he would agree that having the attorneys present would make a shambles of the hearing. Since writing the draft he had given the problem a good deal more consideration and now felt he would go one step farther and perhaps not even mention the right of the state to have an examination, recognizing that within the fifth amendment cases the United States Supreme Court has said that the state may serve process to bring a defendant, for instance, before a grand jury and at that point he may refuse to answer on the grounds of self-incrimination.

Chairman Burns asked if there were Supreme Court cases on this.

Professor Platt said there were no cases on the insanity area but there are many over a wide range, even non-criminal cases, an investiga-

tive procedure by a legislative body, for instance, where the fifth amendment clearly extends.

Mr. Knight stated that clearly an individual can waive a constitutional right if he knows about it; also, the Supreme Court has held that a person cannot be forced to elect between two constitutional rights (the Griffin case). However, he said, if the defendant wants to place his sanity, his responsibility, on issue by th calling of psychiatrists, he could not see why he then should not waive his right to remain silent to do this, as far as having to submit to a psychiatric examination is concerned.

Representative Frost asked if it was required by the constitution that the determination of competency is a fact which must be found by a jury.

Professor Platt replied that it is the court which determines this

Representative Frost asked why this could not be made a question of medical condition. He suggested that if a defendant chose this defense, perhaps a board of arbitration could be set up--one psychiatri chosen by the state, one by the defendant and those two choosing a third The board could then make the report to the court on the defendant's responsibility.

Chairman Burns asked if Representative Frost was referring to the issue of insanity at the time of the commission of the crime, not the ability to assist and Representative Frost said he was. Chairman Burns then stated that he felt this procedure would be a denial of a jury trial.

Professor Platt recalled that the "impartial expert approach" had been examined by the subcommittee but the subcommittee and the Commission had pretty well decided against this as there were some real drawbacks to this approach. It has been observed that an impartia board is unduly prejudicial to the defendant. The jury tends to believe the board because it is the court's board and it was felt that psychiatry is too inexact to impose this type of decision upon the jury

Representative Frost asked if insanity at the time of the commission of the act is a question of fact which must be determined by a jury, constitutionally.

The subcommittee members were of the opinion that it was.

Mr. Knight recalled that the matter of the bifurcated trial had previously been discussed. He thought if the first trial could be on the fact that the defendant committed the act, there would be nothing from this point on that would tend to incriminate the defendan as far as talking freely with the state psychiatrist as well as the

defense psychiatrist and a full psychiatric examination could then be made and the issue of his responsibility could then be tried.

Professor Platt related that this approach had been examined and that the California system of bifurcated trials has failed miserably. California has found that guilt cannot be separated from proving the act. There has been a distinct shift away from the bifurcated trial in this country. Professor Platt did not see, within our concept of mens rea, how a bifurcated trial system could work.

Chairman Burns asked Professor Platt if he read Shepard v. Bowe to specifically require or to permit an attorney to be present.

Professor Platt said not specifically, no, but said he felt the way the facts came up in the order of the court that it was inescapable-especially in light of the fifth amendment cases of the United States Supreme Court, coupled with the right to counsel.

Chairman Burns observed that none of the fifth amendment cases of the Supreme Court have been in this area and he felt there was still the hope that the Supreme Court might do a little retrenching and it might be a period of time before they went as far as Professor Platt indicated. He recalled there had been discussion in previous subcommittee meetings about deleting the section completely. He felt that if just subsection (1) of section 7 were retained, it clearly would not go beyond the central, specific holding of Shepard v. Bowe. He suggested leaving subsection (2) out and then if the Supreme Court or the Oregon Court in a specific case rules an attorney must be present, the section can be amended. He noted that the requirements set out in subsection (2) are not yet law and he felt there was fairly good reason to urge that it ought not to be the law in the absence of a mandatory requirement on fifth amendment grounds.

Professor Platt disagreed with the conclusion of law but did agree in the sense that elimination of subsection (2) would perhaps solve the subcommittee's problem. His feeling was that the Commission ought to establish the policies that the draft reflects--extending the fifth amendment, with far reaching implications, into the areas of forced examination of the defendant.

Chairman Burns observed that what is thought of as self-incrimination today is a far cry from what the framers of the constitution had in mind. He was not sure that the Commission ought to establish as a policy the further extension of a doctrine that, if extended in this area, would clearly upset the fairness of the adversary system.

Mr. Knight said he still clung to the hope that some day the United States Supreme Court might back up a little and he would then hate to have something like this codified.

Professor Platt felt that the fifth amendment discussion was more than an academic point. He agreed that the fifth amendment was aimed at coercion but he did not agree that it was the old third-degree that it is limited to. He felt the cases had clearly moved away from this to along the psychological coercion area and he thought that was what this covered. He took the position that the fifth amendment is already settled as far as Oregon is concerned by the Supreme Court.

Mr. Clark tended to agree with the position taken by Chairman Burns--that there is a matter of fairness involved. He would not want to see the Commission go as far as the proposed amendment to the draft and have it written into the code.

Representative Frost again stated that it was the impracticalitity of the procedure that concerned him. He thought, also, that it could be used as a great discovery tool.

Mr. Paillette pointed out that the testimony given by psychiatrists at the January 18, 1969, Commission meeting was to the effect that having the defense attorney present during the examination was not too workable.

Professor Platt pointed out that there would be three important things that the state would still have: first, cross examination; second, the right to have a psychiatrist sit in the courtroom, observe the defendant during the trial, listen to the evidence, and answer hypothetical questions based on the evidence and his observation of the defendant; and third, and most important, the jury, the trier of the fact, does not have to listen to one word of the defense psychiatrist's testimony because it is not a medical question. This was brought out recently in a Massachusetts' case where two psychiatrists testified for the defendant that he was absolutely insane, no testimony was presented otherwise, and the jury found the man sane and convicted him. The Massachusetts Supreme Court affirmed saying this was not a medical question; it is a legal question for the jury to decide, regardless of the expert testimony presented.

Chairman Burns pointed out the difficulty the state psychiatrist has under cross examination when the defendant's attorney can point out that the only contact the state psychiatrist has had with the defendant is observing him in the courtroom and that the psychiatrist is making his diagnosis on this basis.

Mr. Knight noted that about the only way the state can get by when a defendant comes up with an insanity plea is to rely on physical facts to show that the defendant knew what he did was wrong.

Mr. Knight moved to strike subsection (2) of section 7 and [illegible]. Mr. Clark seconded the motion.

Mr. Paillette felt that the defendant's rights would be protected by the Supreme Court and thought that if the draft went further than the Court requires and wrote it into the code, it would be statutorily required even though the Court decisions had not so stated.

Mr. Knight felt that under Shepard the defendant clearly does not have to talk if it incriminates him.

Professor Platt asked if an individual involved in a sanity hearing or an incompetency hearing could waive his rights. If he is, in fact, incompetent, how could he waive anything.

Representative Frost indicated he favored the motion but stated he was considering making a motion, also, to take out all of section 7 that remained.

Professor Platt agreed--if subsection (2) were to be deleted, he could not see why subsection (1) could not also be deleted.

Chairman Burns asked what the situation would be then when the state sought to have a psychiatrist examine the defendant.

Representative Frost thought if it were to be meaningful at all it would probably be done on stipulation. He did not think, as a practical effect, the state's examination as set forth in the draft would do one bit of good.

Mr. Knight thought there was advantage in having the state psychiatrist at least talk with the defendant.

Professor Platt agreed with Mr. Knight and if, in fact, the defendant desired to talk with the psychiatrist, he could. If the examination is entirely taken away, even this opportunity is gone.

Mr. Knight was concerned that the deletion of the entire section would impliedly mean the overruling of the Phillips case. It might be said by some that since the code is silent on the matter of the examination by the state, the court no longer has the authority to order a psychiatric examination.

Professor Platt recalled that earlier he had felt that Phillips would not be too longstanding but he said he was no longer so sure about this. He did not object to the right of the state to have the initial forced examination as long as it is tied to a fifth amendment restriction. He added that the removal of language with respect to the fifth amendment does not do away with the existing facts, whatever they are. He recalled that Senator Burns had brought up the point at the Commission meeting to the effect that if the section were to be deleted he felt that it should be made a part of the legislative

history that the Commission was not changing the policy of Phillips. It was not the intent of the Commission by considering the section and then removing it to overrule the effect of Phillips.

Representative Frost could not see how excluding the section from the draft could be impliedly overruling the decision.

Chairman Burns thought it might be inferred from the fact that the section had been in the draft and then was removed.

Professor Platt agreed that perhaps this was not too convincing a reason for the commentary but he did feel that the Oregon Supreme Court would pay a good deal of attention to the legislative history of this particular work and it might be possible that without some specific language the Court might be convinced the Commission by its inaction did intend to change the rule.

Chairman Burns thought there was some value apart from the question of whether the state should have a chance at the examination within the limits of Shepard v. Bowe as he felt the section contained some valuable language requiring the state to file notice, requiring the use of suitable facilities, etc., enabling language.

Mr. Paillette felt the section contained some valuable language relating to the defendant, also.

Professor Platt recalled that Mr. Spaulding had been very much interested in inserting language so that the psychiatrist could be changed if the defendant did not like the one designated.

The motion to delete subsection (2) of section 7 carried unanimously.

Representative Frost moved to delete the balance of section 7. The motion failed (Frost and Knight voting "aye", Clark and Burns voting "no").

Mr. Clark moved the adoption of the amendment suggested earlier by Chairman Burns to the new language proposed in section 7: delete "the defendant may raise his objection before the court and, for good cause shown," and insert after "court", ",for good cause shown," so that the sentence would read: "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." The subsection number "(1)" was also deleted from the section. There were no objections to these changes and the motion was adopted.

Amendments to Section 10. Acquittal by reason of mental disease or defect excluding responsibility; release or commitment; petition for discharge.

Professor Platt advised that this section was not sent back by the Commission but he found upon rereading the section that the changes indicated were necessary as a matter of grammar to clarify what the section really intends to do. The policy is not changed in any way from the original draft. Professor Platt felt this section was the heart of the procedural part of insanity.

Chairman Burns asked Professor Platt to review briefly the differences in subsections (1), (2) and (3) of section 10.

Professor Platt replied that in general a flexibility of commitment is provided for in that the judge, upon a finding of dangerousness, may commit to the community and out patient control or he may commit to the State Hospital or there may be a combination where the individual is confined to the Hospital and released to the community upon a later hearing, or vice versa.

Professor Platt advised that there is no language in existing statutes for the defendant to raise the issue where the Hospital itself refuses to find that he has returned to sanity or that he is no longer dangerous. The draft sets out the procedures with allocation of the burden of proof following the one who is trying to make the point. There is a five year limit on the commitment; there is an automatic review whether or not there has been a review in between for any reason. The defendant will not automatically be released at the end of five years if he is still adjudged dangerous but it insures he can get out if for some reason the Hospital has been keeping him there when they should not have.

Professor Platt cited Newton v. Brooks which was a habeas corpus proceeding where the Hospital had refused to discharge the defendant who had shown he was sane within the M'Naghten rule. The Oregon Supreme Court held this was not enough, dangerousness was the issue. Professor Platt felt this was a Draconian requirement, the defendant must show not only that he is not dangerous but also that he is sane. He thaght this unnecessary. If, in fact, under M'Naghten the defendant were found insane still but not dangerous, he could see no reason to retain him in the Hospital as it served no purpose. The petty check passer, then, under the draft provisions, could be released back into society if he is not dangerous to the person of himself or anyone else although he may pass some checks. The court must be convinced the defendant is not dangerous, not just a doctor; this is another important difference under the draft.

Professor Platt added that the draft section pretty well reflected the California suggestions.

Mr. Knight recalled there had been discussion previously about the petitions by the defendant and to limiting the number of times he can petition. He asked how this was taken care of.

Professor Platt replied that this was directed by the Commission and the following had been inserted in section 10, subsection (3) (b): "Application under this subsection (b) shall not be filed oftener than once every six months."

Representative Frost asked if the commitment were civil or criminal.

Chairman Burns replied that it would take the place of present law that following a "Not guilty by reason of insanity" finding or verdict, the court commits or discharges. This is the end of it as far as the court functions are concerned now, from then on it is entirel up to the State Hospital.

Professor Platt added that it is not under the civil commitment statute but is under ORS 136.730.

Chairman Burns observed that the language is different because in an ordinary civil commitment the test is whether the individual is mentally ill and in need of care and treatment and the test when the individual is found not guilty by reason of insanity is "dangerousness".

Mr. Clark asked what the proposed provisions would do that is not currently being done.

Chairman Burns replied that currently it is left entirely up to the State Hospital and it can release the defendant in six months or forget him.

Mr. Clark understood that under the draft, then, the court would make the decision rather than the Hospital and that the issue could be raised by the defendant or by the state.

Professor Platt agreed that this was right and added that the defense can presently raise the issue by habeas corpus but it is a very cumbersome procedure. The draft would build in a more flexible procedure for petition within the existing statute.

Chairman Burns did not feel that this would do away with the habeas corpus and Professor Platt agreed that it would not.

Professor Platt indicated that it was felt by many that the State Hospital wanted to get rid of many of the inmates as quickly as possible and tended to return some individuals to the community too soo This is not good and the draft provisions would allow the court, representing the community, to make the decision.

Chairman Burns recalled that when Dr. Treleaven was asked about this he did not have figures to give but said that he thought the individuals were held, generally, about six months. Chairman Burns cited a case where a woman was charged with killing her two year old daughter and of attempting to kill her two sons. She had been sent to the Hospital in October 1967 because of inability to assist, etc., and was found able to assist in her own defense in August 1968. After being found not guilty by reason of insanity she was returned to the Hospital. He recently received a letter from the Hospital advising that the woman was being returned to the community on a trial visit basis but no mention was made of the children. Judge Burns had a protective order issued so that the children could not be visited by the mother except under supervision by the counselor. He admitted that the Hospital had accorded him unusual courtesy by advising him of her release but noted that apparently no thought was given by the Hospital of danger to the children. He was not convinced the woman had recovered so much in six months that she posed no danger to her children.

Professor Platt advised that Dr. Treleaven and others have indicated that the long confinements invariably result from the incompetency hearing. The reason is that the Hospital cannot let them go; the person who has been declared incompetent can only be declared competent by the court. Professor Platt felt there was unanimity on the part of the Commission and on the part of the psychiatrists appearing at the Commission meeting that the court should make the decision as to the release of the defendant.

Mr. Paillette recalled that section 10 was the only section on which all of the psychiatrists present at the Commission meeting agreed, including Dr. Haugen.

Chairman Burns had two or three suggestions to make on the draft and they were essentially grammatical. He asked Professor Platt if he saw any problem in subsection (1) of section 10 in that there was no explicit allocation of the burden. He noted that in the present statute no burden was spoken of but he was somewhat concerned that since allocation of burden is mentioned in sub (2) and (3), it might be well to consider this in regard to sub (1). He suggested that Professor Platt might want to give some thought to this.

Professor Platt thought Chairman Burns was right on this point and it was his suggestion that the state have the burden of commitment and the defendant have the burden of proving that he should not be committed. He admitted that the subcommittee would probably disagree with this philosophy.

Chairman Burns asked Professor Platt to research some of the other states on this and then the subcommittee could make a determination.

Chairman Burns referred to subsection (2) of section 10 to the language "...released on supervision" and asked if any conclusion had been reached as to who would do the supervising.

Mr. Paillette stated that this had been discussed in subcommittee and it was decided to not specifically state who would do the supervising.

Professor Platt agreed, adding that if there was someone available or capable or interested, then the court could do the supervision under the draft provisions.

Mr. Knight referred to language employed to the effect that a person is no longer a "danger a "danger to himself or the person of others" and asked if this made it clear that the Commission felt that an arsonist is a danger to the person of others.

Professor Platt thought it would be clear--if the medical testimony supported this and the judge believed it, the arsonist would very obviously be dangerous to persons.

Mr. Knight asked if a burglar would be considered dangerous. He thought that under the draft a burglar who was found not guilty by reason of insanity could not be committed.

Professor Platt did not think it was a question of the specific crime involved; it is a question of what kind of a person the actor is.

Chairman Burns was of the opinion that it would be up to the court and thought it would depend upon the past history of the actor.

Chairman Burns referred to section 10, subsection (2) (a) to the language, "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...." and asked who would initiate such a hearing. He wondered if perhaps the language should be more explicit--perhaps the hearing should be upon motion of the supervisory agency.

Professor Platt noted that the order to release the individual to the community would be an order of the court and therefore he would be within the control of the court. He asked if it would be really necessary to formalize who the initiating agency would be; he felt that obviously the only person wanting to initiate a hearing would be some supervising agency.

Representative Frost felt that the individual committed would be the most likely to ask for a change.

Professor Platt stated that if there was a practical problem he would certainly want it corrected but he wondered if this particular situation could not be handled informally.

Chairman Burns was not sure there was a problem; he thought perhaps Professor Platt had answered it.

Chairman Burns referred to the second sentence in the subsection, to the language, "If the court determines that the person is affected by mental disease or defect, the court may release him on further supervision,..." and said he would prefer the language "continues to be affected". He also pointed out that the first part of section 10 subsection (2) sets out the reason for supervision of the individual as, "...the person is affected by mental disease or defect and... presents a substantial danger...but he can be controlled adequately" under supervision whereas the test for releasing under further supervision (section 10, subsection (2) (a)) is different because it is "to determine if the person is affected by mental disease or defect." Chairman Burns thought these tests should be made harmonious.

Professor Platt agreed that the test in subsection (2) (a) should repeat the original grounds set forth in subsection (2).

Chairman Burns drew attention to section 10, subsection (2) (b) which provides that the committed person "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..." and asked why it was made possible for the individual to go to different counties. He noted an individual might be placed on supervision by the court in Multnomah County but be allowed to return to his home in Salem, for instance. If the individual seeks a release or a modification of the supervision order it would seem he should go back to the original court which would know something about the case.

Professor Platt agreed that the application should be made to the court from which the person was committed.

Chairman Burns pointed out, also, that the same problem should be taken care of in section 10, subsection (3) (a) and (b).

Chairman Burns referred the attention of the members to section 10, subsection (2) (b) (See p. 4, Amend. Responsibility) and noted that "the hearing on an application for 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." He suggested that the language referring to the probation officer should be deleted and suggested the wording "the supervisory officer" could be employed.

Professor Platt felt this wording would be more appropriate. He noted, also, that the notice should be sent to the district attorney "of the county from which the confinement is ordered" and stated that this additional amendment would be made.

Mr. Clark asked if there is any problem created by the naming of the institutions. He observed that the Oregon State Penitentiary and the Oregon State Correctional Institution are named in the Penal Code, rather than the Department of Corrections.

Chairman Burns recalled that this had been discussed earlier and it was decided that when the final drafting is done perhaps the naming of specific institutions should be avoided because there may be flexibility in the kind available.

Professor Platt noted section 10 of the draft was very long and pointed out that whenever a section of the code is amended, no matter how slightly, the whole section must be set out. He thought perhaps the section could be broken down into smaller sections but he thought it would involve some very intricate references back and forth to sections 3 and 6, etc. He asked the subcommittee's opinion about this possible inconvenience to Legislative Counsel when future policy changes were desired by the Legislature.

Chairman Burns suggested that perhaps a section could be made of the first paragraph of section 10 and the language "make an order in accordance with sections 11, 12 and 13" inserted. Subsections (1), (2) and (3) could then be broken down. He thought this would partly take care of the problem.

Professor Platt thought it could be worked out but he had mixed feelings about it as it is such a coherent situation; it is such a highly interrelated procedure.

Mr. Paillette agreed that the problem would arise with any subsequent amendments once the code was enacted into law. He felt the section was well divided by subsections as far as readability is concerned. At this stage, he felt he would leave the section as drafted and said he thought clarity was more important than the length of the section.

<u>Amendments to Section 11: Mental disease or defect excluding fitness to proceed.</u>

Professor Platt noted that some language had been deleted from the section as it had been considered by the Commission. This reflected the Commission's wishes without any policy changes.

Chairman Burns asked if the competency test set forth in the section was not essentially the same as under present law.

Professor Platt agreed that it was. The earlier draft had been a little more expansive in this area.

Amendments to Section 12. Psychiatric examination of defendant on issue of fitness to proceed.

Representative Frost referred to section 12, subsection (1), to the language, "...the Superintendent of the Oregon State Hospital to designate at least one qualified psychiatrist, which designation may be or include himself..." and asked if it was felt necessary to include the words, "which designation may be or include himself".

Professor Platt replied that this was presently language contained in the statutes and for that reason he had retained it.

Professor Platt recalled that the amendment appearing in subsection (3) of section 12 and that in subsection (3) (b) reflected the direction of the Commission. He stated the amendment to subsection (3) (c) also reflected the view of the subcommittee and the Commission based on the fact that presently, as a practical matter, an incompetency hearing is requested for the defendant in order to obtain an insanity ruling and this is improper in light of Shepard v. Bowe since the two issues are not the same. Since the subcommittee had previously disapproved of similar wording, Professor Platt noted that the following language would necessarily be removed from the amendments: "During the examination the defendant shall not be required to answer questions 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."

Representative Frost referred to subsection (3) of section 12 and said he, personally, would like to see the report limited to what was set forth in subs (a), (b) and (c), eliminating the new wording "but is not necessarily limited to". When asking for an opinion just as to competency, he wondered why just an ultimate conclusion that the defendant is or is not competent would not suffice.

Professor Platt replied that the direction from the Commission (by a motion) was to specifically write in the new material.

Mr. Paillette added that the reason the Commission felt this way was that they wanted to be sure these things were included; this would be a guideline to the psychiatrist but at the same time they did not wish to tie the hands of the psychiatrist. He recalled that the psychiatrists present at the Commission meeting had said they would include this information in their report, anyway.

Representative Frost noted that the competency examination came at a pretty touchy stage in the proceedings and he noted the report of the examination was to be filed in triplicate with copies provided for the district attorney and the defense attorney. Since all that

is being decided is the ultimate question of competency to proceed with the trial, he was concerned that some report might throw in a few gratuitous comments about statements made during the examination, etc. It would be possible, he thought, to taint the whole proceeding from this point on.

Mr. Paillette observed that what happens in many counties is that when a competency examination is conducted a sanity examination is done at the same time.

Chairman Burns added that there is a very good reason for this--it involves the cost of the examination as well as the information supplied the defense attorney enabling him to decide whether or not he wants to use an insanity defense. Chairman Burns thought that 30 to 40 percent of the time both aspects will be requested by the defendant himself. He recalled that in Multnomah County it was found that each case sent to the State Hospital resulted in a bill of around $455 being received by the County from the State, most of which was room and board. Because of this, unless a case is exceptional, Multnomah County does not send the individual to the State Hospital but handles the examination locally. He thought that if two examinations were required, one for competency and another on the issue of sanity, the cost would be increased very directly, perhaps 50%, perhaps even 100%.

Representative Frost asked what kind of a report the court presently receives from the examining psychiatrist.

Professor Platt replied that it was a written report which routinely went to all parties. This, he said, has been the problem with incrimination.

Representative Frost again noted that under the draft provisions an official report would be filed in triplicate and he thought as a defense attorney he would be somewhat hesitant to request additional information regarding his client's sanity.

Professor Platt agreed because this would be waiving the client's fifth amendment right on the insanity question under Shepard v. Bowe.

Mr. Paillette recalled that Mr. Rothman, from the Bar Committee, had raised this very point at the Commission meeting in January.

Professor Platt added that the defendant, in most instances, cannot afford his own psychiatric examination and it is known that the psychiatrist when asked on competency will routinely answer also on the sanity question thus saving the defendant some expense. He did not think the day was too far away when the U. S. Supreme Court will rule that the defendant must be furnished with a psychiatrist as well as a handwriting expert, an accountant, a fingerprint expert--

a full array of experts for the indigent defendant--just as counsel and one or two other experts must now be furnished.

Professor Platt thought that if the initial report contained information regarding the defendant's sanity as well as his competency, it would have to be at the specific request of the defendant. He would thereby be waiving his fifth amendment right and would thus be entitled to this finding. If the defendant does not ask for this finding, the report would be a violation of Shepard v. Bowe if it did, in fact, give the insanity ruling.

Chairman Burns did not think the report would be a violation of Shepard v. Bowe because he did not think the Court had gone that far. Shepard v. Bowe did not arise in the context of the incompetency examination.

Professor Platt felt Shepard v. Bowe did apply to the insanity part of the competency hearing when one examination is used for both purposes.

Chairman Burns noted that in Shepard v. Bowe the state requested the defendant be examined and the court ordered the defendant to answer questions and ordered the defense counsel not to interfere.

Representative Frost was of the opinion that if the language, "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" were retained that the phrase "but is not necessarily limited to" contained in section 12 (3) could be deleted. He also felt that, tactically, it would be an error to rely upon the State Hospital to make the final determination as to whether or not the defense could interpose a plea of insanity.

Mr. Knight thought that generally when the defense attorney uses this route he really does not know himself and he wants to be assured that he is not overlooking a possible defense. If the attorney feels he really has a possible insanity defense, he thought the attorney would come in and file a motion requesting the court to allow him money for a psychiatrist.

Chairman Burns suggested having the second hald of the psychiatric report (that part pertaining to the sanity issue) go only to the defendant.

Professor Platt replied that he had considered this, also, but in Shepard v. Bowe the Court said specifically that it recognizes the fact that some states seal this kind of information so that it was received only by those entitled to the information but the Court recognized, based on experience elsewhere, that this kind of information has a way of leaking out and prohibited this approach.

Representative Frost asked if the "doctor-patient privilege" applied where the court designates a psychiatrist.

Mr. Knight replied that there is no "doctor-patient privilege" in criminal cases; it comes up only in civil cases.

Representative Frost asked if it would solve the problem to say that the court shall provide for a qualified psychiatrist nominated by the defendant and approved by the court; actually make him the defense psychiatrist.

Mr. Knight stated that under the theory of the competency hearing the psychiatrist is not a defense psychiatrist, he is a court psychiatrist.

Representative Frost pointed out, however, that the court psychiatrist is asked to employ the dual approach and come up with a competency and a sanity ruling, thus leaving the defendant wide open to the state.

Professor Platt revealed that in an article he was writing he was proposing the removal of the court appointed psychiatrist from the proceedings, putting the burden of incompetency on the court. He said he could see no need to have a psychiatrist at all at a competency hearing and could see real drawbacks to it as far as the defendant was concerned. He felt that if anything could be said to be a legal determination, based on concepts of due process and the practicalities of trying someone, competency certainly is a legal question. Psychiatrists will admit, he said, that none of them even ask what a defendant has to do in defending himself or in assisting at his trial. They ask medical, psychiatric, theoretical, scientific questions that have no relationship to what the defendant needs when he gets into the courtroom. Professor Platt felt that it was the judge who does have this knowledge; his common sense based on his observation of the defendant, conversation with counsel, conferences with lay witnesses, etc., qualifies him to make the decision. This would eliminate psychiatrists altogether and save a good deal of money, too. He thought the biggest question would be as to how a judge could tell about the psychiatric or mental life of the defendant but he did not think this was the importan question, which is: Can the defendant help his counsel? The whole thrust of the criminal trial is to get the defendant to trial and too often he felt the psychiatrist is not interested in this at all.

Chairman Burns asked Professor Platt if he would be able to find cases in which the issue was the propriety of a court's ruling where it made its ruling in the absence of expert testimony.

Professor Platt replied that there was an Oregon case which arose on habeas corpus in the federal court. The federal court held the court did not have to pay any attention to the psychiatrist; he was to be considered as just another witness for the court.

Mr. Clark favored this route, personally, and said he would like to see the subcommittee go this way.

Representative Frost observed that the competency to assist in a two week securities fraud case would be a lot different than assisting yourself in a one-day assault and battery case.

Professor Platt agreed and asked who would know this better, the psychiatrist or the court.

Representative Frost agreed that Professor Platt had a good point.

Mr. Paillette asked how a judge was to tell the difference between an uncooperative defendant and one who is incompetent to assist.

Professor Platt thought that if the judge were reasonably sure it was just surliness, he would allow the defendant to go to trial. He thought in 99% of the cases the judge could make a determination and in the instances where the judge was in doubt, there would be nothing to prevent him from going out and bringing in a psychiatrist to help him with the decision. It was Professor Platt's suggestion that the code not formalize and require that the judge appoint a psychiatrist and that the decision be shifted entirely to the court.

Mr. Paillette suggested changing the word "shall" to "may" where it is employed in the section to require court retention of a psychiatrist.

Professor Platt replied that the proposed draft did not reflect any of this thinking; the draft preceded his thinking in this regard. He felt it would take a complete redrafting of the language to reflect the preference for the court to make the determination without the benefit of the psychiatrist.

Mr. Clark was in favor of the subcommittee making this policy decision and move toward redrafting.

Chairman Burns requested Professor Platt to draft another section 12 and an alternate section 12, setting out both approaches.

Chairman Burns related that presently when the defendant or the state raises the question of competency, a psychiatrist is appointed. He felt this arises because the judge feels that if he does not appoint one, he might be violating the rights of the defendant in some way. It has become a habit to appoint the psychiatrist without thinking too much about it, he said.

Mr. Paillette pointed out that the procedure also makes a record, not only for the court but also for the lawyer, and this becomes important when there are so many court appointed cases.

Professor Platt contended that the judge would be more aware of the self-incrimination rights of a defendant than anyone else would be.

Mr. Knight asked if there was reason for the competency determination to be made earlier, i.e., before the preliminary hearing or in this area.

Chairman Burns was concerned that the situation might arise where the competency decision would be made by a justice of the peace. He repeated his request that Professor Platt draft two versions of section 12 and this met with the members' approval.

Mr. Paillette asked if further consideration or action should be taken on any of the provisions in section 12, particularly with regard to the new language in subsection (3).

It was decided to wait until Professor Platt brought in his new drafts of section 12 and then to compare them. Further decisions were postponed until that time.

Consideration of Inchoate Crimes; P.D. No. 1; March 1969, was postponed until the next meeting of the subcommittee which was scheduled for Tuesday, April 15, 1969, 6:00 p.m., Room 421 Capitol Building.

The meeting was adjourned at 3:45 p.m.

Respectfully submitted,

Maxine Bartruff, Clerk
Criminal Law Revision Commission