Tape No. 75

Side 2 only

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 3

Eighth Meeting, June 4, 1969

Minutes

Members Present: Judge James M. Burns, Chairman

Absent: 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

Others Present: Miss Kathleen Beaufait, Deputy Legislative Counsel

The meeting was called to order by Chairman Burns at 2:15 p.m., Room 315, Capitol Building, Salem.

Responsibility; 2nd Amendments to P.D. No. 4. (Article 5)

Mr. Paillette advised that the Responsibility Draft had been previously considered by the subcommittee at its meeting of April 4, 1969.

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

Professor Platt explained that amended section 7 reflects the changes directed by the subcommittee at the last meeting. He noted that all references to fifth amendment problems have been eliminated the subsection which had stated that the defendant "shall not be required to answer questions concerning the defendant's conduct at or immediately near the time of the commission of the crime charged" and the reference to State v. Phillips, where it was held that the state has a right to a mental examination of the defendant who raises a defense of insanity. The effect is that whatever the fifth amendment law is after Shepard v. Bowe is still in effect and whatever the law is after State v. Phillips is still in effect.

Professor Platt pointed out that another adjustment was made to the section by the insertion of the language: "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. This was language generally agreed upon by the subcommittee members.

Chairman Burns felt the thing to do was to pass along section 7 as amended to the full Commission with the recommendation that they consider it and any subcommittee members not present at today's meeting could make objections at that time. He felt that the minutes of the meeting would show that there was no intent to avoid Shepard v. Bowe, which could not be done anyway short of a constitutional change.

Chairman Burns cited the circumstances surrounding a recent case he had heard. He had issued an order containing the Shepard v. Bowe restrictions to the psychiatrist the state had asked to examine the defendant on its behalf--Dr. Ivor Campbell of Portland. Dr. Campbell conducted the examination without any apparent difficulty. This was an instance where having the defendant's attorney present during the psychiatric examination apparently did not make much difference.

Professor Platt observed that section 7 was considerably changed and the commentary will necessarily be changed also. He expressed concern about the relation of his original comments and the notes and comments that will now be sent to the Commission with the amended section. It seemed to him that it might be useful to the Commission to have almost a full commentary again with the explanation that Shepard v. Bowe was discussed at length and that it was decided in subcommittee to eliminate some of the language in the earlier draft. After the Commission adopts the section, he said he did not think that it would be appropriate to put an argumentative commentary in the final draft.

Mr. Paillette felt it would be in order to have the full commentary in the draft when it is considered by the Commission but he was not so sure it should be included afterwards.

Chairman Burns also thought the Commission should be informed as to what the arguments and counter-arguments were.

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

Professor Platt expressed concern about the language contained in section 10, feeling it did not say what was intended in the best way possible. He noted that the instructions he had received from the subcommittee the last time were language changes and corrections to clarify and eliminate some inappropriate references to the probation officer, etc. Professor Platt referred to the last sentence in section 10, subsection (1) and felt it could be improved upon. Here he felt the draft was responsive to a point that had been raised by Chairman Burns as to allocation of burden in a couple of instances where the draft had been silent. The court may discharge a defendant

if it is found the person is mentally defective but no longer dangerous or if he is found no longer defective. The intent of the amendment is to solve the problem if there is a burden when the issue of the original hearing is whether or not to discharge the person and the state seeks committal or discharge on supervision.

Chairman Burns understood that as soon as there was a "not guilty by reason of insanity" verdict or finding, there is automatically a hearing--there is a determination, whether or not there is a separate hearing. (Chairman Burns advised that since the subcommittee had been in this area, he had made a record in each case he had had as to whether or not the defendant wished a separate hearing or whether he wished to have the evidence that came in considered on the subsequent question. His impression is that except in very rare instances, a separate hearing would not be requested.)

Chairman Burns stated that in such hearings he felt the burden should be on the state.

Professor Platt reviewed by stating the upon receiving a "not guilty by reason of insanity" verdict, a judge has three options: he may discharge the defendant entirely, he may release the defendant on supervision or he may commit the defendant to the Oregon State Hospital. Subsection (1) of section 10 deals with the situation where the court discharges entirely; subsection (2) deals with what the court does at the time it wants to release on supervision; and subsection (3) relates to commitment.

Miss Beaufait referred to the subsection relating to commitment and wondered if the commitment should not be to the Mental Health Division rather than to the Oregon State Hospital.

Chairman Burns recalled that there had been some discussion on this point and the decision of the subcommittee had been to leave the language as it is now and to look at it again when the Commission is farther along in its work.

Professor Platt noted, also, that the present statutes when they refer to commitment refer to the Oregon State Hospital.

Miss Beaufait referred to section 7, to the language "...may order the defendant committed to a state institution..." and asked if this language referred to the State Hospital.

Chairman Burns replied that what the subcommittee had in mind was to provide flexibility so that a court could send the defendant to the State Hospital or to Dammasch or to a suitable private or public facility in the county.

Miss Beaufait observed that they could also be sent to the State Penitentiary or Correctional Institution since the section reads "a state institution".

Chairman Burns agreed and again stated that the desirability was flexibility in the sense that normally what has been the practice in the past was that if the defendant were sent anyplace, he was sent to the Oregon State Hospital. There has been objection to this in some cases, primarily due to the expense factor.

Professor Platt admitted that the defendant could be committed to the State Penitentiary if for some reason there was an appropriate and convenient facility there.

Chairman Burns observed that the second paragraph of section 10 could be improved upon in respect to the burden of proof language; it could be made active rather than passive.

Mr. Paillette commented that what bothered him in regard to the burden of proof on the state was that there would be a trial in which the insanity defense had been raised and the state would have been resisting this--trying to disprove this defense. Now that the defendant is acquitted, suddenly the state has to "shift gears" and take the opposite stance. The state must come forward and take the burden of proving the defendant is suffering from a mental defect and should be committed.

Chairman Burns did not feel this was inconsistent. At the trial the state is saying the defendant knew the difference between right and wrong at the time he committed the act. Assuming the jury finds the defendant did not know this, the question shifts to whether or not the defendant is presently dangerous to himself or to others.

Miss Beaufait asked if, in the case of a jury trial, the jury is to be informed that there is to be a separate hearing on this subject if the defendant is acquitted by reason of insanity.

Chairman Burns replied that this was one of the areas that had not been fully discussed and decided upon.

Miss Beaufait added that this matter came up in the Jury Project Study because one of the cases was an insanity case and the jurors spent a great deal of time discussing the issue.

Professor Platt said that he was aware of this study and that he had done a good deal of research which does not appear anyplace since there is no draft provision for this. He came to the conclusion that there ought to be in the instruction to the jurors what

is likely to happen or will happen if they bring in an insanity verdict. He advised that there is a case in Oregon that says this is inappropriate and that the jury may not be instructed on this. He did not think this was decided on a constitutional issue and felt that by statute thedecision could be reversed. Personally, he felt this would be desirable although he did not think it would make too much difference because from the reports he had read of the Jury Project Study, the jurors knew, anyhow, what would happen if they brought in an insanity verdict.

Miss Beaufait commented that this was not her understanding and whether or not such an instruction would make a difference in the number of NGI verdicts was not tested. This was not a variable. One of the impressions she had is that such instruction would have shortened the jury deliberation considerably as the problem would have been resolved for them and they would not have had to speculate.

Chairman Burns questioned that at the outset there was need to place the burden of proof.

Professor Platt observed that the earlier draft did not have this provision in the section and, as he recalled, it had been Chairman Burns who had brought up the question.

Mr. Paillette referred the members to the discussion on this set out in the subcommittee minutes of April 4, 1969, page 12.

Chairman Burns thought perhaps the problem was not that great -- actually, right now nothing is said about the burden. The defendant has the burden under Newton v. Brooks when he tries to get out but at the initial determination if the court finds the person dangerous, etc., he is sent to the Hospital. He suggested sending the section along to the Commission as it is drafted and raise the question when it is considered there.

Professor Platt referred to section 10, subsection (2) (a) to the language, "If the court determines that the person continues to be a substantial danger to himself or . . . . " and said he thought the phrase "affected by mental disease or defect and is" should be inserted so that the sentence would read: "If the court determines that the person continues to be affected by mental disease or defect and is a substantial danger to himself or . . . ". Otherwise, Professor Platt was afraid there might be the implication that although the person may be no longer affected by mental disease or defect but is a substantial danger to himself, he may be retained. This is not the purpose and the insertion of the above language would clarify this.

Miss Beaufait thought there were a couple of other drafting problems, also. The burden of proof phrase, if read the way it appears in the text, is lost in the section that really tells when and how a court makes an order and which sets out conditions for release.

Professor Platt agreed with this comment and added that this was a result of redrafting and trying to allocate the burden of proof in subsection (1).

Miss Beaufait suggested that this might be a separate section which could state that: "in proceedings under section 10 of this Act the state will have the burden of proving by a preponderance of the evidence . . . . ".

Professor Plat replied that there are so many different allocations that it becomes complicated. In some places the defendant has the burden; it is dependent upon what the Hospital recommends.

Chairman Burns pointed out that if it were decided to remove the last sentence from subsection (1) of section 10, the problem would be solved. He asked if it would be bad drafting procedure when the phrase "affected by mental disease or defect and thereby a substantial danger" is first used to put in parenthesis "hereafter meaning dangerous"?

Professor Platt replied that the difficulty was that they become separated later and must be stated in the alternative thus eluding a definition of this type.

Mis Beaufait referred to subsection (2) of section 10 and asked why the subsection was broken down by (a) and (b) instead of numbering the subsections. She noted that in drafting, generally, the a's and b's come because there are alternatives under the subsections, etc.

Professor Platt answered that the draft had originally been based on that of California and this probably reflects the structure of that draft.

Chairman Burns added that (1) covers release, (2) covers supervising and (3) covers commitment.

Professor Platt advised that when the policy decisions were all made he would like to take another look at the structure of the whole draft because numerous policy changes have affected it.

Chairman Burns understood that basically under the provisions of subsection (2) of section 10 if there is a rehearing, the burden of committing the man to the Hospital after he had once been released would be on the state. The burden is on the defendant if he wants to be released earlier than five years. Under subsection (3) the burden shifts back and forth depending on whether the Hospital favors or opposes release after he has been committed.

Professor Platt agreed — if the Hospital favors release, the burden goes to the state to counter this; where the Hospital favors continued commitment, the defendant must prove that he should be released.

Professor Platt referred to subsection (5) (c), the last sentence appearing on page 7 of the second amendments, and stated that just prior

to this paragraph he would insert language to this effect: "If a person is on release on supervision at the end of the five year period and the state wishes to have this release on supervision continued, the state must prove by a preponderance of the evidence that the person on release continues to be affected by mental disease and defect and continues to be dangerous to himself or the person of others but can be controlled . . . . ". He felt this would cover a hiatus in this particular provision.

Chairman Burns suggested that this language should be inserted at the end of subsection (2) (b) on page 4 of the second amendments as this subsection deals with release on supervision. He was not sure, however, that the subcommittee, as a matter of policy, would agree with this. If the individual has not harmed anyone for five years, why should he not be turned loose? He suggested that Professor Platt redraft it, placing the insert on page 4, prior to subsection (3) and a decision can be made when the Commission considers the draft.

Professor Platt advised that the California draft had been silent on this matter and the point brought out by Chairman Burns might be the reason for the silence although no reason is given in their commentary.

Chairman Burns again stated that the full Commission could make the policy decision when considering the draft and remarked that he expected a good deal of controversy in respect to the section anyway when the State Hospital representatives studied the draft.

Mr. Paillette noted that copies of the draft had been provided Hospital officials so that they might study it.

Professor Platt replied to a query by Miss Beaufait by explaining that under the draft provisions the Hospital must keep those committed at least ninety days plus the fact that the Hospital is given some extra duties in respect to keeping track of how long the individual has been committed in order to inform the court ahead of time as to the release date. This administrative burden will cost some money. In addition, there are a couple of new policies in respect to release. The draft takes away from the State Hospital the authority to release and the courts are given this authority. He noted that the psychiatrists testifying before the Commission agreed with the draft policy; they agreed unanimously that this should be a legal decision by the court, not a medical decision by the Hospital.

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

Professor Platt explained that the amendments eliminated the fifth amendment references contained in the first amendments (to the effect

that during the examination the defendant shall not be required to answer questions the answer to which might tend to incriminate him).

The Alternative Section 12 set out on pages 10-11 removes the mandatory provisions that the court must appoint a psychiatrist to examine on the incompetency issue. It allows the court discretion to consult a psychiatrist; otherwise, the court may decide the issue itself. He pointed out the draft contained the language "any witness" in subsection (1) which, he felt, made the intent very explicit.

Miss Beaufait referred to the language "The psychiatrist may employ any method in the examination which is accepted by the medical profession" appearing in the alternate form of section 12 and asked why it was needed.

Professor Platt noted this provision appeared in both versions of section 12. He added that most statutes throughout the country made no reference whatsoever as to the standards for the examination and this was intended to be a general reference to some standard by referring to what would be accepted by the medical profession in conducting one of these examinations.

Miss Beaufait wondered why a psychiatrist would be expected to employ a method not accepted by the medical profession when he is a member of the profession, subject to discipline by that profession for any misconduct.

Professor Platt replied that while it is not true in Oregon, a psychiatrist is not necessarily a member of the medical profession everywhere. He recalled that this had been discussed at an earlier meeting attended by psychiatrists and they had not objected to the language. He was not certain now, however, that the statement said anything.

Miss Beaufait brought out the point that the language might also place a limitation on the treatment or examination because of differences in opinion within the medical profession.

Professor Platt had no objection to the elimination of the language. He did not feel the section would be harmed by the deletion because he thought subsection (3) contained a pretty clear indication of the type of things desired in the examination.

Miss Beaufait thought the requirement of "a description of the nature of the examination" would be very helpful to the judge.

Chairman Burns suggested the retention of subsection (2) of section 12 as he was reluctant to take it out because of the absence of the other subcommittee members. He called the members' attention to Section 4.05 of the Model Penal Code.

Mr. Paillette read from the MPC, §4.05 (2):

> "In any 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."

Chairman Burns observed that, basically, both drafts of section 12 were silent on Shepard v. Bowe, neither taking away nor adding.

Professor Platt agreed this was correct, noting that it was his contention that Shepard v. Bowe applied here while the subcommittee contended that it does not. He asked if the subcommittee desired to leave section 12 in the alternative or to adopt the section.

Chairman Burns thought the section should be left in the alternative. If the full subcommittee were present he would favor making a decision but since they were not, he felt both approaches should be submitted to the full Commission.

Professor Platt commented that he would like to see the Commission adopt the provision giving the judge discretion about calling for assistance on an incompetence hearing. He noted that there had been some misgivings among the subcommittee members about 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 " because this means the reversal of the universal practice of responding on both issues although the issue for which the psychiatrist was called in was that of incompetency.

Chairman Burns advised that Judge Bryson has recently been changing policy in that regard, partly in response to Shepard v. Bowe. Some of his orders now read to report only on incompetency not on the defendant's responsibility.

Professor Platt recalled that the point had one time been made that the change in practice would double the cost of the examinations but he felt that the Shepard v. Bowe situation was so serious that where the incrimination issue can be avoided, it should be avoided.

Chairman Burns asked if under the draft wording the defendant could not waive the protection. He thought perhaps it could read "The report shall not contain . . . unless the defendant consents to have it so contain", or something to this effect.

Professor Platt noted that this was why the defendant asked for the compentency hearing in the first place, really -- the attorney wants to know about his client's mental responsibility and he knows that the report will give him both findings, cheaply. He did not think it would hurt anything to have the report contain findings on both issues unless the defendant objected. He did feel that the defendant should have to do something positive if both findings were to be included. Professor Platt pointed out, however, that there might be a question as to whether a defendant could waive a right if he was, in fact, insane. The assumption has been all along that he had some capacity.

Miss Beaufait suggested that it could be set out so that "unless the defendant asks and the court specifically requests" certain information it will not be included in the report.

Professor Platt thought there might be an instance where a court might take an action which was actually in contradiction to what the defendant's desires were. Since it is a self-incrimination problem, he thought the defendant should be considered primarily.

Miss Beaufait suggested then, that the defendant must request the report and the court then specifically direct the psychiatrist. If the defendant is obviously in a bad state, the court could then decide whether or not to go along with his request.

Professor Platt observed that this would at least allow the defendant to trigger the action. It would also stop him from waiving his right if the judge felt he was obviously not responsible.

Mr. Paillette felt that Miss Beaufait's suggestion was good from the standpoint of the day-to-day practice of the attorney who is in court representing the defendant. It still gives him the availability of the double-barrelled psychiatric examination.

Chairman Burns favored drafting the section in this manner. The psychiatrist, he noted, would not report on the responsibility aspect unless the court directs him to and unless the defendant consents to this.

Mr. Paillette thought it should denote a stronger action than "consent" by the defendant -- perhaps it should be a "request" by the defendant.

Chairman Burns agreed to this,suggesting the language, "Except where the court and the defendant both request to the contrary, the report shall not . . . ".

Inchoate Crimes; P.D. No. 1; March 1969

Chairman Burns recalled that there had been some fairly serious problems left to consider particularly in regard to conspiracy. He hesitated considering the draft without the presence of other subcommittee members.

Mr. Paillette advised that the letter and memorandum on the draft from the office of Sidney Lezak had been distributed as Chairman Burns had requested.

Professor Platt referred to the letter written by Mr. Lezak and to the reference to Kotteakos v. United States, stating that he did not understand what Mr. Lezak meant. Professor Platt did not understand the case to be as described in the letter and thought perhaps there was a mixup in the cases cited.

Chairman Burns felt that further consideration of the draft was not desirable -- that another subcommittee meeting should be set up as soon as possible.

Mr. Paillette commented that as soon as the desired changes were made in the Responsibility Draft and the commentary revised, it would be ready for the full Commission.

Professor Platt advised that year-end work at the University, a Judicial Conference and the upcoming Commission meeting would delay his work on the draft and it would be at least three weeks before he could have it ready.

Chairman Burns suggested that the next subcommittee meeting be scheduled for Monday, June 30. Mr. Paillette will check this date out with the other subcommittee members and advise.

The meeting was adjourned at 3:20 p.m.

Respectfully submitted,

Maxine Bartruff, Clerk
Criminal Law Revision Commission