Tape #74

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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 2

Fourth Meeting, April 24, 1969

Minutes

Members Present: Representative Wallace P. Carson, Jr., Chairman

Absent: Senator Berkeley Lent
Representative Harl H. Haas
Attorney General Robert Y. Thornton

Staff: Mr. Donald L. Paillette, Project Director
Mr. Roger D. Wallingford, Research Counsel

The meeting was convened at 1:00 p.m. by Chairman Carson in Room 401, Capitol Building, Salem. Although there was not a quorum present, Chairman Carson asked Mr. Paillette to explain the provisions contained in the draft on Kidnapping & Related Offenses; P.D. #4; and also to give some background information regarding the three drafts previously considered.

Kidnapping and Related Offenses; P.D. No. 4; April 1969 (Article 12)

Mr. Paillette stated that Kidnapping and Related Offenses; P.D. No. 3 had been considered by the full Commission at its meeting on March 20, 1969. He advised that he had taken care of the changes the Commission had requested at this meeting and in doing so had really restructured the draft. This can readily be noted by comparing P.D. No. 3 with P.D. No. 4.

Mr. Paillette noted that P.D. No. 4 retained the two degrees of kidnapping and makes more aggravated the hostage-shield case; where ransom is involved; serious physical injury to the victim is caused; or the victim or another person is terrorized.

Mr. Paillette observed that the thrust of the draft has not been changed; it is really more a matter of structural changes made in the attempt to get away from the definition problems bothering the Commission, specifically, the terms "restrain" and "abduct" which had been defined in earlier drafts. While the definitions do not appear in the present draft, the same concept is retained in the basic definition of Kidnapping in the second degree. Mr. Paillette referred to section 2, subsection (1), to the language, "...with intent to

interfere substantially with another's personal liberty..," and advised that this is the same language that appeared in the definition of "restrain". He noted that the wording "Takes the person from one place to another" was substantially the same as that which had appeared in the definition of "abduct". The same rationale, therefore, is contained in P.D. #4 as was in P.D. #3 except that they are stated as elements of the crime rather than set forth as definitions. He was hopeful that this approach would answer the objections to the previous draft.

Chairman Carson said he had jotted down a memo to "avoid affirmative defense" when the draft was redrafted and recalled that most of the problems bothering Commission members had come up farther along in the draft--when they had reached the more refined areas, i.e., custodial interference.

Mr. Paillette agreed that there had been trouble in this area, also, and advised that this had been changed.

Mr. Paillette referred to the section on Kidnapping in the first degree and recalled that there had been questions raised regarding the words "hostage" and "terrorize". Judge Burns had been of the opinion that these terms should be defined. Mr. Paillette stated that he had placed definitions of these terms in the commentary. Both terms have precise dictionary definitions and are intended to have the same meanings, as used in the draft. The word "hostage", he noted, is used in the present statute.

Chairman Carson felt that the term "hostage" did not need defining because it is easily identifiable and understood. The word "terrorize", however, is a colorful, literate word. He noted that in section 2 a person would be guilty of Kidnapping in the second degree if he confined a person in a place where he is not likely to be found. If the element of "terrorizing" the victim is added, it becomes first degree kidnapping. He asked what would happen if the actor had just meant to "scare the victim a little bit".

Mr. Paillette did not think the actor would be guilty of first degree kidnapping. To "terrorize" would involve an extremely frightening experience--a fear of torture, starvation, etc. What the draft is concerned with, he said, is "any of the.....purposes...", so that what the actor intends to do is important. It is not so much what the effect will be on the victim or on another person but what is intended by the actor. He admitted that the proof of this intent would be a question of fact and many things would enter into this such as the age of the victim, whether there was any other motivation on the part of the actor, etc., and all of these things would have to be considered. The MPC, he felt, very carefully chose this word and their commentary points out the kind of cases they felt would be covered by it, indicating that the term was employed to cover "vengeful or sadistic abductions accompanied by threats of torture, death.....". As on other cases, where intent is trying to be proved, the best evidence of the intent of the actor is what was done by the actor.

Mr. Paillette pointed out that the dictionary definition of "terrorize" is "to impress with terror; to coerce by intimidation" and "terror" is defined as the "state or instance of extreme fear; violent dread; fright". He did not

think the dictionary definition could be improved upon.

Chairman Carson posed a case where the actor secrets someone in a cabin in order to compel another person to do an act. He asked how this would be handled under the draft provisions.

Mr. Paillette stated this would be kidnapping in the second degree. He noted that this brought up another point. During the consideration on the Assault Draft the section on Coercion was deleted and at that time there was some discussion about the need for such a crime. Mr. Thornton felt there were some acts that could not be reached unless such a section were written into the statute. The MPC places coercion in their kidnapping section and he thought the subcommittee might feel it desirable to add a section on coercion to the proposed Kidnapping Draft.

Chairman Carson cited an instance where someone hands a note to a bank manager telling him that his family has been kidnapped or the actor may, in fact, detain the family of the bank president. He asked if this would come under the "ransom" element in section 3.

Mr. Paillette felt it very well might be kidnapping; it would certainly come under robbery.

Chairman Carson asked if it was not assumed, psychologically, that kidnapping is one of the most severe crimes, much more so than robbery or burglary. He noted this is a crime that is a Federal offense.

Mr. Paillette replied that it was considered a much more severe crime than burglary but not so much more than robbery, particularly armed robbery. He noted that the reason kidnapping is a Federal offense is that the victim is taken across state lines. There is a presumption, he added, that after twenty-four hours the victim has been removed from the state and this is written into the statute.

Mr. Paillette indicated that he felt the provisions in the draft would cover about every aspect of the crime, particularly with the proposed commentary included. He referred to section 2, Kidnapping in the second degree, and again stated that the change was a matter of structure, not of substance. The definitions previously in the section were eliminated and some of the language previously in the definitions of "restrain" and "abduct" has been written into the statement of the crime. Mr. Paillette referred to the language, "...intent to interfere substantially with another's personal liberty..." and noted that the word "personal" had not been in the previous drafts.

Chairman Carson recalled that the Commission had objected to the language "A person does not commit a crime under this section if:" appearing in section 2 of the previous draft. He noted Mr. Paillette had taken care of this objection in the new draft with the language, "It is a defense to a prosecution under subsection (1) of this section if:".

Mr. Paillette added that this defense would be limited to a relative and relative is defined as "a parent, ancestor, brother, sister, uncle or aunt." In

addition, the person taken must not have reached his sixteenth birthday and the sole purpose of the actor must be to gain custody. All three elements must co-exist for the actor to have this defense and it is a defense only to kidnapping in the second degree. If any of the aggravating factors come in (those listed in section 3), the defense set forth in subsection (2) of section 2 will not apply.

Chairman Carson questionedthat this fact was clear in the draft.

Mr. Paillette thought it would be clear when read along with the commentary on page 4 and with the way custodial interference has been drafted. He related that he had attempted to draft custodial interference providing just one degree. He had concluded, however, that it was necessary to separate the parental situations from the others. Most of the states, he said, have provisions which apply to interference with custody. The Federal Kidnapping Statute specifically excludes parents from kidnapping. The proposed statute would change existing law which covers taking away a child with intent to detain and which does cover relatives. Under this statute it is possible for the actor to get life imprisonment. Mr. Paillette indicated he would rate custodial interference in the second degree as a misdemeanor and as a felony if it were first degree, only for the reason that there are situations where the child is taken out of the state. He noted that under subsection (1) of section 4, custodial interference in the second degree must be committed by a relative. The language "with intent to hold him permanently or for a protracted period" is intended to provide some protection for a relative and would also keep the minor custodial interference cases, which should be handled as a contempt of court, out of the district attorney's office. To be guilty under the provisions of section 4, the actor must be a relative of the person under sixteen and know or have reason to know that he has no legal right to take, entice or keep the child from his lawful custodian plus having the intent to hold the child permanently or for a protracted period. Subsection (2) of section 4 is meant to cover the individual in the custody of an institution. Custodial interference in the first degree arises when the person taken is removed from the state or is exposed to a substantial risk of illness or physical injury. Subsection (2) of section 5 is meant to cover the situation where a child is under medication or on a special formula, etc.

Mr. Paillette commented that child custody is a very "sticky" area and noted that under the present statute there is very little difference between kidnapping and child stealing. If it is really an aggravated case, he felt it could be prosecuted as kidnapping in the first degree under the proposed provisions.

Chairman Carson asked the reason for picking the age of 16 as the age limit in the draft provisions.

Mr. Paillette admitted that the age was fairly arbitrary. The MPC, he said, uses 14, Michigan and New York use 16, Illinois uses 13. He noted that sixteen was the age used in the statutory rape statute now.

Mr. Wallingford noted that in Oregon there is an age in child custody cases where a child has a right to be heard on the issue of his custody; it was his understanding that this was fourteen years of age.

Replying to a question by Chairman Carson, Mr. Paillette stated that the language used in stating the age of the child, "a person who has not reached his sixteenth birthday," was suggested by Judge Sloan.

Judge Sloan had felt this language would be clear to judges--that if the person "has not reached his sixteenth birthday", the statute would apply and if he had reached his sixteenth birthday, the statute would not apply.

Chairman Carson suggested returning to section 1, definitions.

Mr. Paillette recalled that when the previous draft had been considered, there had been a good deal of discussion on the language "without consent". The draft had read: "A restraint is without consent when it is accomplished by: (a) physical force, intimidation or deception; or (b) any means, including acquiescence of the victim, if he is a child who had not yet reached his sixteenth birthday or an incompetent person...". There was a good deal of discussion, also, about what was meant by an "incompetent person". What was meant, really, was a mentally incompetent person but there was some feeling that the statute should not be restricted to mentally incompetent and that what was really the concern was the "capacity" to consent. Mr. Paillette advised that in the present draft he uses the word "incapable" and the term "incompetent" has been taken out altogether. He advised that the reasoning behind this change is explained in the commentary and read paragraphs three and four, page 2, Preliminary Draft No. 4.

Mr. Paillette explained that the term "lawful custodian" found in subsection (2) of section 1 is necessary to both kidnapping and custodial interference. Placing the definition in section 1 allows a shorter statement of those crimes in sections 2 and 4.

Chairman Carson suggested that perhaps the structuring of subsection (1) could be improved so that it would read more clearly and smoothly. He thought perhaps this could be accomplished by breaking subsection (1) into paragraphs: "(1) 'Without consent' means: (a) that the taking or confinement is accomplished by force, threat or deception; or, (b) in the case of a person...".

Mr. Paillette referred to subsection (2), the definition of "lawful custodian", and revealed that he had thought about inserting the language "or institution" after the word "person" so that it would read: "...means a parent, guardian or other person or institution responsible..." but decided against this as the person institutionalized is given to the custody of the superintendent of the institution, not to the custody of the institution itself.

Mr. Paillette referred, again, to the subject of a section on coercion. He felt the subcommittee would be remiss if the section were merely written off and admitted that he had changed his thinking about the problem. With respect to assault, he had felt the section might be superfluous in that there was coverage of theft by extortion in the Theft Draft. He noted, however,

that it covers the question only when there is property involved. He did not think the statute would cover the case where someone does not intend to obtain property but intends to force someone to do an act against his will. He cited an instance where a legislator might be threatened with harm to himself or family if he did not vote "properly". He felt that perhaps the Commission might be on safer ground to have something specifically written into the statute to cover such situations and thought it would more properly be placed in the Kidnapping Draft than in the Assault Draft.

Mr. Paillette explained that coercion would cover instilling in the victim a fear that, if the demand is not complied with, the actor or another will cause physical injury to some person; cause damage to property; engage in other conduct constituting a crime; accuse some person of a crime or cause criminal charges to be instituted against him; expose a secret or publicize an asserted fact tending to subject some person to hatred, contempt or ridicule; cause or continue a strike, boycott or other collective action, except that such a threat shall not be deemed coercive when the act is for the benefit of the group in whose interest the actor purports to act. He noted that this is language very similar to that in Theft by Extortion except that the intent there was to obtain property. There is a section drafted, he said, that had been in the Assault Draft and if the subcommittee desired, this could be sent to the Commission for consideration.

Chairman Carson favored adding a section on coercion to the Kidnapping Draft so that it might be discussed by the Commission.

Discussion of Sexual Offenses; P.D. No. 1, was postponed until the next subcommittee meeting set for Saturday, May 3, at 9:30 a.m., Room 401, Capitol Building.

The meeting was adjourned at 2:45 p.m.

Respectfully submitted,

Maxine Bartruff, Clerk
Criminal Law Revision Commission