Tape No. 36
All of Side 1; 1 to 225 of Side 2

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 3

Tenth Meeting, September 30, 1969

Members Present: Representative David G. Frost
Mr. Frank D. Knight

Delayed: Judge James M. Burns, Chairman

Absent: Mr. Donald E. Clark

Staff Present: Professor George Platt, Reporter
Mr. Donald L. Paillette, Project Director

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Inasmuch as Judge James M. Burns, Chairman of Subcommittee No. 3, had been delayed in court, Mr. Knight presided over the meeting until his arrival.

INCHOATE CRIMES; Preliminary Draft No. 1; March 1969

Section 8. Conspiracy with multiple criminal objectives. Professor Platt reviewed the action of the subcommittee with respect to the Inchoate Crimes Article at its meetings on April 15, 1969, and July 18, 1969. He recounted that the subcommittee had agreed to pass the draft on to the Commission with the exception of sections 8, 13 and 14. Section 8, he said, had been held in abeyance pending an agreement to be reached between himself and Mr. Knight who objected to the section because he read it to mean that once a person had been tried for conspiracy, he could not be tried for the substantive crime because double jeopardy principles might apply.

Professor Platt said he and Mr. Knight had discussed section 8 at some length by telephone and had finally agreed to leave the section as drafted. In his opinion a person could still be convicted of a substantive crime even though acquitted of a conspiracy charge connected with the same crime. He said he found it impossible to suggest a method for carving out the double jeopardy situation which concerned Mr. Knight.

Section 8, he said, posed a basic policy choice between providing for conviction of several conspiracy charges arising out of the same agreement or one such charge. If the latter course were taken, there was a remote risk of a second conspiracy charge being brought and double jeopardy being raised successfully as a defense but he nevertheless recommended that the section remain as drafted. It seemed to him the best policy was to prosecute the defendant just once for his criminal plans.

Mr. Knight said most of his objection would be taken care of if it was clearly understood that when the draft referred to a conspiracy charge, it was talking only about being charged with the crime of conspiracy and did not refer to being charged as an accomplice or an accessory before the fact to a substantive crime. He wanted to make certain that if the defendant were a conspirator to several substantive crimes, he could be tried as a conspirator and would not then have a double jeopardy defense available to him against further charges arising from the conspiracy.

Mr. Paillette commented that under the "different transaction test," there would certainly be a different transaction if the prosecutor moved from a conspiracy charge into a charge for a completed substantive crime and under the "same evidence test," the evidence would necessarily be different for the two charges.

After further discussion, the committee agreed to pass section 8 on to the Commission for a final decision.

Section 13. Multiple convictions barred in inchoate crimes. Section 13, Professor Platt explained, set forth the relationship between the attempt and the completed substantive crime. It provided that although the evidence on the charge of attempt showed the substantive crime had been completed, the defendant could still be convicted of attempt. This, he said, reflected present Oregon law although there were some cases to the contrary which said that if the crime had been completed, the attempt merged with the crime and the defendant could not therefore be convicted of attempt.

Subsection (4) provided that the state could charge and prosecute for both the attempt and the substantive crime, but the defendant could not be convicted on both charges; i.e., the state could only convict on one of the charges but it could proceed and prosecute on all of them.

Professor Platt called attention to a choice to be made by the committee in subsection (3) wherein brackets were placed around the phrase "or conspiracy to commit that offense." The background for the provision in subsection (3), he said, was that at common law all three of the inchoate crimes -- attempt, solicitation and conspiracy -- merged into the substantive crime; e.g., if the defendant were convicted of the substantive crime, he could not be convicted of conspiracy, solicitation or attempt. In this country the charge of conspiracy in nearly all jurisdictions had been separated out as not merging with the substantive crime and many states permitted, for example, prosecution for conspiracy to rob a bank, prosecution for robbing the bank and conviction for both charges as well as consecutive sentences for both convictions.

His recommendation was that conspiracy be treated in the same manner as solicitation and attempt; namely, the state would be required to take an election and not be allowed to convict the defendant of both conspiracy and the substantive crime. The traditional explanation of why conspiracy was singled out for treatment different than that for solicitation or attempt -- that is, to allow conviction for both the conspiracy and the substantive crime -- was that the conspiracy was more serious than the other inchoate crimes because of the multiplicity of parties involved and therefore should stand alone as a separate crime in addition to the substantive offense. One answer to that theory, he said, was that it was ridiculous to think that the conspiracy could be more dangerous than the completion of the crime itself.

Representative Frost said he thought it would be unwise to make a different penalty structure for a conspiracy than for a solicitation or an attempt.

Mr. Knight was concerned that section 8, when read in conjunction with section 13, would preclude the state from trying a man for a bank robbery committed in Eugene if he were acquitted on a conspiracy charge of conspiring to rob a Salem bank and where the bank robbery in both Eugene and Salem had been planned in the same conspiracy. He asked if the defendant, following acquittal of the conspiracy charge, could then be tried on the substantive crime of robbing the Eugene bank or whether the defense of double jeopardy would be available to him because both the Eugene and the Salem robbery merged into one conspiracy charge. Professor Platt replied that he could indeed be tried for the substantive crime and he had no doubt that the state could also introduce evidence of the existence of the conspiracy, since conspiracy would not be charged in that indictment and he was not being tried for conspiracy.

Representative Frost moved that the brackets in subsection (3) be removed from the phrase "or conspiracy to commit that offense" and that the phrase be included as part of the subsection. Motion carried.

Representative Frost asked if subsection (4) would lead to a Pirkey situation by permitting the prosecutor to choose among a variety of penalties, particularly if the situation should arise where prosecution of a conspiracy charge would result in a greater penalty than prosecution of the crime.

Professor Platt said he hoped the committee would adopt section 14 for that reason. He called attention to the commentary to section 14 on page 70 of the draft wherein it was explained that section 14 would work a major change in the punishment for conspiracy by equating the maximum penalty for the conspiracy with the maximum for the substantive crime.

Mr. Paillette commented that section 13 could not raise a Pirkey situation unless there was both a felony and a misdemeanor growing out of the same acts from which the district attorney or grand jury could choose indiscriminately. The mere fact that a person could be charged with either of two different felonies would not raise a Pirkey problem.

Professor Platt noted that section 14, if adopted, would solve the problem because it would set the penalty in relation to the most serious crime conspired to, attempted or solicited.

Representative Frost agreed that section 14 would take care of the problem he had raised and moved that section 13 be approved as amended. Motion carried.

Section 14. Grading of criminal attempt, solicitation and conspiracy. Professor Platt said that under section 14 if a person conspired to a murder, bank robbery and a couple of lesser crimes and was thereafter convicted of conspiracy, the penalty would be tied to the murder charge because that was the most serious crime conspired to. There was one exception, however, which was derived from Model Penal Code section 5.05 (1) and that was that if it was a first degree murder that was conspired to, the penalty would be dropped to that of second degree murder. Apparently, he said, the Model Penal Code drafters felt that the penalty for first degree murder was too severe for a conspiracy charge. The reasoning behind this provision, Professor Platt said, could also be that the Model Penal Code as drafted encompassed capital punishment and first degree murder under the MPC resulted in capital punishment. Inasmuch as there was no capital punishment in Oregon, there was no reason for reducing the penalty in the Oregon code. He suggested that the committee might want to consider leaving a conspiracy to commit first degree murder with a first degree felony penalty.

Mr. Knight moved to strike the last sentence of section 14 because of Professor Platt's comments. Vote was not taken on this motion.

Representative Frost said he could not equate the danger to society arising from an attempt, solicitation or conspiracy with that of an actually completed crime.

Mr. Paillette expressed agreement and noted that from the standpoint of the day-to-day business in a district attorney's office, the removal of the last sentence of section 14 would take away a great deal of the prosecutor's bargaining power because there would not be a lesser charge available to the defendant. He said he could not see the value in forcing a defense attorney to advise his client to plead guilty to an attempt when the maximum penalty would be the same as for the completed crime. He expressed the view that this course would do no favor to either the state or the defendant.

Professor Platt commented that the Model Penal Code approach was not designed with the practical problems of the "cop out" in mind. The provision stemmed from the general philosophy of penalizing the dangerousness of the personality, the theory being that if that person failed in completion of the crime the first time, he would undoubtedly attempt the same crime again and again until he finally accomplished his goal. Secondly, he said, the Model Penal Code acknowledged that making the penalty for attempt the same as the penalty for murder was not a great deterrent. The MPC approach was to key the penalty to the dangerousness of the person; because he attempted and failed was no reason to believe he was less dangerous to society than if he had succeeded on his first attempt.

Representative Frost maintained that the Model Penal Code theory was erroneous. Planning to commit a murder and actually committing one were two entirely different matters, he said. A man might well plan a murder but when the time came to commit it, he might lose his nerve and abandon his plans; yet this Article would still punish him. Professor Platt explained that if he withdrew and frustrated the plans of the conspiracy, he could escape the conspiracy charge entirely. If his co-conspirator later committed the crime, the person could then be charged with conspiracy, but if he thwarted the plans of the conspiracy completely, Professor Platt saw no reason why he should be punished.

Mr. Paillette said it seemed to him that even though the crime charged had three penalty degrees, he could see an advantage in having section 14 available from the standpoint of a negotiated plea. If a man were charged with robbery in the first degree, he might be more inclined to plead to an attempted robbery than to plead to robbery in the second degree simply because the plea might sound better to him, he might feel that the possibility of probation would be better or for any number of reasons.

In an example where a person planned to kill another, pointed the gun, fired and missed, then decided he was glad he had failed, walked away and decided never to try again, Representative Frost contended that a lesser penalty than attempted murder should be available to him. Professor Platt believed this was a matter for the judge to decide. He noted that the statute would not contain a fixed term penalty; it would fix the maximum but the judge could establish a lesser penalty.

Mr. Knight said that a better example of an attempted crime and one which occurred more frequently was the situation where the offender was caught while prying open the door of a warehouse. Under the present statute the maximum penalty for attempted burglary not in a dwelling was five years as opposed to the possibility of a ten year sentence for burglary. As a practical matter, the judge in determining the sentence, would treat him as if he had actually broken into the the building and then determine, because of his background, whether he should be given probation or a sentence.

Representative Frost suggested that the conspiracy penalty be set at one-half of the maximum for the substantive crime. Professor Platt commented that there were many states which adopted that approach. Mr. Knight remarked that it would be necessary to include some type of exclusion such as "unless another penalty is specifically provided" because some crimes -- OMFP, for example -- said anyone "who obtains or attempts to obtain" and the penalty for that crime was contained in the statute itself.

Professor Platt recommended that there be no language in the criminal code concerning attempted crimes except in the Inchoate Crimes Article. To take a different course, he said, would be an unnecessary proliferation of the variation of penalties throughout the present code.

Representative Frost moved that section 14 be redrafted to reflect a maximum penalty of one-half the penalty for the crime which was the object of the attempt, solicitation or conspiracy. This motion was subsequently withdrawn.

Mr. Knight asked how the assault with intent to kill section would be drafted in the proposed code. Mr. Paillette replied that the draft contained no section for this crime. Mr. Knight pointed out that the Supreme Court had ruled that assault with intent to kill was attempted homicide. Representative Frost said this posed an interesting question and asked what treatment should be given an aggravated assault. Professor Platt replied that this type of aggravated assault was really attempted murder and he would so treat it.

Mr. Knight commented that under Representative Frost's motion a man could get life for first degree murder but if charged with assault to commit first degree murder, he could only get half a life sentence. Professor Platt asked if a life penalty would be included in the proposed code and Mr. Paillette replied that he would expect the code to retain a life penalty for first degree murder. Professor Platt remarked that the impracticality of imposing a sentence for half a lifetime may have been one of the reasons why the Model Penal Code reporters had used the language contained in the last sentence of section 14. He suggested that it might be possible to leave the second degree penalty in section 14 and attach the one-half formula thereto for crimes other than first degree murder.

Mr. Paillette pointed out that the Commission's decisions with respect to classification and grading of offenses would have a distinct bearing on section 14. Michigan, he said, treated attempt, solicitation and conspiracy in separate sections and included a penalty in each one. For example, under "attempt" they said it was a Class A felony if the defendant attempted to aid in the commission of a murder in the first degree. This gave the judge all the options available for the highest grade of felony so that the defendant could receive life imprisonment for an attempted murder. This approach, if adopted, would not change Oregon law from the standpoint of assault with intent to kill.

After additional discussion, Representative Frost suggested that further consideration of section 14 be deferred until the Commission adopted the grading system for the proposed code. He withdrew his previous motion and moved that section 14 be deleted from the draft under consideration and that it be referred to the sentencing and grading subcommittee. The motion carried.

Possession of instruments of crime. Professor Platt explained that he had not drafted a section covering possession of instruments of crime because he did not know how the subcommittee would want to treat the subject. He noted that the Commission had postponed action on section 4, 5, 6 and 9 of Forgery and Related Offenses, Preliminary Draft No. 2, because those sections dealt with crimes defined in terms of possession. The Commission had decided to postpone action on possessory crimes until the subcommittee dealing with the Article on Inchoate Crimes completed its work. [See Commission Minutes, February 22, 1969, pp. 18-21, 26-28; June 17, 1969, pp. 29, 30.] Professor Platt said his personal predilection would be to keep all inchoate crimes in one section. He called attention to the Model Penal Code sections dealing with this subject on pages 75 and 76 of the draft.

Representative Frost remarked that possession of instruments of crime would encompass possession of firearms which could be an "explosive" subject. Professor Platt replied that the phrase in section 5.06 (1) of the MPC which said "if he possesses any instrument of crime with purpose to employ it criminally" would exempt sporting rifles and at least made an attempt to circumvent the legitimate possession of weapons.

Representative Frost commented that Oregon's present approach to possession of firearms was not a bad one in that it provided for enhanced penalties, assuming there was a deterrent factor involved in the penalty.

Chairman Burns arrived at this point and presided over the remainder of the meeting.

Mr. Paillette advised that a Firearms Article had been drafted. One of the problems which arose in drafting the Article, he said, was whether enhanced penalties, assuming the Commission recommended their retention, should be treated in the Firearms Article or included as part of the penalty and sentencing Articles. His personal preference was to place them in the penalty sections and Professor Platt expressed agreement.

Mr. Paillette indicated that the Firearms Article would be presented to give the Commission a clear choice between treating firearms as instruments of crime or having a separate Article dealing specifically with that specialized subject. He said he was inclined

to agree that forgery devices could be treated in the Inchoate Crimes Article but suggested that the committee might want to consider a separate section on possession of burglar's tools. He called attention to section 4 of Tentative Draft No. 1, Burglary and Criminal Trespass, covering possession of burglar's tools which had been tentatively approved by the Commission with the caveat that the section might be unnecessary, depending on the provisions of the Inchoate Crimes Article. The section read:

> "(1) A person commits the crime of possession of burglar's tools if he possesses any burglar tool with the intent to use the tool or knowing that some person intends to use the tool to commit or facilitate a forcible entry into premises or theft by a physical taking.
>
> "(2) 'Burglar tool' means explosive, tool, instrument or other article adapted, designed or commonly used for committing or facilitating a forcible entry into premises or theft by a physical taking."

Mr. Paillette commented that the state under the proposed section would have to prove not only possession but also guilty intent to use the tools. He was critical of MPC section 5.06 because it contained a presumption of intent to use the weapon criminally. He pointed out that the Commission thus far had treaded very lightly with respect to creating presumptions of guilt or presumptions of intent and indicated he felt this was sound policy.

Mr. Knight contended that possession of certain instruments of crime should be criminal in itself when the instrument or weapon had no useful purpose except to be used in crime.

After further discussion, Professor Platt observed it was apparent that the committee agreed that possessory type crimes should be covered in the proposed code; the question was the proper place to include them. Mr. Frost said he could see ample reason to cover items specifically designed for commission of a crime but questioned the wisdom of including items such as tire irons, hammers and screwdrivers which had other legitimate uses. Professor Platt replied that the defendant was adequately protected so long as the statute also required proof of an intent to commit a crime. Representative Frost asked how it was possible to prove intent and Chairman Burns responded that the prosecution would argue that the defendant was loitering in front of a store at 2:00 a.m. with a tire iron and a black mask in his possession.

Representative Frost was critical of the Model Penal Code section on possessing instruments of crime. He asked how a person would "negative unlawful purpose" as used in section 5.06 (1) (b) and also expressed objection to the presumption of possession of criminal instruments in automobiles as set forth in section 5.06 (3).

Mr. Paillette pointed out that the approach taken thus far by the Commission in the sections dealing with possession of weapons, the terms "dangerous" and "deadly" weapons had been defined because they were used in connection with other crimes such as robbery and burglary. Those definitions would not be disrupted if possession of such weapons were permitted to remain as presently drafted. It would then only be necessary to reinsert sections 4, 5, 6 and 9 in the Forgery Article and to include an Article on firearms in the code.

Professor Platt was of the opinion that internal construction would be eased by having a central location for the possessory type crimes.

Mr. Knight moved that a section along the general lines of Model Penal Code section 5.06 be drafted for presentation to the Commission and that the final decision as to whether to adopt such a section or to leave possessory crimes in the separate Articles be left to the Commission.

Mr. Paillette suggested that the staff draft a section as contained in Mr. Knight's motion and submit it to the subcommittee along with the firearms draft so the two could be considered together. If the Model Penal Code approach were adopted, it would largely eliminate the need for a separate Firearms Article, he said.

Professor Platt asked if the subcommittee was generally agreed that all presumptions should be deleted. Representative Frost said he would favor a presumption for possession of a device which could be used only for a criminal purpose and gave as an example a key type instrument used in Portland for opening parking meters. Chairman Burns commented that it might be difficult to define such an instrument.

Mr. Paillette said it seemed to him that if a prohibited Article were defined specifically and sufficiently, it was unnecessary to be concerned about intent. The legislature would then be saying that it was a crime to possess that article and the necessity to include a presumption of intent would be negated.

The committee was in general agreement that they would follow Mr. Paillette's suggestion to consider a section on possession of instruments of crime in conjunction with the Firearms Article.

RESPONSIBILITY; Preliminary Draft No. 5; July 1969

Section 13, subsection (4). Pretrial legal objections by defense counsel. Professor Platt reviewed the discussion of the Commission at its most recent meeting and outlined that the Commission had favored the policy of subsection (4) of section 13 which would permit the incompetent defendant, through counsel, to raise certain technical defenses to the crime for which he was charged. The Commission had,

however, felt the language was too general and also objected to the phrase "fair determination" as being too vague. They wanted the subcommittee to spell out specific instances where subsection (4) would apply. [See Commission Minutes, September 12, 1969, pp. 24, 25.]

Professor Platt said that subsection (4) was aimed at motions ordinarily determined at the pretrial stage and gave as examples an insufficient indictment, the statute of limitations had run, double jeopardy principles applied or the venue was improper. He recommended that subsection (4) be amended to read:

> "The fact that the defendant is unfit to proceed does not preclude any legal objection, including but not limited to:"

The four examples given above would then be set out as subsections (a), (b), (c) and (d).

Inclusion of this subsection, Professor Platt explained, would give the court some flexibility and still indicate the kind of pretrial motions that were intended to be included and would certainly indicate that the merits and facts of the case were not to be tried. The intent and purpose of the section could be further reinforced by the commentary, he said, and if the defendant were required to participate personally in the motion, it would not be covered by this subsection.

Chairman Burns suggested that perhaps the better way to handle the subsection would be to leave it as drafted and in the commentary give examples of the sort of motion that would be permitted by this subsection. Representative Frost said he was not content to rely on the commentary and would prefer to make the statute as precise as possible. Professor Platt commented that even if the court construed the statute very narrowly and limited it to the four motions set forth therein, it would still be some advancement over present law in rectifying what might otherwise be a very unjust situation.

Mr. Knight noted that the expiration of the statute of limitations and the sufficiency of the indictment were raised by demurrers and in those two situations the same result could be accomplished without this statute. Chairman Burns said he doubted that a court would consider a demurrer if the defendant were incompetent and in the state hospital. Professor Platt said he was under the impression that once a defendant was adjudicated incompetent, under present law he could do nothing.

Chairman Burns asked what would happen if an indictment were found on which the statute of limitations had run and the defendant was in the state hospital. If his attorney demurred on the statute

of limitations and the court sustained the demurrer and threw out the indictment, what would happen to the defendant?

Representative Frost said that if he were in the hospital on the basis of his competency to proceed, he would be automatically released. Mr. Paillette remarked that the question would become moot because there were no proceedings before the court at that point and the reason to determine competency would be gone. Representative Frost contended that once the indictment was gone, the authority to hold the defendant had disappeared and his release would automatically follow.

Chairman Burns commented that if subsection (4) were retained and the Commission later approved different procedural aspects, unforeseen problems might arise. On reflection, he said, he felt that the fact that the venue was improper should not be included in the subsection because the only time venue was raised was during trial. He also advised that double jeopardy principles would rarely, if ever, come up at the motion stage. Oftentimes, he said, double jeopardy was tried before the trial of the main case but it would normally require some evidence. Professor Platt said that if the defendant did not have to participate, his counsel could put on whatever evidence he could muster.

Chairman Burns asserted that the only two instances which should be listed in the statute were the insufficiency of the indictment and the fact that the statute of limitations had run. Professor Platt urged that at least these two be included in the subsection and if another relevant instance occurred later, the legislature could add it to the statute.

Representative Frost said he was concerned about the double jeopardy situation. If double jeopardy were provable without the active participation of the defendant, it should be permitted by this subsection. Mr. Knight said he understood that a plea of double jeopardy was determined by the court before the defendant went to trial and Chairman Burns confirmed that this was true in the vast majority of cases.

After further discussion, Representative Frost suggested that the subsection include double jeopardy, the statute of limitations and an insufficient indictment and that a phrase be added to the effect that it would apply, at the discretion of the court, to such other matters as were susceptible of fair determination. Chairman Burns expressed agreement with this suggestion and asked Professor Platt to draft a subsection incorporating Representative Frost's proposal.

Mr. Paillette suggested that a motion to set aside the indictment might also be included in the subsection.

Next Meeting

Mr. Paillette indicated he would like Subcommittee No. 3 to meet twice in October and advised that the Article on Riot and Disorderly Conduct would be the next subject to come before the subcommittee. The members agreed to meet again on October 24 and October 31.

Miscellaneous Matters

Mr. Paillette called attention to an article which appeared in the Los Angeles Times indicating that the staff of the California criminal code revision project had been dismissed principally because of objections from law enforcement agencies.

Mr. Paillette advised that he recently had spent a day in Eugene with the Legislative Committees of the Oregon State Sheriffs' Association and the Oregon Association of Chiefs of Police and had discussed in some depth a number of the Articles which the Commission had considered. The committees voted, in view of the work the Commission had accomplished, to submit no requests for criminal legislation to the next session of the legislature. They were well satisfied with the approach and direction of the work of the Commission thus far and the Chairman offered to the Commission the assistance of these two groups in supporting the proposed code.

The meeting was adjourned at 4:00 p.m.

Respectfully submitted,

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission