Tape 2

OREGON CRIMINAL LAW REVISION COMMISSION

Twenty-third Meeting, December 10, 1970

Minutes

Members Present: Senator Anthony Yturri, Chairman
Judge James M. Burns
Senator Wallace P. Carson, Jr.
Mr. Robert W. Chandler
Representative Harl H. Haas
Senator Kenneth A. Jernstedt
Attorney General Lee Johnson

Excused: Senator John D. Burns, Vice Chairman
Mr. Donald E. Clark
Representative David G. Frost
Mr. Frank D. Knight
Mr. Bruce Spaulding
Representative Thomas F. Young

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

Also Present: Captain Glenn Bowman, Salem Police Department

Agenda:

Senator Anthony Yturri, Chairman, called the meeting to order at 10:15 a.m. in Room 315 State Capitol.

Approval of Minutes of Commission Meeting of October 12, 1970

Mr. Chandler moved that the minutes of the Commission meeting of October 12, 1970, be approved as submitted. Judge Burns seconded and the motion carried unanimously.

Amendments to Burglary and Criminal Trespass, Final Draft

Mr. Paillette explained that the amendments to the final draft of the Article on Burglary and Criminal Trespass had originally been suggested by Mr. Johnson's office and by Mr. John Leahy, Lane County

District Attorney, and were submitted to the Commission at its October meeting. At that time the Commission had referred them to Subcommittee No. 1. The subcommittee had subsequently met with a representative of Mr. Johnson's office, Mr. Leahy, Judge Virgil Langtry and Mr. Malcolm F. Marsh, both representing the University of Oregon Alumni Association. The type of premises at which the amendments were aimed, he said, were buildings such as the State Capitol, a university building or a county courthouse where the premises were open for certain purposes and the public was privileged to use them for those purposes, recognizing that certain portions of the premises were designed to be subjected to a usage different from other portions. For example, a committee room in the Capitol was designed to be used for meeting purposes whereas a meeting would not ordinarily be held in the rotunda.

Mr. Paillette advised that the amendments to the definitions in section 135 were basically intended to clarify the intent of the term "enter or remain unlawfully" and to allow an individual in charge to tell persons to leave the premises when they abused the use of those premises.

Judge Burns observed that one person could be prosecuted for entering or remaining on premises not open to the public under paragraph (a) of subsection (3) while paragraph (b) required that the person had to be directed to leave the premises by the person in charge before he could be prosecuted. He was of the opinion that the proposed statute might constitute an inconsistency when one person had to be directed to leave the premises while another was liable for conviction if he had merely entered or remained when the premises were not open to the public, even though he had not actually been informed that this was so.

Mr. Paillette expressed the view that the definitions were not inconsistent in this respect. It would be necessary, he said, to look at the total circumstances of a given situation. If the persons involved merely walked around the halls of the Capitol, for instance, and caused no problem, this conduct was permissible, but if they were to lie down in the corridors and interfere with the use of the building, they would be put on notice by the person in charge that their use of the premises had reached the point where it was no longer a lawful usage of that building.

Mr. Chandler commented that as a practical matter, prosecution under this type of circumstance would probably involve a mob situation where the crowd would be ordered to leave by the person in charge and everyone present would be well aware that they had been given notice to leave.

Professor Platt asked if the subcommittee had addressed itself to the type of problem which occurred at the University of Oregon where disruption had been caused by a large number of students packing themselves into the rooms. No actual violence had occurred but it was impossible to conduct the business of the office simply because of the large number of people on the premises.

Mr. Johnson pointed out that one of the purposes of the proposed amendment was to provide a relatively simple way to handle situations such as Professor Platt described. The person in charge of the building could tell the students to leave and they could be prosecuted if they refused to do so.

Captain Bowman expressed approval of the intent of the proposed amendments. He asked whether subsection (3) (a) would require two prosecutions -- one for entering and one for remaining. Mr. Paillette replied that the complaint would charge the person with "entering and remaining" and it would be necessary to prove only one or the other.

Judge Burns moved that the proposed amendments to section 135 be adopted and the motion carried unanimously.

Time Limitations; Preliminary Draft No. 2

Section 1. Time limitations. Mr. Paillette indicated that the draft on time limitations was the first draft of the procedure code to come out of subcommittee. He explained that subsection (1) of section 1 contained the same exception for murder or manslaughter as existing law.

Subsection (2) remained unchanged from existing law except in paragraph (c) where a shorter period of limitation for a violation was provided. It limited prosecution of a violation to a six month period after commission of the act.

Subsection (3) entered an entirely new area and contained exceptions not in the present code. It provided that if the period of limitations otherwise prescribed had expired, a prosecution could nevertheless be commenced under certain circumstances prescribed in paragraphs (a) and (b). He explained that under paragraph (a) prosecution of a felony would be limited to six years. In reply to a question by Chairman Yturri, Mr. Paillette advised that when the offense was based upon misconduct in office, the time limitation would be five years if the man were no longer in office but six years if he still held the office.

Chairman Yturri asked what the result would be if a person committed felonious misconduct in office and the offense was not discovered until he had been out of office for more than two years. Mr. Paillette pointed out that paragraphs (a) and (b) were disjunctive and that in the situation posed by the Chairman, the person could be prosecuted under paragraph (a) or (b).

Chairman Yturri noted that a violation was not a crime and asked what the time limitation would be on a violation. Mr. Paillette replied that the first period was six months with an additional two years added under this draft; the total would therefore be two years and six months.

Judge Burns asked whether paragraph (b) applied only to official misconduct in office in the first or second degree as described in Article 25 (Abuse of Office) in the proposed code and was told by Mr. Paillette that the provision was intended to be broader than that and would be applicable to offenses such as embezzlement, bribe receiving, etc.

Judge Burns urged that the commentary to section 1 contain a statement that paragraph (b) was not intended to be limited to the crime of official misconduct as set forth in sections 214 and 215 of the proposed criminal code. Other members of the Commission agreed.

Mr. Johnson asked whether paragraph (b) would apply to a crime committed by an official while he was in office which bore no relationship to the office. Mr. Chandler replied that the provision was intended to apply to an act which the person had an opportunity to accomplish because he held a particular office and Mr. Paillette expressed agreement.

Mr. Chandler moved approval of section 1. Judge Burns seconded and the motion carried unanimously.

Amendment to ORS 131.110, Time within which criminal action must be commenced. Mr. Paillette advised that the bill to be submitted to the legislature containing the proposed criminal code made no change in the existing statute of limitations. He suggested that an amendment to ORS 131.110 should be submitted which would, in the event the proposed code became law, give the courts a guideline to follow as to what the statute of limitations would be for a violation.

Mr. Johnson moved that Mr. Paillette prepare and submit to the legislature an amendment to ORS 131.110 to accomplish the above-described purpose. Mr. Chandler seconded and the motion carried unanimously.

Section 2. Prosecution; when commenced. Mr. Paillette indicated that section 2 was derived from the Model Penal Code. It would change existing law in that present law made no mention of a warrant. He read from the commentary on page 9 of the draft relating to the two main types of current legislation on this subject, i.e., statutes requiring that an indictment be found or an information filed and statutes requiring merely that prosecution be commenced.

In reply to a question by Representative Haas concerning John Doe warrants, Mr. Paillette said it was his opinion that prosecution would be commenced under a John Doe warrant even though the defendant was not named, provided the warrant was executed without unreasonable delay.

Judge Burns expressed concern about the wisdom of adopting section 2 in view of the phrase pertaining to "unreasonable delay." He asked what criteria the courts would use in determining what constituted unreasonable delay and questioned whether adoption of the section would add another decision-making process for the courts which was purely procedural as opposed to considering only the merits of the case. If the section were to be adopted, he said he would recommend that the Commission furnish to the legislature some guidelines or criteria by which the court could be bound in determining "unreasonable delay."

Mr. Paillette advised that this question had been discussed in subcommittee and the feeling at that time was that the state should not be permitted to toll the statute indefinitely by getting an indictment and not taking any action on it.

Mr. Chandler commented that the criteria to be considered should be whether the defendant was available for service or whether he was out of state and the kind of attempt made to serve the warrant. The subcommittee felt, he said, that a secret indictment should not be permitted to be kept on file in the courthouse for a long period of time without some action being taken on it.

Judge Burns remarked that in any large operation, such as that in Multnomah County, there were bound to be unexplainable oversights and omissions. He said he could foresee where difficult problems could arise and the police would have to be brought in to testify as to their efforts in attempting to serve the warrant, the dates they had tried to do so, etc.

Mr. Paillette commented that it was inadvisable to make the statute so specific as to limit it, for instance, to six months or a year. The court would then be locked into a situation which might create injustices to both the defendant and the state.

After further discussion, Judge Burns withdrew his objection in deference to Mr. Chandler's eloquence in urging adoption of the subcommittee's view that even though there was a possibility that problems might arise with the phrase "without unreasonable delay" and even though it might occasionally cause added court appearances and added decisions by the trial court, it would be better to build flexibility into the statute than to make it arbitrary.

At a later point in the meeting the Commission agreed to include an explanation of "unreasonable delay." (See page 8 of these Minutes.)

Mr. Paillette pointed out that the draft avoided words such as "information" and "indictment" because of the uncertainty of the type of language which would be used when the Commission reached those areas of the procedure code.

Judge Burns moved adoption of section 2 and the motion carried without opposition.

Section 3. Time limitations; when time starts to run; tolling of statute. Senator Carson asked why section 3 provided that the time would not start to run until the day after the offense was committed and was told by Mr. Paillette that it seemed desirable to specify that the day the offense was committed would not count against the state.

Chairman Yturri inquired as to the meaning of "inhabitant" and "usually resident" and Mr. Paillette advised that this was the same language used in the existing statute. It had apparently caused no problem, he said, since there was no Oregon case law on the subject. Under similar cases in other states, "inhabitant" had been construed to mean a person living in the state, even though temporarily, but not necessarily domiciled in the state.

Mr. Paillette reported that the first draft of this section used Model Penal Code language but the subcommittee felt it was too involved and was unfair to the defendant. That draft stated that the period of limitation would not run during "Any time when the accused is continuously absent from the state or has no reasonably ascertainable place of abode or work within the state" and went on to place a three year limit on the period. The subcommittee believed the language of the existing statute was superior to the Model Penal Code version, one reason being that the accused's place of work was not too relevant.

In response to a further question by Chairman Yturri, Mr. Paillette said he was unable to state precisely the distinction between an inhabitant and a resident.

Mr. Johnson again raised the question which had earlier concerned Judge Burns concerning a criteria for "unreasonable delay" and noted that the two principal excuses for delay were covered in section 3. He asked what the result would be if the time had elapsed on the face of the indictment, and the person had secreted himself continuously since burglarizing a service station. Chairman Yturri replied that courts in other instances had passed on whether there was unreasonable delay based upon the facts of the case and contended that this was the best way to handle the situation under this draft. Mr. Johnson remarked that this course could cause all kinds of inconsistent results and was told by Judge Burns that based on past experience, cases of the kind Mr. Johnson was discussing were apt to be extremely rare and agreed with the Chairman that they would best be handled by the court on an individual basis.

Mr. Chandler moved approval of section 3. Senator Carson seconded and the motion carried unanimously.

Section 4. Tolling of statute; three year maximum. Mr. Paillette explained that section 4 was a marked departure from present law. It provided, in effect, that the statute could be tolled up to three years for the reasons mentioned in section 3 but placed no lid on offenses such as murder or manslaughter where the statute of limitations did not apply. It was, he said, intended to apply only to section 3.

Mr. Johnson commented that under section 4 if a man committed embezzlement and went to Brazil where he could not be extradited, he could stay six years (or eight if he had embezzled public funds) and would be "off the hook" at the end of that time. Mr. Paillette explained that the proposed statute provided that the action had to be commenced within the three year period. If the person were in Brazil, it would not be considered "unreasonable delay" if the warrant were not executed within that period.

Mr. Johnson contended that the situation he had cited was covered by section 3 which tolled the statute so it was not in his opinion a relevant question when the offender was not an inhabitant of the state. He would therefore get off scot-free, he said.

Judge Burns suggested that the commentary contain a statement that "unreasonable delay" was intended to relate to the efforts of the authorities to serve the warrant and not to the conduct of the defendant as set forth in section 3. Chairman Yturri agreed and stated that if the authorities found the man to be in Brazil when they attempted to serve the warrant, the courts would not require them to perform a vain and futile act by continuing to try to serve it.

Judge Burns asked if it was the intent of the proposed statute that when prosecution was properly commenced, the warrant could be served, for example, ten years later so long as reasonable delay was established. Chairman Yturri replied that this was his understanding of the draft and that the tolling statute would not apply in that situation.

Mr. Johnson said a reasonable argument could be made that inasmuch as the accused was out of the state and for that reason the warrant could not be served, there was no excuse for the delay because that situation was covered as a matter of policy in section 3 where the tolling of the statute was permitted.

Chairman Yturri explained that there were two parts to the statute. If the action were commenced, there would be no tolling problem unless there was unreasonable delay. The only time that tolling came into play was when the action was not commenced within a maximum of three years. In that event, regardless of any other consideration, the statute would be tolled. One part of the statute related to tolling and one to commencing and they were, he said, unrelated.

Judge Burns again suggested that the commentary clarify the intent of the statute with respect to Mr. Johnson's question. Mr. Paillette agreed and proposed to include in the commentary to section 2 a list of factors to be considered on the issue of whether the delay was reasonable. Mr. Johnson agreed and said the focus of the commentary should be placed on the efforts made to serve the warrant.

Judge Burns moved adoption of section 4 and the motion carried unanimously.

Mr. Chandler then moved to change "secretes" in subsection (2) (b) to "secrets." Motion carried.

Staff Report

Mr. Paillette reported that he had in the last few weeks met with the Circuit Judges Association, the District Judges Association, the District Attorneys Association and the Sheriffs Association. Generally, he said, the reaction to the proposed criminal code had been very good. The district attorneys had adopted a formal resolution endorsing in principle the proposed code, recognizing, as did the Bar, that not everyone would agree with every provision. The district attorneys were troubled primarily by the Responsibility Article. The sheriffs too were concerned with the Responsibility Article and also with section 26 relating to limitations on the use of deadly physical force in making an arrest. They felt the code was unduly restrictive in the limitations placed on an officer in making an arrest for commission of a felony. Generally, however, he had

received favorable comment from the sheriffs. He said he had advised the Sheriffs Association that the Commission recognized there were differences of opinion on section 26 and suggested their legislative committee might want to submit proposed amendments to the legislature.

Mr. Paillette indicated that he would meet with the Chiefs of Police in February. He further advised that the proposed criminal code would be designated in the legislature as Senate Bill 40.

Judge Burns expressed the appreciation of the Circuit Judges Association for the excellent presentation made by Mr. Paillette and Professor Platt.

Introduction to the Legislature of Bill on Firearms and Deadly Weapons

There was a brief discussion as to where the firearms bill should be introduced. Mr. Chandler recalled that the Commission had discussed this subject at a previous meeting and Representative Tom Young had suggested at that time that it be introduced in the House. There being no objection, Chairman Yturri so ordered.

Attorney General's Report on Expediting Disposition of Criminal Appeals in Oregon

Copies of Mr. Johnson's report of November 3, 1970, entitled "Expediting Disposition of Criminal Appeals in Oregon" were distributed to Commission members. Chairman Yturri noted that the report concerned a time table on criminal appeals and discretionary bail on appeal. There being no objection, he ordered that this report be submitted for study to an appropriate subcommittee.

The meeting was adjourned at 12:00 noon.

Respectfully submitted,

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission