Tapes #31 and 32

Both sides of the two tapes

OREGON CRIMINAL LAW REVISION COMMISSION
Rooms 44-45 State Agriculture Building
Salem, Oregon

January 18, 1969

A G E N D A

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OREGON CRIMINAL LAW REVISION COMMISSION
Seventh Meeting, January 18, 1969

Minutes

Members Present: Senator Anthony Yturri, Chairman
Judge James M. Burns
Senator John D. Burns
Representative Wallace P. Carson, Jr. (delayed)
Mr. Donald E. Clark (delayed)
Representative David G. Frost
Mr. Bruce Spaulding
Mr. Robert Y. Thornton

Absent: Mr. Robert Chandler
Representative Douglas Graham
Representative Harl H. Haas
Mr. Frank D. Knight
Senator Berkeley Lent

Staff: Mr. Donald L. Paillette, Project Director
Miss Jeannie Lavorato, Research Counsel

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

Also Present: Dr. John L. Butler, Dept. of Psychiatry, University of Oregon Medical School, Portland, Oregon
Dr. Gerhard B. Haugen, Psychiatric Consultant, State Board of Parole & Probation, Portland, Oregon
Mr. Bruce J. Rothman, Bar Committee on Criminal Law & Procedure
Mrs. Lucy Schafer, Lebanon
Justice Gordon Sloan
Dr. Rogers J. Smith, President, Oregon District Branch American Psychiatric Association, Portland, Oregon
Dr. Daniel V. Voiss, Director, Delaunay Institute for Mental Health, Portland, Oregon
Members of District Attorneys Association Criminal Law Revision Committee:
Mr. Donald R. Blensly, Yamhill County District Attorney
Mr. Lou L. Williams, Columbia County District Attorney

The meeting was called to order at 9:45 a.m. by the Chairman, Senator Anthony Yturri, in Rooms 44-45, State Agriculture Building, Salem.

Chairman Yturri explained that five new Commission members had been appointed on Friday, January 17, and that while each new member

had been advised of the meeting scheduled for January 18, some of their plans were such that it was impossible for some of them to come. He introduced Representative Frost, a lawyer from Hillsboro, who was present and advised that Representative Carson, also a lawyer, would be delayed due to a previously scheduled speaking engagement in Corvallis.

Chairman Yturri explained that Representative Harlan had been the chairman of subcommittee No. 3 which had considered the drafts on Responsibility and as he was no longer in the Legislature that, by reason of the terms of the statute, he no longer qualified for membership on the Commission. Since Judge Burns was next in line on that particular subcommittee, Chairman Yturri asked him to take over the discussion leadership on P.D. #4, Responsibility.

Judge Burns welcomed four representatives in the field of psychiatry from Portland--Dr. Gerhard Haugen, Dr. John Butler, Dr. Rogers Smith and Dr. Daniel Voiss--who had been invited to attend the Commission meeting. Since Professor Platt was the reporter for the draft on Responsibility, Judge Burns asked him to start the discussion and to go through the draft section by section.

Section 1. Mental disease or defect excluding responsibility.

Professor Platt commented that one of the problems facing the Commission was the one with the word "responsibility," because it had various meanings--legal as well as general. There is the problem, then, he said, of communications between two helping professions, the legal and the psychiatric.

Professor Platt noted the subcommittee's views in respect to the first section of the draft. The section set out the so-called tests for determining responsibility and was based entirely on the Model Penal Code. It was the general consensus of the subcommittee, he said, to not view the actual test applied as the most crucial aspect of that particular article. Professor Platt felt this was generally recognized by those who had looked at the cases in Oregon and cases elsewhere with respect to the definition of "responsibility." Although the M'Naghten rule applied in most states and has applied in Oregon since the very outset, he noted that it is not as an inflexible rule as sometimes is stereotyped. He observed that the psychiatrists when testifying have been allowed quite a free-ranging scope; most trial courts, generally, take most relevant testimony from psychiatrists with respect to determining the mental condition of the defendant. Professor Platt stressed that he was not speaking in favor of M'Naghten but was simply pointing out that the language is categorical on its face and would seem to be very narrow, but that the rule had grown over the last one hundred twenty six years that it had been in operation.

Professor Platt stated that he felt that the M'Naghten rule had, in fact, outlived its usefulness. He pointed out that, in practice, the strict, old concepts from M'Naghten are not being used and applied and, therefore, it was time to turn to a more flexibly stated rule. The rule chosen was the American Law Institute version, the Model Penal Code formulation. Its advantages are at least two: one, it does recognize the control test and allows not only the testimony of the expert witness with respect to the defendant's control mechanisms, but also allows instructions to be given by the trial court to the jury; secondly, the language is less categorical; it speaks of "substantial capacity" of "appreciation of criminality," for example. Professor Platt felt the fule presented was the rule of the future, that it is now gaining momentum in the United States and has been adopted in at least a half-dozen states in one variation or another, largely as in the proposed provision. This more flexible rule has gained favor in a number of jurisdictions while in contrast the Durham test, which originated in 1954 in the District of Columbia Circuit, has been presented in at least twenty-two jurisdictions and has been denied in all of them except in the Virgin Islands and Main jurisdictions.

Judge Burns felt that this was an appropriate place to listen to the statements that Doctors Haugen, Butler, Smith and Voiss might wish to make.

Dr. Butler stated that he was very glad to see action taken to redefine criminal responsibility as he had been quite concerned that the rules as currently applied in the courts could be modified to provide the possibility for psychiatrists to make a more substantial contribution to the understanding of criminal responsibilities. Dr. Butler felt that a number of questions should be discussed by the Commission: What happens when an individual is acquitted? What happens when he goes to the State Hospital? How are presentence investigations most appropriately conducted?

Dr. Voiss stated that his experience with testifying had been during some ten years with the military, which was M'Naghten, while concurrently he had done private practice working in the state of New Hampshire, which had no legal test of responsibility but something similar to Durham. His own feeling was that since the courts or the law do not really define what a mental disease or defect is, the interpretation of this has been left up to the psychiatrist. Aside from the issue of right or wrong, Dr. Voiss had never felt too constrained by M'Naghten yet he felt there was a lot in it that could be clarified to open up the opportunity for free diffusion of information about what is going on about a person who committed a particular offense.

Judge Burns asked Dr. Voiss if he had testified in the courts of New Hampshire, was told "Yes", then asked if his impression of the latitude of the testimony there was any different under the New Hampshire rule than under the M'Naghten rule.

Dr. Voiss replied that he was in the military and they quite rigidly adhered to McNaghten. He noted that he never would testify with respect to right and wrong because he felt this was not a judgement that he could make. Aside from that, he felt the latitude was the same. It seemed to him that in New Hampshire the jury, as a respreentative of the community, really defined what they would accept as mental disease. Replying to another question by Judge Burns, Dr. Voiss stated he did not think the rule used would affect the jury verdict.

Senator Yturri asked Dr. Voiss if he thought Oregon should have a more complete and full definition of mental disease and defect in its statutes and, secondly, did Dr. Voiss think it was possible to do this?

Dr. Voiss replied that he did not know if anyone had ever been able to define mental disease or defect, except operationally. It eventually depends, he said, upon the consolidation of the views of the particular twelve people on the jury; they represent the community.

Professor Platt noted that it was interesting to observe that in the Chicago Jury Study, when the control jury had submitted to them the same case under the M'Naghten rule, under the Durham rule and under no rule, simply whether or not they found the defendant sane, that the results were that there was no difference in the incident of "Not guilty by reason of insanity" verdicts between M'Naghten and Durham, but there were more verdicts of "Not guilty by reason of insanity" under the non-rule. The difference was noticeable enough to be called a "major difference."

Dr. Butler asked if it were not true that there has apparently been some increase in findings of "Not guilty by reason of insanity" in Washington, D. C. where the Durham rule has been applied.

Professor Platt replied that the figures he had seen did not show a substantial increase, but there had been some increase.

Mr. Thornton asked the doctors what they thought was wrong with the definition under the present system in Oregon. Did they feel it was not achieving justice?

Dr. Smith stated that functionally we have gotten along quite well under M'Naghten but he did feel that even without a vote he could speak for the Oregon District Branch of the American Psychiatric Association in saying that a change is indicated. Durham, in his opinion, was too loose, allowing the recidivist, chronically anti-social person, the pure character disorder, to be irresponsible. Dr. Smith said he had long thought the Model Penal Code would be an ideal compromise, allowing more latitude than he felt now existed. Even though most judges give the psychiatrist a lot of latitude, he said they still felt constricted under the rigid wording in the existing code.

Senator Burns noted that Dr. Voiss in his initial remarks had said there was a lot in M'Naghten that could be clarified and asked that he expand on this, advising where and how it should be clarified.

Dr. Voiss replied that as far as mental disease or defect were concerned, as it is stated in M'Naghten, it is something that cannot be clarified. The individual psychiatrist, he said, has to testify according to what his conceptual framework is with respect to mental disease or defect. Dr. Voiss stated that he did not think it was appropriate for a psychiatrist to testify as to whether a person knew right from wrong. He did feel it appropriate, however, for a psychiatrist to testify as to what he felt was the motivation in the crime, what kind of incapacity the individual had and all of the circumstances that come to bear upon the commission of the crime. The judgement of right or wrong, however, should be made by the court or by the jury.

Senator Yturri asked Dr. Voiss if during the course of an examination, after the psychiatrist had had all of the exposure to the individual involved that the psychiatrist desired, was it in most cases possible for the psychiatrist to form the conclusion as to whether or not that person did know right from wrong? He noted that Dr. Voiss did not feel this was an appropriate conclusion, but he wondered, apart from the appropriatness, if it were possible in most cases for the psychiatrist to form that ultimate conclusion.

Dr. Voiss replied that in his opinion the function of the psychiatrist was not to make that determination but rather to produce in testimony all of the factors which were involved and then to allow the jury to form that conclusion.

Professor Platt suggested this was an example of the difficulty of understanding the language of M'Naghten--for instance, the word "wrong"--what exactly does it mean? In M'Naghten, he said, no one knew from the very outset of the case if it meant moral wrong or a criminally defined statutory wrong. Professor Platt felt that the Model Penal Code solved this ambiguity by using the word "criminality" as something against which society has to defend itself and which it has defined as a crime.

Dr. Haugen noted that there are very few persons who at the time they commit a crime debate with themselves as to whether what they are doing is right or wrong. The psychiatric examination given is a medical examination to determine whether or not some condition existed making him incapable of making this determination. He stated that for the past nineteen years he had been the psychiatric consultant for the State Parole Board and had also been involved in a number of trials--both for the prosecution and for the defense. Dr. Haugen explained that for the Parole Board he saw persons who have committed murder, robbery, or other crimes of violence, any sex crime or arson. Of those that he saw, he felt in fully half of the cases that if he were called to testify for the individual at his trial under the proposed rule he would have to say that in his opinion there existed

a defect, of a substantial capacity, to conform their conduct according to the requirements of the law (this would include those whose acts were influenced by some extent by alcohol). He noted this rule would exclude those who had planned an act and taken reasonable precautions not to be caught and that in the Oregon penitentiary there are a minor number of these. Dr. Haugen said Oregon does not have organized crime. There is not a great amount of criminality as a profession. He contended that we have here mostly individuals with character personality defects which might be characterized in that mainly they have more than ordinary inability to say "No" to themselves when they are emotionally aroused, strongly tempted. They are not sociopaths. The sociopaths are a definite minority in the Oregon penitentiary, he said. Dr. Haugen felt there would be a great number of people in society who would qualify under the definition of one having a personality defect but most are lucky and never run into trouble with the law, particularly if they came from a rather good family. Dr. Haugen contended that a psychiatrist could find evidence of a personality defect in the defendant's handling of his daily life which would show this tendency--this inability to say "No" to himself under certain conditions. He said this was a personality defect--not sociopathic.

Senator Yturri asked if the acts or tendencies in the past would have to relate to the same kind of action as that with which he was involved at the moment.

Dr. Haugen replied that they would not but there would be acts which the psychiatrist could determine to be evidence of a personality defect. Dr. Haugen commented that Dr. John Evans, the first psychiatric consultant to the State Parole Board, had brought to his attention the fact that there were a surprising number of individuals in the penitentiary who had committed a crime during a depressed state. Dr. Haugen felt that perhaps 10% of the persons he examines would fall into this category. Very often, he said, the crimes committed in this state are committed in such a way that the individual seems to invite apprehension. He said these would also be included in those cases he felt would be considered to have a defect which would substantially decrease their capacity to conform to the law.

Judge Burns asked Dr. Haugen what the effect might be in actual results in actual cases if Oregon went to the ALI rule--how many more "Not guilty by reason of insanity" verdicts would there be under that rule as opposed to the present rule?

Dr. Haugen did not feel he could answer this question--a good deal would depend, he thought, on how good the defendant's lawyer was, a lot on the community, whether the sympathy was with the victim or the defendant.

Senator Yturri asked Judge Burns what difference it would make from an evidentiary point of view whether Oregon had M'Naghten, the Model Penal Code formulation, the Durham or no test at all.

Judge Burns said he believed the rule in most Oregon courts generally to be that an opinion question cannot be asked which is framed in either ALI or Durham terms; when the ultimate question is asked, it must be framed in M'Naghten terms. Judge Burns' impression was that short of this, it would not make a bit of difference as to the scope the psychiatrist has in his actual testimony. Judge Burns was persuaded that it would make no difference in ultimate jury verdicts although he admitted that he was basing this on a very few cases that he had seen personally and upon the Chicago Jury Experiments referred to by Professor Platt.

Mr. Spaulding stated that he tended to agree with Judge Burns. He commented that he had always felt that the insanity plea was a "peg to hang your hat on" when the defendant had no other defense. The reason he had no other defense, he remarked, was that the law prohibits the committing of the act and the insanity plea permits the jury to weigh the situation and determine what went on, in their minds, that really was criminally wrong. He did not feel the rule used was important; what was important was to get to the jury with the defense.

Dr. Haugen asked why it was proposed that this be a matter of legislation instead of leaving it in the hands of the Supreme Court as it had been heretofore.

Judge Burns replied that presently it is a matter of statute in Oregon.

Professor Platt added that it is part of the insanity defense chapter, ORS 136.410. The statute, he commented, doesn't refer directly to the M'Naghten formulation but at the morbid propensity, which means that specifically that section would prohibit a Model Penal Code version because the MPC contains a control element and the statute specifically prohibits that. Professor Platt stated that the Supreme Court has been asked by attorneys on a number of occasions to establish a control test and that the Court has held this must be done by the Legislature.

Judge Burns expressed the view that ultimately what the Commission wanted was a rule which as far as possible would produce the result of putting those who would respond best to correctional treatment into the correctional system and those who would respond best to mental treatment into the mental health system. This, he felt, was what was said when a defendant was acquitted by reason of insanity.

Mr. Spaulding asked if something were not wrong with nearly everyone guilty of criminal conduct. Was not this the result of some character defect?

Dr. Haugen agreed that 90% of the time this would be true.

Dr. Voiss stated that voyeurism, for example, is practically untreatable. He said that people usually come in after they have been picked up but even those who come in because of anxiety over possible trouble do not stay in treatment. The treatment of a neurosis with this particular type of symptomatic expression involves years with the most skilled kind of therapist and it just is not available for more than a few people. As a rule, he said, the individual does not stay under treatment. Dr. Voiss pointed out, then, that we are confronted with someone who can't be changed by locking him up and who cannot control this (this might, he said, even fit in under "irrestible impulse") and yet expresses a mode of adapting that society has sanctions against.

Dr. Haugen commented that he thought that the system of quarantine would have to be accepted here. He felt this was an old, legitimate system and persons such as those described above by Dr. Voiss would simply have to be quarantined for the protection of society.

Dr. Voiss said that this was what was done in 1965 with the Civil Commitment Act for the sexually dangerous.

Senator Burns and Professor Platt questioned that someone guilty of indecent exposure should be classed as sexually dangerous.

Judge Burns advised that he had had many talks with Sgt. O'Daniels of the Multnomah County Sheriff's Office who dealt with the sex cases and Sgt. O'Daniels was not persuaded that some defendants are as harmless as generally suggested by psychiatrists. Judge Burns stated that he was not persuaded as he had had a number of cases recently where he had worked with those charged with indecent exposure and required that as a condition of probation they be treated at the county mental health clinic and these people had graduated to aggressive sexual acts against others.

Mr. Thornton stated that there is a secondary problem that is of considerable concern to the district attorneys and that is in the area of the mentally ill and that at the present time there are perhaps twenty-five to thirty inmates in the penitentiary who are mentally diseased and who do belong in the State Hospital but there is no facility there for receiving them. The same situation, he said, occurs at Fairview--there are seriously disturbed and dangerous mentally retarded in Fairview under very limited security who are real problems. This lack of facilities, Mr. Thornton contended, obliges the State Hospital, many times, to release seriously and dangerously disturbed persons back into the community. The district attorneys, he said, feel there should be some method for a judicial hearing on the release of these people from the State Hospital. Mr. Thornton felt the Commission should give consideration to a provision for a judicial determination prior to the release of persons back into the community.

Professor Platt agreed that this was one of the crucial problems. He referred to section 10 of the proposed draft which he hoped would provide procedural safeguards.

Senator Burns pointed out that that particular proposal in the draft probably would not meet with the approval of the staff at the hospital. He noted they had opposed such a proposal in a bill last session, feeling the release to be a medical decision or an administrative decision which should be made by the staff. He asked the reaction to such a judicial hearing requirement from the doctors present.

Dr. Smith referred to section 1 and stated that he felt that such changes as those embodied in that section certainly would provide him with more latitude in speaking about how the personality disease, motivation of the patient, contrubuted to whatever crime he had committed. He did not feel, however, that it would give him as much latitude as Dr. Haugen felt it would give him. Dr. Smith said that in his own case he would have to be able to make a diagnosis that would conform to the International Classification of the Disease No. 8 from the World Health Organization which is what he functioned under. This would exclude for him, Dr. Smith continued, the personality disorders, for the most part. The proposed changes, however, would give him more of an opportunity to communicate his thoughts about a patient to the jury.

Replying to Judge Burns, Dr. Smith did not think the proposed changes would result in much change in the number of pleas made because he felt the defendant probably would not elect to take this defense. If the defendant just took his chances, he remarked, he would get a definite sentence but if he were judged insane, he might be locked up the rest of his life.

Judge Burns admitted that this was a point that had previously been brought up but that his own inquiry among those who do most of the defense work now indicated, almost without exception, that the possibility of a long-term commitment in the State Hospital hardly ever even entered into the decision of whether or not to use the insanity defense. He asked Dr. Smith if he thought the ALI rule would get more people into the State Hospital who ought to be there and who are now going to the correctional institutions.

Dr. Smith answered in the affirmative.

Dr. Voiss expressed disagreement with Dr. Smith in regard to the question of the use of diagnosis and diagnostic nomenclature which he felt was meaningless. In his opinion to call someone schizophrenic really did not say anything. Dr. Voiss thought that the psychiatrist in his testimony could give an idea of some of the strengths of the individual and his ability to adapt and look at the crime in an adaptational framework--what it meant in terms of the individual and the community and environment and the defendant's way of dealing with what was going on inside of him as well as what he was confronted with outside. Dr. Voiss contended that if we would begin to think

in this way, perhaps we could get away somewhat from the old bug-a-boo of "mental defect" and "disease" etc. This, he said, is what is being talked about--how is society going to protect itself; how is society going to separate between the "mentally ill" and the "criminal?" An insoluble dilemma seems to arise, he said, when the attempt is made to separate these. Dr. Voiss repeated that he felt discussion of a "diagnosis" meaningless in trying to give any idea of the liklihood of events being repeated or of the adaptive capacities of the individual or his culpability.

Judge Burns asked Dr. Butler if he felt more people would be acquitted by reason of insanity if Oregon adopted the ALI rule.

Dr. Butler agreed with Dr. Haugen's statement that more often psychiatrists would be able to say that the individual was not responsible. Whether that would result in turning more of the juries to making the final agreement, he could not determine.

Dr. Butler stated that one of the things that lead him to decide to try to testify in insanity as a defense was the feeling that the individual was treatable. If by response to pschotherapy, by response to hospitalization, the defendant's behavior could be modified by treatment, he would be much more likely to try to implement the defense of insanity. If he evaluated the individual in such a way as to feel that he would not respond to psychiatric treatment, Dr. Butler said he would be much less inclined. He felt this was something all psychiatrists have as somewhat of a determinant in their decisions.

Senator Yturri commented that if the individual would not be susceptible to treatment and the psychiatrist had no further interest in him, then insanity would not prevail and then there might be an individual going to the penitentiary who quite clearly should not be there.

Dr. Smith said he would disagree on the matter of treatability because, in common with general medicine, the psychiatrist has quite a few people who are not treatable but whose diagnosis clearly, even under M'Naghten would exclude them from responsibility--organically damaged individuals, mental defects, and some of the chronic, long-standing psychotics.

Dr. Haugen called attention to the remarks made about those mentally ill being in the penitentiary. He noted that he had probably seen all of them and in his opinion those who are there are not treatable. He could see no advantage in their being in the State Hospital and felt, personally, if he were going to be incarcerated for a number of years, he would much prefer being in the penitentiary than in the State Hospital. At present, with the limited abilities to do something about so many of the things, he did not feel where the individual was quarantined was too important.

Judge Burns asked if these individuals get treatment in the State Hospital now when they are sent there after they are found "Not guilty by reason of insanity."

Dr. Haugen replied that a good many of those sent to the Hospital had used the plea of temporary insanity and that in some cases sending some of these persons to the Hospital is a little silly because they are no longer that way.

Mr. Paillette advised that Dr. Treleaven had testified before the subcommittee advising that so far as persons involved in a crime are concerned, most of those they have at the State Hospital have been adjudged unable to stand trial because they could not understand the nature of the charge or were unable to assist in their defense.

Judge Burns added that Dr. Treleaven indicated that most of those sent there after a not guilty verdict are out inside of six months or so.

Senator Burns advised that the Ways and Means Committee had visited the State Hospital during the week and noted that Section 38 was being remodeled (or what used to be Section 38) and that an additional 30 beds were being put in the maximum security because of the tremendous press that they have had on the State Hospital from the correctional institutions under the institutional transfer program. Senator Burns remarked that Dr. Haugen seemed to be saying that it does not do much good to send the individual to the Hospital and if this were followed through, then by adopting section 1 of the proposed draft which might make it easier for acquittals because of insanity, more people might then be sent to the State Hospital. He wondered if perhaps the problem were being compounded instead of being remedied.

Dr. Haugen agreed that the problem exists because psychiatrists do not yet have sufficient skills and knowledge to do a great deal with any large number of persons who get into trouble with the law, whether at the penitentiary or the State Hospital.

Senator Yturri asked Dr. Haugen the difference between the treatment an individual would receive at the State Hospital and the penitentiary, not those at the Hospital awaiting trial, but the person found not guilty by reaon of insanity.

Dr. Haugen replied that a psychiatric consultant, perhaps two, from the State Hospital goes over to the penitentiary for a few hours a week. They see primarily cases referred to them by the administration or by the medical department. The psychiatrist may transfer the inmate to the State Hospital for treatment if this seems warranted. When the person is considered to be sufficiently improved, he will be transferred again back to the penitentiary. At other times, a drug may be prescribed to treat the prisoner and he may remain at the penitentiary. Dr. Haugen said he had no criticism of the treatment

given those in the penitentiary. He felt that whenever someone might be benefited by treatment at the Hospital, there was no hesitancy in transferring him. He stated that Dr. Suckow, who was in charge of this type of thing, was very interested in doing everything he could for these people.

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

Judge Burns was of the opinion that in the discussion of section 1, section 10, which provides for what happens to those found "Not guilty by reason of insanity," should also be considered. He asked Professor Platt to outline the details of section 10.

Professor Platt said that assuming the verdict was "Not guilty by reason of insanity," the court under procedures found in the draft and now existing according to statutes, finds that not only is the person suffering from mental disease or defect but is also dangerous and ought to be committed and does so, that the individual would then find himself in the State Hospital and the question then would be how he would get out, when and if it were appropriate for him to get out. Currently, there is no statutory provision covering this and by practice the superintendent of the Oregon State Hospital has made these decisions.

Section 10 would change this practice and would have this effect: When the jury finds the individual "Not guilty by reason of insanity," the judge may release him under supervised custody back into the community or if the judge feels the individual to be dangerous, he might commit him to the Oregon State Hospital. There is in the section a fixed period of five years, so that the maximum period for holding a person in the Hospital or for holding a person on supervised release in the community would be five years. At this point, Professor Platt continued, if nothing had occurred in the interim to lead to his discharge, the individual under section 10 would be entitled to an automatic hearing as to whether or not he should be retained in the custody of the Hospital. Here, he noted, is where the problem of the dangerous offender is dealt with. If a dangerous individual, say a rapist, were sentenced to the penitentiary for ten years, at the end of that period he must be released. If at the outset, however, he were found "Not guilty by reason of insanity" and were committed to the Oregon State Hospital, at the end of a five year period if the individual had not been helped (found not treatable), the court may leave him in the State Hospital. In this kind of an extreme case, it would be possible for a man to remain his entire life in the Hospital.

Professor Platt pointed out that section 10 also had another purpose--to release those who ought not to be in the State Hospital but who may, nevertheless, still qualify under the legal concept of mental disease or defect of being mentally diseased or defective.

The petty thief or check casher might qualify under this description--one who is not a physical threat to himself or society. In this case, the superintendent would certify to the court again, the court makes the ultimate decision as to whether or not the individual should be released, although he still may be mentally diseased or defective. The big difference, Professor Platt stressed, was that the court was making the ultimate decision. He stated that the subcommittee had discussed this at some length. He also noted that at the outset of the procedure the decision made was a legal one, not a medical one. Professor Platt remarked that this might not be the proper method but historically this was the way our society had functioned. Since the community had expressed itself through the judge and jury in putting the individual into the State Hospital, it was the determination of the subcommittee and, Professor Platt thought, of most legal scholars and authorities, that the ultimate decision of discharge back to society ought to rest with the courts. Professor Platt thought, frankly, that this probably showed the animosity underlying law and psychiatry--too many times psychiatrists are viewed as being overly permissive. This is the basic conflict between the legal view and the medical view, he said. The enlightened judge, the subcommittee felt, would best express the views of society which placed the defendant in the Hospital. He added that this outline of section 10 was very sketchy, that it also contained many detailed procedures for filing of notice and for burden of proof allocations at different stages.

Dr. Voiss asked if there were any provisions to allow examination of the individual by another person or if the release would depend upon what the state psychiatrist determined.

Professor Platt gave the following example: Assume that the individual were committed to the State Hospital (he also noted there was a provision for a 90-day minimum stay) and at the end of the 90-day period the superintendent of the Hospital and the doctors no longer believed the man dangerous and, perhaps, not even mentally defective or diseased anymore, the court would be advised of this and at that point the state if it wished to object, must have the burden of proof itself in keeping that person in the Hospital. Professor Platt felt this to be very important, because if the burden of proof were left on the defendant, as it is in the first instance to prove his own insanity, it is much more difficult. When the superintendent and the doctors advocate release of the individual, in that sense the state psychiatrists are the defendant's psychiatrists. If the Hospital refuses release and if the inmate, under provisions in the section, seeks release, he would be entitled to his own psychiatrist and would proceed much as an original trial would to decide the issue of dangerousness.

Judge Burns asked if the draft did not also provide that at any time during the five-year period, upon appropriate provisions, the individual could be released from custody to supervision and the bruden of proof would remain with the defendant whenever the head of the State Hospital felt he was dangerous.

Professor Platt agreed that this was right.

Judge Burns expressed regret that none of the doctors from the State Hospital had been able to be present at the Commission meeting since he felt that if the Commission were to take action to approve the basic action taken in section 10, the people at the State Hospital would strongly oppose it.

Senator Burns agreed but felt it was an extraordinarily good section. He indicated that a question that had always been in his mind was one in respect to "equal protection," whether or not it might be argued that there would be a denial of equal protection under the law, referring specifically to incarceration after acquittal, the whole review of the case.

Mr. Paillette pointed out that the individual was not committed for five years under the provisions of the section.

Professor Platt also pointed out that the five-year period was not a sentence; it was, rather, a built-in protective device, so that the defendant would be assured of periodic reviews on the basis of his own petition or automatically at the end of five years. The burden of keeping track of this five-year period and of informing the court thirty days ahead of time as to when this five-year period of retention in the hospital expired is placed on the State Hospital.

Judge Burns noted that this was clearly a change from the present situation and asked the doctors present to comment on section 10 and on the broad scheme contemplated.

Dr. Butler also expressed regret that no representative from the State Hospital was present because he suspected that the provisions being discussed would require substantial changes in the record keeping and practices--particularly having to get approval from the court to discharge a person.

Judge Burns asked Dr. Butler if he thought the court should make this determination.

Dr. Butler replied that he thought the court would be more attuned with community attitudes and that the court could appropriately take such a role. How well it would work, he, of course, could not predict,

Dr. Voiss tended to agree with Dr. Butler. He felt it was a function of the community as represented by the court to make a determination about this kind of matter. He thought there might be problems of administration as far as the hospital was concerned but felt this might be a matter for the Legislature to determine--regarding budget or some other way to handle the procedural problems arising.

Dr. Smith agreed that this should be the court's decision and also felt it would impose more work upon the State Hospital. Dr. Smith thought that one tangential point might come up, citing a case which came up in the District of Columbia where a young individual was found not guilty by virtue of a schizophrenic process procedure and was sent to St. Elizabeth Hospital for treatment. The parents felt he was not getting treatment and they went back to court and obtained his release on this basis. Dr. Smith pointed out, then, that the state cannot provide just custodial placement for these people. If they are, indeed, ill, then they are entitled to whatever treatment is available; if none is available, that is a different matter, he said.

Professor Platt was familiar with the case cited and felt it was a proper decision. If an individual sent to a hospital did not receive treatment, Professor Platt said he felt they should be released; they would not be getting equal protection of the law; they would not be getting what the system put them there for. This could be raised, he said, either under the petition in section 10 or under habeas corpus. It would be proper, Professor Platt contended, to release such a person, even though he might be dangerous, since it would then be the system that would be breaking down, not the individual, who ought not to bear the burden.

Dr. Voiss asked if "treatment" was defined in the case cited.

Professor Platt replied that it had not been defined.

Dr. Butler commented on a pervious statement made by Dr. Haugen to the effect that some of the people who have mental illnesses were better off in the penitentiary than in the State Hospital and wondered if it were in error to direct people who might not respond to treatment to mental hospitals when they would be more appropriately dealt with, even in terms of vocational rehabilitation, in the penitentiary.

Dr. Haugen replied that the State Hospital would furnish workshops, etc., in time, with funds, but agreed that they do not have the vocational facilities now. He also stated that he felt the section should be adopted whether or not the rule regarding responsibility were changed. Dr. Haugen thought that if he were a superintendent at the State Hospital, he would prefer to have the matter decided in this manner. The superintendent of a large hospital, he said, cannot personally acquaint himself with all the details of each case and has to go on staff recommendation. This would give the responsibility to the judge. Dr. Haugen felt the matter of release if an inmate were not receiving treatment was somewhat ridiculous because of the fact that medicine is limited--some things are not presently treatable. He did not feel that society could be blamed for the present state of ignorance.

Section 2. Partial responsibility due to impaired mental condition.

Judge Burns asked Professor Platt to briefly outline section 2 of the proposed draft.

Mr. Thornton asked if the subcommittee had given any consideration to the split hearing procedures of California and to the proposal of the court appointing psychiatrists to get away from the competing psychiatrist situation.

Professor Platt answered in the affirmative to both questions. The subcommittee examined the bifurcated trial system of California and the few other states which have it and read articles written about the system. Most writers, Professor Platt stated, concluded it was ineffective, causing longer, more complicated trials and ultimately settled the problem no better than the single trial. The trend throughout the United States, Professor Platt continued, seemed to be away from bifurcated trials; some states years ago went to them and have since gone back to the single trial. He noted that one of the reasons for the subcommittee decision was the section dealing with partial responsibility--section 2.

Professor Platt outlines section 2 by saying that it covered the condition where the defendant would not qualify as being mentally diseased or defective, so as to qualify for a complete defense of insanity. If, for example, the defendant were being tried for murder in the first degree, he would not enter a plea of insanity but instead would introduce evidence by experts to show that because of a mental disease or defect he was unable to form the necessary premeditation or intent required by the law, the mens rea, for the crime charged. The defendant would not be saying he was not guilty of something else--he would be saying, in effect, that he ought not to be convicted of, say, the murder in the first degree charge, but perhaps ought to be convicted of a lesser included offense. This would apply to any crime that is legally defined with an element of knowledge or purpose. It would not apply in the situation of intoxication--there will be, Professor Platt said, a separate section on intoxication in the new Oregon code and noted it is treated separately in the Model Penal Code. The proposed draft, he said, makes it relevant that the evidence be brought in to show a lesser mens rea or that the defendant is incapable of the mens rea charged. The present status in Oregon of this particular rule is undetermined in the sense that the Oregon Supreme Court has never been asked directly to rule on the subject. He noted that the subcommittee's observation was that in practice in the Oregon courts that partial responsibility does exist as a matter of fact and that evidence of psychiatrists is generally allowed in this type of situation. Professor Platt was of the opinion that the subcommittee agreed that the proposal was a justifiable and useful provision in that it attempts to make the definition of crime more responsive to the culpability of the individual defendant. The stress, he continued, is on subjectivity rather than on the old objective rule that the man intends all the consequences of his act.

Professor Platt admitted that there was a problem which had been recognized in the draft--it would be possible for a defendant to be so convincing with his psychiatric testimony that the jury would acquit him of any crime. The subcommittee was concerned about such an event and provided in section 8 that the trial judge himself could act as the civil committing agent, instituting the proceedings on the basis of the evidence presented so that it need not go into the probate court system presently existing under chapter 426.

Professor Platt returned to the question of the bifurcated trial system and related that California's problem had been that when endeavoring to try a defendant for his guilt on the act, it is impossible to determine his guilt unless his culpability is examined. In a sense, Professor Platt maintained, it is impossible to separate the defendant's guilt, the mens rea, from the act. In addition, he continued, with the partial responsibility doctrine which is in effect in California and, practically speaking, in Oregon, the same question would be litigated even in a bifurcated trial system on the question of partial responsibility. With insanity taken out the court still must hear, on the question of the act, whether the defendant did the act as charged, whether he had the mens rea capable of that particular charged act. The result, Professor Platt continued, is that the testimony is duplicated from one trial to the other and California's experience has been that the complications have not been solved by splitting the trial.

Professor Platt referred to the comments regarding the impartial witness which were taken from Goldstein's summation in The Insanity Defense of the criticism of the so-called impartial expert system. He outlined the criticism briefly by saying that the system placed too much creditability on one psychiatrist because he was the court's psychiatrist and the defendant was prejudiced because the jury tended to feel that because the judge appointed the psychiatrist, he must be right and tended to believe him. Professor Platt noted that this is not always so, that psychiatrists legitimately and validly differ about an individual case. This, he said, was one reason why Oregon has not adopted and why the subcommittee agreed to stay away from that system.

Dr. Haugen noted that in the past psychiatrists had presented a bill to the legislature to embody the impartial, expert witness system but it was on the basis that if both the prosecution and the defense agreed on one psychiatrist, there could be just one but, if not, then the judge was to appoint one, the prosecution one and the defense one. The panel resulting would then get away from the problem of depending too much on the basis of one expert's testimony. Replying to Senator Yturri, Dr. Haugen said the panel could express one opinion or several when giving testimony.

Professor Platt pointed out that another problem was one of cross examination--in effect the court is being cross examined and this does not work very well. Even on a panel basis, he felt the criticism could be raised that there was too much credibility, of closeness to the bench itself, to be allowed in an adversary system.

Judge Burns asked if there were other comments on partial responsibility.

Dr. Smith understood that the partial responsibility section did not include cases of intoxication and Professor Platt agreed that this was correct. Dr. Smith felt that there was one type of intoxication that was diagnostically classified as pathological intoxication that might fit better in this section than in another. This, he said, was essentially a psychotic reaction of a very brief duration caused by hypersensitivity to alcohol and accompanied usually by violent behavior and always with a total organic type of amnesia or blacking out of memory for the acts.

Professor Platt replied that the section on intoxication has not yet been the study of any of the subcommittees but that it has been in the back of the mind of subcommittee No. 3. The Model Penal Code, he continued, treats exactly the problem raised by Dr. Smith by defining pathological intoxication and keeping it in the intoxication section. The effect, he said, is the same as under the insanity test, when pathological intoxication is proved, as defined in the section, it is a complete defense.

Dr. Haugen suggested that the section on alcohol be so worded as to include a few other things because there are already persons pleading not guilty on the basis they were under the effects of amphetamines, LSD, barbiturates, and various things like these. He noted these were taken voluntarily and it would seem to him that the same should apply to these as applies to alcohol and that the section should be worded to include these.

Judge Burns expected that if the partial responsibility rule were enacted that the major use of it would be in burglary and other "specific intent crimes" where the responsibility would be diminished because of either alcohol or narcotics. With the current rise in narcotic use he felt that probably quite a bit of use would be sought to be made of it.

Professor Platt remarked that the basic difference was that the use of alcohol or narcotics is not generally recognized as a disease and therefore does not qualify under the mental disease or defect aspect of partial responsibility as a doctrine. That is why, he said, it is treated separately. He also noted the MPC section is not limited to alcohol and was hopeful that the Oregon section would not be limited to alcohol. He stated that intoxication is defined in the MPC as the introduction of substances into the body.

Dr. Haugen referred to his previous statement regarding crimes committed by persons in depressed mental states and said he would think such acts would come under the partial responsibility section.

Senator Burns noted that the use of alcohol is not illegal if a person is twenty-one or over but there are laws against the use of drugs. He wondered if it would still fit into partial responsibility if someone were on drugs (heroin, for instance, which is a felony); if this would still be exculpating in some way, even partially? In other words, would the commission of a crime be exculpating in some way for the commission of another crime?

Professor Platt asked if the use of a drug was a crime.

Mr. Spaulding replied that possession of drugs was. In answer to Senator Burns, Mr. Spaulding commented that it seemed to him that the question was the forming of an intent, in mens rea it doesn't matter whether the mental condition was arrived at legally or illegally.

Senator Burns called attention to the felony-murder rule and said, assuming that the defendant were charged with first degree murder and wanted to exculpate it because he was under the influcence of drugs at the time he committed the crime, would or would not the felony-murder rule attach if it could be shown that he committed a felony by being under the influence of drugs at the time he committed the murder?

Professor Platt replied that the only case there was in Oregon on this was the Jensen case where the defendant made that exact argument. The court observed that the partial responsibility doctrine did not apply in this case--he must make his argument to the crime that underlaid the felony-murder. This was the closest, Professor Platt stated, that the Court has come to making a decision but it was a negative decision and certainly did not say that partial responsibility does not apply in Oregon; it said it was misapplied by the defendant in that case.

Senator Burns noted that Professor Platt had been talking about partial responsibility attached in the specific intent crimes like burglary. Senator Burns said he could see the applicability of partial responsibility in offenses like rape or murder, reducing it from first or second degree.....

Professor Platt pointed out that it would not work in rape because it is the old general intent crime and there is no element of purpose by definition in the crime of rape, it can be committed recklessly.

Senator Burns asked what would be done with grand larceny; if partial responsibility attached, would it be reduced to petty?

Mr. Paillette replied that it would not apply in that case; you don't need a specific intent to commit grand larceny--you need an intent to permanently deprive but the value is not an element.

Senator Yturri pointed out that where the lesser included offense is also a specific intent crime there would not be the application.

Professor Platt amplified on this by stating that it could not be petty larceny, either, because the same intent would apply to petty larceny, so it would be a lesser crime--it would be assault and battery, a trespass or something of that sort. Professor Platt also noted that it would be possible that there would be no lesser included offense, that the jury would have to acquit and in which case the judge faced with a person he sees as dangerous could proceed civilly to commit him.

Senator Burns was of the opinion that it would not apply to taking and using, which, he said, is one of the crimes most often involving people suffering from some kind of a mental defect, because it would not involve a specific intent.

Professor Platt agreed with this--unless it were done while the defendant was drunk. Intoxication, he noted, is exactly like partial responsibility; as a matter of fact, the partial responsibility laws have stemmed directly from the intoxication concept. Intoxication, he continued, reduces culpability to a lesser included offense; so they are very similar. One stems from what is recognized as a mental disease or defect, partial responsibility, and intoxication stems from that which is not now, at least, recognized in the law as a mental disease or defect.

Mr. Paillette responded to an earlier question by Dr. Voiss regarding drugs and intoxication by pointing out that the Model Penal Code affirmative defense would apply only if the condition were not self-induced or were pathological.

Professor Platt added that intoxication, even though self-induced, could be a defense on the specific element aspect under responsibility, wherever purpose or knowledge is an element, but not on recklessness. The law now stops there, he said, and the Model Penal Code stops there, too.

Judge Burns stated that the way he read the Model Penal Code, that part did not materially differ from the present Oregon Law on intoxication and Professor Platt agreed.

The Commission meeting recessed for lunch; the afternoon session resumed at 1:30 p.m.

Section 3. Burden of proof in defense excluding responsibility.

Judge Burns thanked Justice Sloan for the great amount of help he had given the subcommittee and the Commission. He also introduced Mr. Williams, District Attorney from Columbia County, Mr. Blensly, District Attorney from Yamhill County, and Mr. Bruce Rothman, representing the Criminal Law Committee of the State Bar. Judge Burns invited these gentlemen to participate in the Commission discussions

whenever they desired. Judge Burns noted that section 2 of the proposed draft was still under discussion but wondered if the question of burden of proof should not also be worked into the disucssion because he felt it was also an inherent part of the problem and one about which the subcommittee had mixed feelings.

Professor Platt related that the burden of proof had been touched on fleetingly with respect to discharge decisions under section 10 but that the issue of burden of proof arises much earlier in that when the defendant files notice that his defense will be mental disease or defect, the statute in Oregon now provides that the burden is on the defendant to prove his insanity by a preponderance of the evidence. The subcommittee, he continued, decided to leave the law as it now is with respect to burden of proof. Professor Platt said he thought this was the only area in which he had any major dissent with the subcommittee. He indicated he had set out the case for shifting the burden of proof on the question of sanity to the state rather than leaving it where it now is.

Judge Burns pointed out that it was interesting to note that the Colorado Supreme Court had recently ruled that the Colorado statute which imposed the burden of proof on the defendant in insanity cases was unconstitutional, that it is a matter of due process. Just recently, he continued, along the same line, the Eighth Circuit had ruled unconstitutional an Iowa statute which imposed the burden of proof on the defendant on alibi, again by preponderance of evidence. Judge Burns felt the Commission members should be aware, while discussing section 3, of what he described as a growing trend toward doing away with any burden on the defendant, on constitutional grounds.

Senator Yturri referred to a U. S. Supreme Court decision made a number of years ago that he thought held to the contrary.

Professor Platt remarked that it had occurred in the early 1950's and had been a case which arose in Oregon, Leland v. Oregon, and the United States Supreme Court had said the states are left to their own--it was not a case of due process and the state may choose to put the burden where it feels the policy in the state best dictates. At that time the burden in Oregon was beyond a reasonable doubt. Despite that decision, Professor Platt felt that if the case arose now in the Supreme Court, the opinion would be different.

Professor Platt stated that when he had drafted the original article, the language had read that the defense of insanity was an affirmative defense so that under the definitions of the MPC the defendant must raise the issue. If the defendant did not raise the issue of insanity, the state had the presumption of sanity and need not introduce evidence at all. If the defendant raised some evidence on the issue (the amount of evidence necessary would have been left to the courts of Oregon), the burden of proceeding and also the burden of persuasion would have shifted back to the state, beyond a reasonable doubt. The subcommittee, Professor Platt related, did not agree with him on this.

Judge Burns indicated that the subcommittee's feeling was that with the presumption of sanity and with the proper allocation of the burdens in the case, it would still be unwise to depart from the traditional Oregon rule that the burden be imposed on the defendant to prove his case.

Senator Yturri pointed out that Oregon has already relaxed from the "beyond a reasonable doubt" to a "preponderance of the evidence" and asked Judge Burns to amplify on this.

Judge Burns replied that essentially the burden on the defendant is that he must prove insanity by a preponderance which is defined as a greater weight of the evidence as opposed to beyond a reasonable doubt, which is defined as proof to a moral certainty or proof that would justify action in the most important of one's affairs. The burden then, he continued, is less on the defendant than the one on the state as to the elements of the crime, etc.

Dr. Smith was of the opinion that this was more of a legal question than it was a medical question. It would seem, he thought, that if a defendant were to offer this defense, he would have expert witnesses to back it up. Dr. Smith thought sanity could always be proven, even in an insane person, if you observed such a person in a lucid moment.

Dr. Voiss agreed that it was very much a legal question but he felt it was the function of the psychiatrist to say what he knows about a person and what was going on at the time and the relationship of the individual to the offense and he could not see what a psychiatrist could add to this type of question.

Judge Burns asked Mr. Williams and Mr. Blensly if they favored leaving the burden on the defendant.

Mr. Williams replied in the affirmative because he felt that the state would ordinarily not have complete access to the defendant's background, his associations. The defendant's witnesses might not be especially persuasive, he said, but they would have access to back-gound data to persuade a jury. The state would not have access to the same degree so that it could persuade an impartial mind that the defendant was sane, especially if the crime were a bizarre one. There seems to be "unwritten law," Mr. Williams continued, that an individual would not commit certain acts unless he were crazy.

Mr. Blensly said that he would agree somewhat with Mr. Williams. He felt the procedural questions that would come about as a result of something of this nature would bother him. He said that insanity at the time of the commission of the crime was what was being discussed and here he would defer to the doctors about the difficulty of arriving at a decision in that light unless there was the possibility of forcing the defendant to disclose to the psychiatrist

information which he might have which would be involved in the question of what he did or did not do as far as the act committed was concerned. In having a single trial, he commented, the issue of insanity is being tried as well as the issue of whether or not the defendant committed the act. If the state would have the burden of proving sanity and yet does not have the concurrent ability to discuss the matter with the defendant, it seemed to him that the just and right answer was not being arrived at. It seemed to him that it would be much harder to come up with the right answer by putting the burden on the state.

Mr. Spaulding asked if the burden of proof were shifted to the state if it would still be required that the defendant give notice to the state that the defendant intended to rely on insanity as a defense.

Professor Platt replied that the notice requirement would be retained. Professor Platt related that in Oregon, Shepard v. Bowe decided that the state psychiatrist may not ask a defendant he is examining in behalf of the state any questions relating to the criminal act itself. That is now protected by the fifth amendment in this state. He asked the psychiatrists present that if they were appointed by the state, if they could find other ways to arrive at a legitimate conclusion as to the mental condition of that defendant at the time of the commission of the act without asking about the act itself.

Dr. Voiss replied that he would not undertake the job--he would not undertake the examination of anyone with those kind of proscriptions. He would not be satisfied with his conclustions if he were prohibited from discussing the actions surrounding the crime itself--if he did not have control of the examination and how it was to be conducted.

Dr. Smith noted that from section 7 he had jotted down the wording "the defendant when being examined by the state psychiatrist shall not be required to answer questions concerning his conduct at the time...." and he noted that this information might be quite essential to constructing the present illness or evaluating the patient's mental status at the time the act was committed. Also, regarding the defendant's right to have an attorney and/or a psychiatrist present at the examination, Dr. Smith felt this generally would be a great interference. He would not say that in either of the instances that the examination could not be done, but, ideally, the psychiatrist would rather conduct it on his own terms, in his own environment and in his own way. Replying to Judge Burns, Dr. Smith stated that not being able to ask the defendant about the act itself would diminish his confidence in his conclusions.

Dr. Butler agreed that these proscriptions would diminish his confidence in his conclusions. He felt it necessary to obtain details about the act in order to evaluate what might be behind the

act itself. Replying to a question from Judge Burns, Dr. Butler felt it would be all right to have another psychiatrist or an attorney present during an examination if they would honor the psychiatrist's desires as to verbal or non-verbal participation in the examination proceedings.

Representative Carson was now present. Senator Yturri presented him as a new member of the Commission.

Judge Burns asked Mr. Rothman if he had any comments on the question of whether the burden of proof in insanity cases be on the defendant or on the state.

Mr. Rothman was of the opinion that the burden should remain on the defendant because it prevented spurious insanity defenses. Generally, he said, these matters do not come up in Multnomah County unless there is an indigent defendant or a bizarre crime where an evaluation is made. The purposes for which an evaluation is made under present llaw, Mr. Rothman continued, are quite limited. As it presently works in Multnomah County, when an evaluation is made the report automatically goes to the district attorney's office which obviates any secret non-disclosure of evidence. If there is a private evaluation made, it is a different circumstance; the problem in that regard, the problem generally within the law, is the area of discovery which is a vast problem.

Professor Platt directed a question to the district attorneys asking them how they disproved evidence of insanity presented by a defendant if the court psychiatrists could no longer ask the defendant about the crime. How would they get around this problem. Mr. Williams and Mr. Blensly replied that they had not had this experience as yet.

Professor Platt pointed out that the state would be handicapped in not knowing about the defendant, whereas before Shepard v. Bowe they had the right to ask the defendant about the crime to counter the defendant's evidence. He asked the district attorneys if they saw this as a problem.

Mr. Williams felt the problem was minimized to a certain extent because he felt that by the time the defendant was brought to trial the state would have facts that would indicate the defendant was guilty.

Dr. Voiss asked if the assumption, then, would be that the person who would invoke this would be guilty because otherwise he could not refuse to talk about an offense he did not commit.

Mr. Williams replied that this would not be correct because there is but one trial and both issues would be tried at that trial.

Professor Platt commented that he did not see the problem as one of insanity; it was one of basic innocence or guilt and he viewed the problem as a constitutional one and it disturbed him that the burden had been placed, in this case, on the defendant.

Professor Platt agreed with Senator Burns that just because the instances were rare in Oregon statutes, that it would be wrong to assume it was not right to place the burden of proof on the defendant. Replying to Senator Yturri, Professor Platt noted that the states were split on this matter, it was about half and half, but he felt the trend was away, by choice, not legal necessity.

Mr. Spaulding stated that it seemed to him that the presumption of sanity should carry the state's case on that issue until there had been some evidence to the contrary but it did not make sense to him to require the state to prove sanity by carrying the burden.

Senator Burns agreed; he thought the defendant would be in the best position to go forward with evidence of insanity. He thought the rule requiring proof by the defendant by a preponderance of evidence was equitable and workable. He could see nothing wrong with placing the burden on the defendant, practically or philosophically.

Representative Frost thought the two opposing views were good and said that he felt the strong argument in favor of requiring the defendant to do something of this kind was the fact that he would be the one in possession of the facts. A disclosure to the state cannot be forced and he felt it would then be unfair to shift the burden to the state. He felt, also, that it would be easy to explain this to a jury and to make them understand.

Section 4. Notice required in defense excluding responsibility.

Judge Burns asked Professor Platt to outline the question of notice.

Professor Platt did not recall anything in the section that was substantially different from existing practice. When a defendant plans to use insanity as a defense, present statutes require that he enter a written notice to this effect at the time he enters his plea. If the defendant does not give notice at that time, present statutes allow him to give notice later for good cause shown or evidence may be admitted at the trial for good cause shown. That policy, he continued, is pretty well continued under the proposed statute with somewhat more economical language. The difference would be, Professor Platt said, the existence in the article of the partial responsibility defense and the subcommittee decided to require notice to the state when the defendant intended to raise partial responsibility. There was an alternative question here, Professor Platt noted--one where the defendant intended to bring in an expert

witness and another situation existed where he would depend on any testimony other than expert. The subcommittee decided that where the defendant depended on lay testimony only, or his own testimony only notice to the state need not be given. Where the defendant intended to use expert witnesses, he must give notice in the same manner as required if he were to plead insanity as a defense.

Professor Platt related that Frank Knight, District Attorney, Benton County, served on the subcommittee and had responded in behalf of the district attorneys and had indicated he would not be surprised or disadvantaged by lay testimony in this regard. Mr. Knight subscribed, Professor Platt said, to the ultimate notice provision adopted by the subcommittee.

Justice Sloan drew attention to the wording in section 5 stating that the defendant may not introduce expert testimony regarding partial responsibility "unless he has complied with the provisions of section 6..." and noted that section 6 read, "A defendant who is required under sections 4 or 5 of the Article to give notice....." Justice Sloan said that he did not read sections 4 or 5 as requiring the defendant to give notice.

Professor Platt replied that this was not his intent nor that of the subcommittee and if this had happened, the language ought to be clarified.

Judge Burns felt this was a drafting problem and asked if what Justice Sloan were suggesting was that sections 4 and 5 should read, "Unless you have given notice in accordance....." Justice Sloan felt this would take care of the problem.

Section 11. Mental disease or defect excluding fitness to proceed.

Senator Yturri suggested the Commission consider section 11 of the draft next and invite the comments of the doctors so that if they so desired, the doctors might be free to leave the meeting.

Professor Platt remarked that the section pretty well touched what is existing law again, with perhaps some specificity that is not now in the law with respect to sub-paragraphs (1), (2), (3), and (4) and they were there only to make clear the kinds of issues that ought to be in the mind of the psychiatrist when he is talking to the person who is being examined.

Senator Yturri felt that the sub-paragraphs were exclusive and he wondered if the psychiatrists felt anything should be added, changed or deleted.

Judge Burns asked if a psychiatrist could upon examination reach a conclusion with reasonable assurance in his mind that someone who

failed to qualify under the listed sub-paragraphs in the section ought not to be forced to trial. Judge Burns related that it was the intent of the subcommittee to give a broad scope to the examiner who essentially makes the decision now.

Dr. Voiss felt the draft was quite clear and said these were the questions that he asked himself and included everything needed to make a reasonable decision as to whether an individual should proceed with a trial.

Representative Frost asked if sub (3) were not redundant--if it would not fit in with (2) and (4).

Professor Platt replied that if no change were made in existing law, it would probably be all right without any of the specific references but he noted that the section is directed to psychiatrists and not to lawyers. If the section language were redundant, he felt it did no harm.

Dr. Smith felt the section was valuable in that it defined what the court wanted answered and thus placed the psychiatrist in a better position to supply answers.

Senator Burns felt that subsections (2), (3), and (4) were redundant and referred to "following the evidence" or "participating in his defense" and felt it really meant being able to assist such as is in the present law. He also stated he had some particular questions, and would go into them with Professor Platt later, about the use of the language "A person cannot be proceeded against" as opposed to the present language. Senator Burns directed some remarks to Dr. Smith asking if it would not be entirely possible as a result of an examination to conclude that an individual might not be able to follow the evidence while at the same time finding that he could understand the nature of the proceedings against him and also be able to assist counsel.

Senator Yturri questioned that someone could understand the nature of the proceedings against him if he were unable to understand the evidence.

Mr. Spaulding pointed out that if evidence were, for instance, scientific and complicated, many people would not be able to understand it.

Dr. Smith said that he could conceive of a case where an individual might be able to understand the proceedings against him but be unable to assist and cooperate with his counsel--the deeply depressed individual or the individual feeling antagonism toward an appointed defense attorney. Dr. Smith said he did not feel he really understood subsection (3) but felt that (1), (2), and (4) had usefulness.

Senator Burns referred to earlier comments by Dr. Smith during which Dr. Smith stated that he felt section 11 would be of value and asked Dr. Smith what new dimension would be added to the examination by the inclusion of subsection (3) which would enable the doctor to say the defendant was incompetent.

Dr. Smith did not feel it would add anything to the examination but it might make it easier for the psychiatrist to communicate with the court if it were clearly defined as to what the court had in mind.

Judge Burns asked if under the proposed language the answer in a given case would be different from what the answer would be under present rules--would the psychiatrists have more, less or the same number of defendants that, in their opinion, they could judge as able to assist with their defense or as unable to assist with their own defense.

Dr. Smith said that with the exception of subsection (3) in section 11, that these were the questions he presently used in making out a report for the court.

Judge Burns noted that the language of subsection (3) and for the whole section came from the California draft.

Professor Platt thought the language was also found elsewhere, perhaps in the proposed Michigan code. In reply to Senator Burns, Professor Platt advised that it had not been his intent nor the intent of the subcommittee to expand the nature of the examination. The purpose was to make clear what the court needed to know from the psychiatrist within the presently existing concepts of what incompetence with respect to aiding counsel meant. If it appeared that sub-paragraph (3) would expand this, Professor Platt felt this was beyond the intent of the subcommittee and the draftsman.

Senator Yturri felt that the section did expand beyond existing law as the existing law merely referred to the ability to understand the nature of the proceedings against the defendant and for the defendant to be able to assist and cooperate with his counsel in his own defense.

Senator Burns felt sub-paragraph (3) possibly added a new dimension that just complicated the system. Senator Burns said he was rather fond of the present language which prefaces the meat of this by saying "If before or during the trial in any criminal case the court has reasonable gounds to believe....." as it specifically defined when and under what circumstances this particular section could be imposed. In the draft, he continued, it read, "a person cannot be proceeded against while he is incompetent as defined in this section." He wondered if a district attorney would be proscribed from filing an information of felony or taking it to the grand jury because of this. It could be said it was an issue that could be

immediately raised on a habeas corpus because of lack of definition here where under the present state of the law there is no question but what an information can be filed.

Judge Burns felt that sections 12 and 13 would make it clear that there has to be a determination; therefore, the determination has to be made by the court and brought to the court's attention, presumably by one of the parties or conceivably in the defense in open court, but until the determination is made, the proceeding continues and he was certain the subcommittee did not intend to create jurisdictional problems. He said that once the determination had been made by the court pursuant to sections 12 and 13 and it had been found the defendant was not able to proceed, proceedings would halt.

Senator Burns commented that the MPC had built-in safeguards because it used the language that a person cannot be tried, convicted or sentenced but that it did not have a proscription insofar as proceeding against that person such as the proposed draft had.

Mr. Clark asked what would be wrong with using the MPC language.

Professor Platt remarked that there was no intent to expand in this area and he felt the points raised were good. He thought the MPC language, however, might be a little more restrictive than the current law. It was his understanding that the "before or during trial" concept and language now existing in the statute were to be retained.

Judge Burns recalled that the subcommittee talked about avoiding changes in existing law and sentence. It was thought, he continued, that the word "sentence" in the MPC provisions could possibly be productive of delay and that there were adequate provisions under present law for preventing sentencing of persons who were not mentally capable. He suggested that Professor Platt go ahead and make changes so as to continue existing law.

Senator Yturri concurred.

Dr. Smith referred back to section 7, the first paragraph, and wondered if this would be deemed an instruction by the court. Dr. Smith commented that on a strictly dollars and cents cost to the counties, evaluations can often be done at less expense in the patient's home community rather than remanding the patient for thirty days at the hospital. (He noted the language said not more than 30 days, but, practically, he said, that meant 30 days.)

Senator Yturri pointed out that the section provided the use of "any other suitable facility" not to "exceed 30 days."

Dr. Smith replied that there were very few suitable facilities.

Professor Platt noted that the subcommittee did dwell on this particular problem and let the language stand in light of the practice that often in Multnomah County the defendant is sent to the office of a psychiatrist for an examination--that this is a suitable facility within the concept of the draft.

Dr. Smith felt this was done but frequently in Multnomah County this does not happen.

Judge Burns noted that it is a severe expense factor to Multnomah County. He remarked that in fiscal 1967-68, the cost to Multnomah County for examinations of this type was about $65,000 for one year.

Dr. Voiss said that he had done examinations through the Clinic where the defendant had been in the county jail and the examinations had gone on over a period of four, five, or six visits.

Senator Burns asked the psychiatrists if they could perform an adequate and satisfactory examination by going out to a jail and interviewing a defendant for an hour or so.

Dr. Voiss did not feel that it could be done in an hour and admitted that it would not be as satisfactory as possible. He did not feel the physical setting was that important, providing there was some privacy and some comfort. Unless the examination were made to answer a specific question, i.e. the proceedings, Dr. Voiss felt the examination would require more than one visit; it would vary.

Dr. Smith noted that he had examined people at The Butte, the downtown jail, at his office, and at Holliday Park Hospital. There are cases, he contended, where in short order a psychiatrist can make up his mind that the mental defect is serious enough.

Dr. Voiss questioned the meaning of "assisting in his own defense."

Senator Yturri commented that it meant for a defendant to assist in his own defense, to his own advantage as the ordinary person would see it, to help himself, to free himself. He felt this was the general understanding of this.

Dr. Voiss referred to section 12 (3) (b) and the wording "diagnosis of the mental condition of the defendant;" and asked Professor Platt to clarify what was meant by "diagnosis."

Professor Platt replied that it was not used as a term of art that a psychiatrist would use and he thought perhaps a less artful word, a less controversial one among psychiatrists, than the word "diagnosis" would be more appropriate. He noted that Dr. Voiss had suggested that the words, "The finding on the mental condition of the defendant" would be appropriate and Professor Platt thought they would serve the purpose in which the court would be interested.

Dr. Voiss wondered if the diagnosis in the classical sense (such as saying pschizophrenic reaction) was what the statute had in mind or whether the findings in terms of the phenomenological description of the behavior of the patient and the whys and wherefores of the events was what was wanted.

Judge Burns replied that customarily when these reports are received the court desires as full a setting out of the facts as is possible. The reports from the State Hospital, he continued, normally have the specific diagnosis using numbers and this had not been too helpful.

Mr. Spaulding suggested the wording "a description of the mental condition" of the defendant be used in place of the word "diagnosis."

Mr. Thornton suggested the use of the word "statement" in the place of the word "description."

Senator Burns questioned that it was necessary to specify in the statute what the report of the examination was to contain. He felt the order from the court could specify what was wanted.

Senator Yturri replied that one of the reasons for defining what the report was to contain was the great variety of reports presently being received.

Dr. Smith commented that in most cases the psychiatrist never sees the order written by the court--very often the request comes by telephone.

Senator Burns noted that orders from the Federal Court were sent out.

Judge Burns noted, also, that the State Hospital saw the order and he knew, also, that they customarily see the police report.

Dr. Voiss remarked that he, in the clinic, did not proceed until he received the order.

Senator Yturri suggested that the word "diagnosis" in section 12 (3) (b) be changed to "statement."

Dr. Voiss commented that he understood the "nature" of the examination to mean the physical setting, the tests involved, the number of interviews, when, where and the time of the examinations.

Judge Burns asked if the use of the word "statement" in place of "diagnosis" would help; if it would be more likely to increase the validity of the communication.

Dr. Smith did not think it would make much difference; he did not think it was possible to legislate the quality of the reports obtained from physicians.

Professor Platt observed that the purpose was not to improve the quality of the reports but rather to help eliminate non-uniform practices and to help physicians where judges do not ask anything in their order requesting the examination.

Senator Burns referred to the wording in section 12 (3) (b) and noted that a diagnosis of the mental condition of the defendant is requested but that it does not specify the time of the mental condition.

Judge Burns pointed out that this is in context at this point with the question to be answered--is the defendant able to proceed? It had been the practice of the State Hospital, he continued, and the practice of some of the private psychiatrists, that when they make such a determination they report as well upon their opinion as to the mental condition at the time of the act in question. This also serves the practical purpose of eliminating another examination in the event the defendant later pleads insanity.

Mr. Spaulding noted that if the statute encouraged the psychiatrist to be too specific in the type of questions asked the defendant, he might be furnishing the prosecutor with somewhat unfair information to use on cross examination of the defendant.

Mr. Paillette referred to section 12 (3) (c) pointing out a minor clerical addition--before the word "opinion" the word "an" should be inserted.

Senator Burns felt it was obvious that as a result of the discussions, some redrafting was needed and rather than make specific amendments to sections 11 and 12, he would recommend that Professor Platt make the changes he thought appropriate and that the Commission members consider them at the next meeting.

This suggestion was agreeable with all present.

Judge Burns and Senator Yturri expressed the gratitude of the Commission to the psychiatrists present for their assistance and those doctors who wished, excused themselves from the balance of the meeting. Dr. Butler remained for the rest of the meeting.

Section 14. Incapacity due to immaturity.

Professor Platt advised that generally the section is not intended nor did the subcommittee think it made any change with respect to the present juvenile code and the way it operates nor does it make any change in the Little decision and the impact that that had on the law. Professor Platt observed that the section dealt with a very small group; this would cover the individual who when he committed the act was in the jurisdiction of the juvenile court but for some reason was not tried until he became an adult--perhaps he was not apprehended or perhaps the crime was not discovered until he reached the age of 18 or upon reaching the age of 16 or 17 he had been committed to the jurisdiction of the criminal court to be tried as an adult. This provision, dealing with that kind of a person, provides that he cannot be convicted in court when tried as a criminal under those jurisdictions if he committed the criminal act when he was less than fourteen years old. Professor Platt admitted that the age of fourteen was an arbitrary age--it was the outside limit at common-law; many states say fifteen and some say sixteen. It was the concensus of the subcommittee, he said, that the age ought to be put at fourteen but there is no real, supportable reason for that particular year. The objection was raised, Professor Platt said, to making it too far back.

Judge Burns pointed out, also, that where this peculiar set of circumstances occur, though the defense is spoken of as an "affirmative defense" it is simply that the burden on the defendant is to raise the issue and the state must prove beyond a reasonable doubt that he was of a culpable age in order to purview jurisdiction.

Professor Platt added that the words "affirmative defense" were used on the assumption that section 1.12 of the Model Penal Code would be enacted in substance in Oregon when the Commission dealt with that subject. The old, existing common-law rule would have a different effect, Professor Platt said, because it had some varying ages--conclusive under seven and presumptive but rebuttable between seven and fourteen. The proposed draft would do away with this and states flatly that the defendant is not responsible for any criminal act performed before the age of fourteen. Professor Platt observed that the number of people who would be involved under the proposed section would be minute but the subcommittee concluded that it had to be dealt with because while the number of cases would be small it would involve a very heinous kind of crime that would come to public attention.

Section 4. Notice required in defense excluding responsibility.

Professor Platt answered a question asked by Senator Yturri by advising that any testimony, lay or expert, would be excluded if notice had not been given. He noted that the Supreme Court had held that such testimony is improper unless there had been notice of mental disease or defect. Professor Platt stated that if any testimony were given

in an insanity defense, under section 1, there must be notice. Under partial responsibility, he continued, in section 2, there may be lay testimony without notice.

Senator Burns noted that with respect to admissability of expert testimony that there are certain well defined rules that the trial court can follow, which require that a foundation be laid. He noted that in the area of partial responsibility that a layman could testify and asked what guidelines there were that would assist the trier of the fact in regulating this type of testimony.

Senator Yturri did not think there was any difference in the law; he felt it was covered by the statute and by cases already if a lay person were to testify as to a defendant's mental condition.

Judge Burns observed that presently under a standard insanity case, that he thought lay evidence could be presented provided that the witness had an opportunity to be close enough to make the observation, etc. He did not see where there would be any difference under the draft either where there was insanity or partial responsibility. Judge Burns noted that two alternatives regarding the notice provisions for partial responsibility had been sent to the Commission by the subcommittee. It was felt by the subcommittee, Judge Burns stated, that testimony by lay witnesses without notice would not be unfair to the state.

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

Professor Platt stated that subsection (1) recognized the limitation imposed under Shepard v. Bowe. The state under Oregon law does have the right to have a psychiatrist of its own choice examine the defendant but now that is limited by Shepard v. Bowe and the psychiatrist may not ask any questions the answers of which might tend to incriminate the defendant.

Professor Platt noted that subsection (2) carried this further and provided that at the examination where the state psychiatrist is examining the defendant, the defendant is entitled to have counsel present. The subcommittee decided a right to an attorney at the hearing would be imposed because it flowed naturally from Shepard v. Bowe but the decision of also adding the presence of a psychiatrist to that of counsel was left to the discretion of the Commission. The idea of having a psychiatrist present at the hearing was aimed at eliminating the battle of the psychiatrists later, Professor Platt continued.

Senator Yturri asked if the defendant would not be protected adequately if his attorney were present.

Mr. Spaulding expressed the opinion that the attorney would be foolish to have his psychiatrist at the hearing but did not feel there would be any harm in allowing it if the attorney desired this.

Senator Burns noted, regarding Shepard v. Bowe and subsection (2) of section 7, that a matter of policy was involved. It was, he said, a matter of taking case law and putting it into the statute. There was always the possibility that case law might change and Senator Burns wondered if it were a good policy to put it into the statute.

Judge Burns related that the view of the subcommittee had been that whether they liked it or not, this was the law and they did not anticipate that there was much likelihood of a change and that to sit down and write a statute prescribing details for this type of examination simply ought to reflect the law.

Mr. Spaulding asked if the draft went further than Shepard v. Bowe where it prohibits any questioning "concerning the defendant's conduct at or immediately near the time of the commission of the crime." As Mr. Spaulding read it, the questions would be prohibited even though the questions would have nothing to do with the criminal act charged.

Professor Platt was not sure he could answer the question; he stated that the language in the section reflected the language of the court decision.

Mr. Spaulding admitted that he had not read the decision carefully but felt that what the court meant were questions in reference to the crime, questions that would be incriminating.

Professor Platt felt this was probably right and thought perhaps it should be specified.

Senator Burns reiterated his view that a good principle of statutory revision was to try to make the statute as workable as possible without pinning it down to a lot of particulars.

Senator Yturri asked if the words "which might tend to incriminate him" related all the way back to "questions concerning the defendant's conduct at or immediately near the commission of the crime."

Mr. Spaulding noted that the words "charged or any other..." made two different subjects.

Professor Platt agreed but remarked that the defendant ought not to have to answer any question which might tend to incriminate him regardless of whether or not it related to the crime.

Mr. Thornton suggested the problem could be taken care of by deleting "concerning the defendant's conduct at or immediately near the time of the commission of the crime charged or any other question." He felt there was merit in Senator Burns' point about writing case law into the statutes.

Professor Platt pointed out that it was constitutional case law rather than the construction of a statute. He felt constitutional case law tended to change more slowly.

Senator Burns was of the opinion that some of the fourth, fifth, and sixth amendment cases, constitutional questions, might very radically change over the period of the next eight years, depending upon the make-up of the Supreme Court.

Professor Platt stated that he did not disagree violently but felt that the draft ought to reflect what the case law is at the moment. If, he continued, the case law is changed there would just be some language in the code which would be obsolete.

Senator Yturri and Mr. Spaulding disagreed, saying it would be provided by statute then and it wouldn't be true if it weren't for the statute. Presently, there is court-made law, with the statute there would be court-made as well as statutory law.

Mr. Paillette interjected the comment that the Legislature could go beyond what the Supreme Court requires and Mr. Spaulding and Senator Yturri agreed that this was their point.

Representative Frost commented that the practical benefit of retaining the language is that it is a direct "thou shalt not" to the doctor and he felt a problem could arise if the doctor asked the wrong question, wrote it in the report and sent it to the court without an attorney being present.

Senator Yturri stated that provision could be made for the presence of the attorney and the psychiatrist and any further reference to the asking of questions eliminated; let it ride on case law.

Representative Frost liked the idea of having it in the statute.

Mr. Thornton suggested writing it in a different vein--that any information elicited shall not be used in the trial, in this same area, because the draft language rather made the psychiatrist become a lawyer in the phrasing of his questions.

Professor Platt responded by pointing out that the observations made by the Supreme Court in Shepard v. Bowe dealt with this subject and said that too many times information of that kind got out to the wrong persons and the Court was not willing to run that risk and the questions were prohibited.

Senator Burns pointed out that his objection to subsection (2) of section 7 was not opposition to Shepard v. Bowe but a desire to make the Commission's work flexible and durable so that Supreme Court decisions would not necessitate changes in the code.

Justice Sloan suggested that the reference to the questions in the subsection be omitted. It seemed to him that as long as there was a statute which provided a procedure to be followed, an omission of what is now the current law would not have to be taken as a legislative rebuke to this decision. The reference to whether or not an attorney should or should not be present at the examination was, he continued, the more crucial thing.

Senator Yturri observed that the commentary could show that this was not a rebuke and the reason for it. The fact that the defendant's attorney or his psychiatrist were present was not the point; the thing that would render the examination ineffective, Senator Yturri contended, was, if he understood the psychiatrists correctly, the fact that they would not be able to ask questions concerning the very period of time and actions on the basis of which they could form a valid judgement as to mental disease or defect. Senator Yturri stated he was willing to go either way on the matter of placing it in the statute.

Professor Platt said that he could see an advantage to Senator Burns' approach. There is but one decision in this area and it certainly has not filled in all the answers with respect to the questions that the psychiatrists can ask or to the procedure of the state having a psychiatrist, so by omitting it with a note in the legislative history that the Commission was not rebuking the decision, the problem would be solved. The Commission would not be getting into an area that the court might have more to say about later. Professor Platt felt there probably was even more reason for eliminating subsection (1), State v. Phillips rule, as he thought the state was more likely to reverse that rule than to change its mind about Shepard v. Bowe. Perhaps, he said, it would be best to forget it all except, perhaps, the guaranteeing the right to an attorney in the case of an insanity examination.

Judge Burns asked if Professor Platt were saying that he thought the draft ought not to provide the state an opportunity to have the defendant examined.

Professor Platt replied that he had a feeling that there might be more reason to say the state has no right to examine the defendant--that there is more likelihood that the court will change its mind about that than it would about the fifth amendment question. This might be another reason, he said, for remaining mum on the issue with a note that the Commission was not taking a position on the thing.

Senator Yturri asked if statute granted the state authority to have the defendant examined by a psychiatrist.

Professor Platt replied that there was no provision--it is case decision.

Senator Burns added that there is provision for the defendant to be examined and the prosecutor is provided with a copy of the report.

Professor Platt agreed, adding the the state's right, Phillips, is new, 1967.

Mr. Spaulding referred to the first sentence in section 7 (1), and wondered if there should be a provision making the selection of the state psychiatrist subject to the approval of the court so that the defendant could raise a question as to whether the psychiatrist was in fact disinterested.

Professor Platt thought this might be beneficial as a policy matter.

Senator Yturri did not feel that the objection would have to be spelled out; that it would be sufficient to say that the state would have the right to have at least one psychiatrist selected by the state, with the court's approval, to examine the defendant.

Mr. Spaulding said this is what he had in mind.

Professor Platt was a little alarmed at this, wondering if this would not put the stamp of official approval on the psychiatrist. He thought that perhaps the problem could be avoided by providing that if the defendant objected to the psychiatrist appointed, he could raise the objection and the court would direct the state to choose another psychiatrist. This would avoid the approval label, in a sense.

Mr. Spaulding, at Mr. Thornton's request, restated his proposed amendment--some provision that would give the court the right to determine whether the psychiatrist selected by the state was impartial and competent (although he did not know that the word "competent" was needed).

Professor Platt suggested that the first sentence in section 7 (1) be retained and that an additional sentence be inserted immediately thereafter: 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.

Mr. Spaulding agreed that this was what he had in mind.

Mr. Rothman asked if the subcommittee had given any consideration to that time before the filing of the notice of the intent to rely upon insanity as a defense, when an initial evaluation takes place. This is the area, he said, which in his judgement was most dangerous, noting the admonition of the Boyd case, which he felt was a good admonition, and which applied to the initial evaluation which is made for the defense counsel before he makes up his mind to file a notice that he intends to rely on an insanity defense. In the initial

Tape 2 begins here:

evaluation, he continued, all the facts are given by the defendant to the defendant's appointed psychiatrist and this time is when the incriminating facts will really come into play. As a practical matter, this is what the counsel relies on to decide whether or not he will file notice to rely on the defense of insanity.

Professor Platt noted that the provision for an incompetence hearing did not include the question of whether the defendant was mentally diseased or defective so as not to be responsible. That question would be improper, he said, under the provisions in the draft.

Judge Burns advised that the subcommittee had talked about this and he felt the subcommittee opinion was that the fifth amendment problem was not present because it would not be the state psychiatrist that examined the defendant, it would be a court psychiatrist who determined whether or not the defendant was able to proceed. Judge Burns surmised that sooner or later the question might be raised that though it was a court psychiatrist, the state psychiatrist gets a copy of the report and perhaps thereafter might be able to use it in defiance of the fifth amendment right. The subcommittee did not feel that there was any indication that Shepard v. Bowe was going to be carried that far.

Professor Platt related that he had attended a seminar that Judge Solomon had held for some judges from his district with psychiatrists and the question came up--what should a judge do when he gets the answer back that not only is the defendant incompetent, but is insane? Judge Solomon had stated that the judge should immediately disqualify himself; he felt that that was the kind of information that no judge ought to see, especially if the judge was to try the same defendant without a jury. Not all judges, Professor Platt continued, feel this way; they do not feel that this is a fifth amendment problem. In the proposed draft the psychiatrist is not asked to tell the court whether or not he thinks the defendant is insane; he is only asked at this point whether or not the defendant can proceed.

Mr. Rothman asked if the subcommittee gave any consideration to expanding the inquiry by statute to say that the initial evaluation might also include the opinion as to sanity.

Judge Burns did not know that the subcommittee had dwelt on this but he did know that it was the practice of the State Hospital to express this opinion when they expressed an opinion on the defendant's competency to stand trial.

Mr. Rothman stated that his experience had always shown that the question of insanity was always answered as a part of the initial evaluation. The authority for the examination, he continued, was predicated on determining whether or not the defendant was competent to proceed, but in essence that was fiction because what is really wanted and given is whether or not the defendant knew the quality of

the act at the time of the question. Mr. Rothman felt that the initial report was the greatest problem in trying the case and where the greatest prejudice was done to the defendant. After the initial evaluation is made and after the counsel determines to file notice of intent to rely on the defense of insanity, the act itself is unimportant. Whether or not the defendant committed it is not a consideration at trial; the only consideration thereafter, he said, is whether or not the defendant knew the nature and quality under M'Naghten.

Judge Burns noted that the Phillips case had not arisen in context of determining competence but arose concerning an insanity examination.

Senator Yturri asked the value of Shepard v. Bowe if before notice is ever given, the state is provided all the information, whether or not they have asked the questions. The report provided the state contained all the answers to questions prohibited by Shepard v. Bowe. He wondered what business the state had getting a copy of the initial report.

Mr. Paillette observed that the Phillips case said that the state had a right to a mental examination of a defendant after he had raised insanity as a defense.

Professor Platt agreed that Shepard v. Bowe would mean nothing if in fact the information in the initial report were floating around. He felt that it would be necessary to conclude that it must mean that the state cannot be supplied with the kind of information that heretofore has been supplied as a uniform practice. Professor Platt did not feel that a hearing on the competence of the defendant to proceed should involve the criminal act at all. He asked if there was a need to ask this type of question in that what was to be determined was whether the defendant was able to understand the proceedings against him not did he understand what he was doing at the time the act was committed.

Dr. Butler replied that if this was all that was wanted at that time, there would be no need to inquire about the offense. The defendant would be examined in relation to the here and now and the psychiatrist would be projecting into the future as to how he would function during the trial and cooperate with his attorney. Dr. Butler said, however, that he had never been asked to do an examination of this sort.

Judge Burns questioned that the defendant's competency to proceed could be established without asking him questions relating to the event.

Senator Yturri asked Judge Burns who normally raised the question of competence and asked if the defendants were usually sent to the State Hospital for examination.

Judge Burns replied that normally the defendant raised the question, but occasionally the state or the court. He stated that the cost of an examination by the Hospital was $544, which was mostly board and room for thirty days so that the court now tries to have as many defendants as possible examined in Multnomah County for budgetary reasons.

Mr. Rothman again stated that as a practical matter, an attorney uses whether or not a defendant is able to assist in his own defense to obtain an evaluation of whether or not he knew the nature and quality of the act committed, to obtain a psychiatric evaluation to help in the defendant's defense and to determine whether or not he has an insanity plea. The essence of the problem, Mr. Rothman continued, was that the statute was not broad enough. There is no statutory authority to obtain an examination for an indigent to determine his mental condition at the time of the alleged act, he said, only to obtain a competency examination.

Professor Platt agreed that there was no statutory authority for providing this type of examination although he understood that it is the practice in some courts having the funds to allow such examinations. The U. S. Supreme Court, he continued, has not said that the right to an expert extends that far yet; although he thought it would sometime.

Representative Frost expressed surprise at the complications arising in some counties. He cited a recent example of a case he had handled wherin he had simply filed a motion asking the court under authority to appoint counsel and also to provide expenses necessary to defend the case, to allow him to hire a psychiatrist for the purpose of having an examination made. The order, he said, specified in detail that he could hire the psychiatrist he wanted and that the report was to go to him and no one else. There was no objection, he continued, and the examination was done at the State Hospital.

Judge Burns stated that in Multnomah County if the court authorized an appointment of a defense psychiatrist the information could be kept for the defense counsel but the initial examination of whether or not the defendant is competent to stand trial goes to everyone just by custom and this is what the proposed draft provides for.

Mr. Spaulding asked if the draft could not provide that the examination not go into the question of a person's mental capacity under M'Naghten--or whatever rule is used.

Judge Burns did not feel this was the problem raised by Mr. Rothman, namely, that of factual disclosures the defendant makes to the examining physician which later get into the report and furnish new leads for the district attorney, etc.

Mr. Spaulding felt the problem went beyond the mere proposition of procedure used for the purpose of saving the cost of hiring a private psychiatrist for a defendant because the defendant ought to have the right to raise the defense without having to waive any fifth amendment rights.

Professor Platt suggested that this was a very large dilemma struck late in the day and noted that he would like to think about the problem and its impact on the Shepard v. Bowe situation.

Mr. Paillette commented that there appeared to be differences from county to county in the way that the situation is handled.

Judge Burns suggested that perhaps sections 11, 12, and 13 should be sent back to subcommittee.

Professor Platt observed that section 7 should also be kept in mind as it was a part of the same problem, from a different angle, but should be in the same package.

There was general agreement with these suggestions by Judge Burns and Professor Platt.

Judge Burns felt that perhaps the Commission members could go ahead and vote, starting with section 1, and going on as far as possible. He asked for opinions on section 1.

Senator Burns stated that he was not prepared to vote on section 1. and Senator Yturri suggested it might be better to postpone voting until the next meeting giving the Commission members time to think over the day's discussions.

Mr. Williams asked that as long as the voting was to be postponed that the members carry away a question he had regarding section 5--as to whether or not there was any unfairness in not requiring notice of lay testimony.

Judge Burns said that the problem the subcommittee foresaw in this area was that when notice is required, testimony is barred unless such notice is given and the subtleties and differences of the type of evidence which diminish responsibility is a lot more difficult to see and give notice about than on the expert phase of it. Furthermore, he said, the subcommittee was largely of the feeling that the quality of that testimony was not so dangerous to the state's case as to create any severe problem.

Mr. Paillette added that the district attorneys appearing at the subcommittee meeting were of that opinion and he felt that was what really persuaded the subcommittee to adopt the procedure in the draft.

Senator Yturri asked Mr. Paillette to confer with Professor Platt to determine the date of the next Commission meeting and to advise the Commission members of this date sometime the following week.

Mr. Paillette advised the Commission that subcommittee appointments for the new members and subcommittee chairman appointments would be made shortly and all Commission members would be notified of these appointments.

The meeting was adjourned at 4:30 P.M.

Respectfully submitted,

Maxine M. Bartruff, Clerk
Criminal Law Revision Commission