

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 3

Fifth Meeting, October 31, 1968

Minutes

Members Present: Representative Dale M. Harlan, Chairman,  
Subcommittee No. 3  
Judge James M. Burns  
Mr. Frank D. Knight  
Senator Anthony Yturri, Commission Chairman

Absent: Mr. Donald E. Clark

Also Present: Professor George M. Platt, Reporter, University of  
Oregon Law School  
Mr. Donald L. Paillette, Project Director

The meeting was called to order by Chairman Dale M. Harlan at  
10:00 a.m. in Room 321 Capitol Building, Salem.

Minutes of Meetings of September 7, 1968, and September 20, 1968

Judge Burns moved, seconded by Mr. Knight, that the minutes of  
the meetings of September 7, 1968, and September 20, 1968, be approved  
as submitted. The motion carried unanimously.

Responsibility; Preliminary Draft No. 3; October 1968 (Article 5)

Professor Platt advised that in going over the minutes of  
September 20, 1968, he found that the subcommittee had asked him to  
prepare an intoxication section to be included with the responsibility  
draft. He had completely forgotten to do so, he said, and noted that  
intoxication was included under Principles of Liability in the Model  
Penal Code (section 2.08). This subject was again discussed near the  
close of the meeting. [See page 22 of these minutes.]

Section 1. Mental disease or defect excluding responsibility;  
section 2. Partial responsibility due to impaired mental condition.  
Judge Burns said he was still of the opinion, as he had indicated at  
the previous meeting, that section 1 should be submitted to the full  
Commission for a final decision on the rule to be adopted in Oregon  
with respect to mental disease or defect excluding responsibility.  
The committee agreed that the full Commission should be given the  
benefit of hearing testimony from psychiatrists when this matter was  
discussed and that there would not be sufficient time at the  
Commission meeting scheduled for November 21; it would be preferable  
to discuss the Responsibility Article at another meeting of the  
Commission to be called especially for this purpose.

Section 3. Burden of proof in insanity defense. Professor Platt indicated that the policy set forth in section 3 had been adopted by the committee at its previous meeting but the language of the section had not been reviewed. Section 3, he said, did not change the burden of proof from existing law; the burden was on the defendant by a preponderance of the evidence.

Mr. Knight indicated that when the burden was on the defendant to prove his insanity, the statute implied that he was presumed to be sane. He asked if a sentence should be included in the draft stating a rebuttable presumption existed that a person was presumed to be sane. Judge Burns indicated that the Uniform Jury Instructions stated the defendant was presumed to be sane and suggested the commentary specify this fact together with a statement that the Commission did not intend to disturb those instructions. Professor Platt noted that the commentary to P.D. #1 discussed the fact that the presumption did exist. Senator Yturri suggested the commentary contain a statement to the effect that Oregon law presumed the defendant to be sane, the jury was instructed to that effect in Leland v. Oregon, 343 U.S. 790 (1952), and no change was intended to that rule. The committee concurred.

In reply to a question by Chairman Harlan concerning the burden of proof under section 3, Professor Platt explained that once the defendant presented some evidence of insanity, the burden would shift to the state which would have to prove sanity beyond a reasonable doubt, and this would be one way to encourage defense counsel to make more use of the insanity defense.

Mr. Knight contended that if the burden was going to shift to the state after some evidence of insanity was introduced by the defendant, the procedure should not be called an "affirmative defense." Judge Burns pointed out that the original draft of section 3 stated, "Mental disease or defect excluding responsibility is an affirmative defense." When the committee discussed this matter previously, Professor Platt's position was that the procedure was called an "affirmative defense" because of the Model Penal Code definition of the term contained in section 1.12. [See Minutes, September 7, 1968, p. 10.] He commented that if, in other parts of the code, "affirmative defense" would mean that the defendant would not have the burden of proof, he would approve deletion of "affirmative" from section 3.

Mr. Knight moved to approve section 3 with an amendment to delete "an affirmative" and substitute "a". His motion also included an instruction that the commentary would include a statement to the effect that Oregon law presumed the defendant to be sane, in accordance with the discussion of the committee set forth above. Chairman Harlan seconded the motion and it carried.

[Note: See page 11 of these minutes for amendment to title of section 3.]

Section 5. Notice required in defense of partial responsibility. Professor Platt pointed out that section 5, in response to the committee's directive, had been drafted in the alternative and called attention to the commentary following section 5 which pointed out the difference between notice requirements in the alternative sections.

In a case where a neighbor of the defendant described the conduct of the defendant in such a way that to the ordinary juror the defendant would appear to be insane, Senator Yturri asked if the defendant under those circumstances would have to comply with section 6. Professor Platt replied that he would not have to give notice under Alternative No. 1 but would under Alternative No. 2.

Judge Burns commented that a typical case would be where the defendant was under the influence of narcotics or alcohol at the time the crime was committed and would attempt to diminish his responsibility by saying he was under the influence and did not know what he was doing. Judge Burns said he was doubtful that there would be very many cases where the defendant would bring in an expert witness to try to diminish his responsibility under such circumstances.

Senator Yturri cited a hypothetical situation where a defendant developed an unusual animosity toward a certain person and was eventually arrested for assault and battery upon that person. The defense attempted to show, through lay witnesses, that on previous occasions whenever the victim's name was mentioned, the defendant flew into an unreasonable rage. In such a case, he was of the opinion that notice to the state should not be necessary because instances of this type would be so rare that it would be preferable in the majority of cases to allow testimony of lay witnesses, which testimony would usually tend to show lack of intent. Mr. Paillette commented that in Senator Yturri's hypothetical, the district attorney in all probability would be put on notice by police reports of the defendant's history of conduct with the victim, and Professor Platt pointed out that in such a case the criterion would still be mental disease or defect.

Professor Platt stated that in the insanity defense it was almost universally accepted, and certainly was accepted in Oregon historically, that notice was required regardless of the kind of evidence to be presented. He asked if it would be treating defendants differently to require notice for the defense of insanity and not require notice for the defense of partial responsibility unless an expert witness was involved. Judge Burns expressed the view, and Senator Yturri agreed, that the court would say this was the kind of classification the legislature could reasonably make and such a provision would do no violence to existing law.

Judge Burns indicated that the purpose of section 5 was to insure a fair situation between the defendant and the state and if the

defendant was going to spring a psychiatrist on the state, he should be required to give notice. Beyond that, the number of cases in which the state would be put at a severe disadvantage by lay testimony would be so small as to be unworthy of attention. Also, by adopting Alternative No. 2, he said, some harm might result in cases where the defendant said he was drunk and such testimony might be ruled inadmissible because notice had not been given.

Judge Burns then moved that section 5, Alternative No. 1, be adopted. Mr. Knight seconded and the motion carried unanimously.

Section 6. Notice requirements. Professor Platt explained that section 6 reflected existing law in Oregon and was liberal so far as the defendant's rights were concerned, yet protected the state against last minute surprises. Chairman Harlan asked if section 6 would place the judge in a difficult position by granting the court discretion to permit evidence to be introduced at the trial when notice had not been given before the trial. Judge Burns replied that in 90 to 95% of the cases in his court where such a situation occurred, there had been an examination to determine if the defendant could assist in his own defense. In all such cases the state was well aware of the examination and the surprise element rarely entered into the case. Mr. Knight commented that the purpose of the statute was to require the defendant to give notice at the time he entered his plea so that when the case was set for trial, all parties could be reasonably certain that the case would go to trial on that date.

Judge Burns commented that in Multnomah County one or two days notice afforded the court sufficient time to have the defendant examined by a psychiatrist. In some areas where psychiatrists were not readily available, he said it could be a problem but in the larger counties it was not.

Chairman Harlan suggested that the phrase "or give notice in open court" be inserted after "file a written notice" in the first sentence of section 6. He asked if the notice in open court would accomplish all that was necessary. Mr. Paillette replied that in the larger district attorney offices the deputy who appeared at the arraignment was not usually the attorney who would be trying the case. He said there was an advantage in filing written notice because a copy would then be filed in the district attorney's office and would be included with the file on that particular defendant. Judge Burns commented that filing written notice was not an undue hardship and the committee concurred.

Judge Burns moved, seconded by Mr. Knight, that section 6 be approved for submission to the full Commission. The motion carried unanimously.

Section 7. Right of state to obtain mental examination of defendant; limitations. Subsection (1). Senator Yturri noted that section 7 granted the state a right to examine the defendant and also said that the court "may order the defendant committed to a state institution or any other suitable facility . . ." He asked if that language required the court actually to commit the defendant before he could be examined. Judge Burns replied that in the vast majority of cases the defendant was in custody when the examination was ordered so it was unnecessary to "commit" him. Section 7, he said, was intended to take care of the situation where the defendant was at liberty and the state wanted to examine him. If the court wanted a lengthy period to examine him, section 7 would grant the authority to commit him to the Oregon State Hospital for that purpose.

Judge Burns cited some of the problems inherent in committing a defendant to the State Hospital for examination, one of which was the expense involved. The widespread use of psychiatrists in Multnomah County, he remarked, had caused budgetary problems; the county had determined that it cost an average of \$544 to send one patient to the State Hospital for psychiatric examination. An advantage, however, in committing him was that the Hospital almost invariably returned a letter saying (1) that the defendant was or was not able to assist in his own defense and (2) that he did or did not know the difference between right and wrong.

Chairman Harlan asked Judge Burns if he felt that a one-time visit by a psychiatrist was adequate to determine the defendant's mental state and Judge Burns replied that it probably was not adequate but time and money presented limitations on services the county could be expected to provide. Senator Yturri commented that a psychiatrist's background of experience might have shown that he could accomplish his findings with a one-time visit in the majority of cases. Mr. Paillette observed that psychiatrists often could tell quite rapidly whether the defendant was able to assist in his own defense but the question of whether he knew right from wrong at the time of commission of the crime would probably take considerably longer to answer.

Professor Platt called attention to the phrase "examine the mental condition of the defendant" at the end of the first sentence in section 7. He suggested this language might be unduly restrictive and it might be preferable to say "examine the defendant." The committee agreed.

Mr. Knight noted that the same sentence said "shall have the right to have a psychiatrist" which would limit the state to an examination by one psychiatrist when the defense could use an unlimited number. He cited a case in which he was involved where the court had ruled that the state was entitled to have the defendant examined by a psychologist as well as a psychiatrist under the court's first ruling granting "psychiatric examination." Judge Burns observed that psychiatrists sometimes requested an EEG (electroencephalogram) and in such cases a geneticist might be needed to interpret the test. He

suggested that the commentary include a statement that a psychiatrist could call upon other professions as a part of his examination and the statute was intended to entitle him to do so. He noted that the Model Penal Code said "at least one psychiatrist" and the committee agreed that language would be preferable to "a psychiatrist."

Chairman Harlan asked if the phrase at the end of subsection (1), "not to exceed 30 days", was too restrictive. Senator Yturri suggested "unless extended by the court" be added at the end of subsection (1). Professor Platt proposed to ask Dr. Treleaven if 30 days was enough time to conduct an examination. Judge Burns indicated that in his experience 30 days was ample time in the majority of cases and had almost become a rule of thumb for the courts. The State Hospital, he said, tried to take care of the patients as rapidly as possible because of their space limitations.

Mr. Knight pointed out that it was in the interest of the state to have the examination as soon as possible since the lapse of time could have an effect on the weight to be given the testimony. He objected to allowing the defendant to stall for time by saying, "We are having the defendant examined and we are not ready to enter a plea at this time." Judge Burns commented that if the judge believed the defendant was stalling, he would insist that a plea be entered. He was of the opinion that the state had sufficient power to force the issue.

Mr. Knight moved, seconded by Judge Burns, that the first sentence of subsection (1) be amended to read: ". . . the state shall have the right to have at least one psychiatrist of its selection examine the defendant." Included in the motion was a recommendation that the commentary include a statement that the draft in subsection (1) was intended to entitle the examining psychiatrist to call upon other experts, such as psychologists or geneticists, to assist in his diagnosis of the defendant. The motion carried without opposition.

Subsection (2). Judge Burns reviewed the decision in Shepard v. Bowe, 86 Or. Adv. Sh. 981 (1968), where it was held that the defendant being examined by the state's psychiatrist could not be forced to answer questions which might tend to incriminate him. He then asked why it was necessary in subsection (2) to say that the defendant was entitled to have his attorney and his psychiatrist present during such examination. Professor Platt's response was that he did not see how such a provision could be avoided in light of the defendant's constitutional right to counsel. Judge Burns remarked that the Supreme Court might hold that the examination would be a "meaningful confrontation" where the defendant would be entitled to assistance from his attorney, although he did not recall that Shepard v. Bowe so held, but he said he was not at all sure that the defendant would need to have his own psychiatrist present.

Professor Platt explained that the provision was derived from the Model Penal Code and was intended to forestall what might later develop into a battle of the experts at the trial where the defendant's psychiatrist had not been on the scene to see how the examination was conducted. If the defense psychiatrist knew the method used was proper, he would be less likely to challenge the state psychiatrist at the trial, he said. Judge Burns conceded such a procedure would be a valuable safeguard for the defendant if the state psychiatrist proved to be a charlatan, but, aside from that possibility, the opposing psychiatrists would probably stem from different schools of thought and would not agree at the trial in any case.

Professor Platt said a second argument in favor of the provision in subsection (2) would be fairness to the defendant who was forced to reply to questioning. If he wanted to have his own psychiatric expert and his own counsel observe the examination, how, he asked, as a matter of individual protection, could he be denied those rights. Chairman Harlan expressed agreement that the examination was an important area where the defendant should be fully protected.

Senator Yturri asked if the psychiatric reports were less reliable since the Shepard v. Bowe decision and was told by Professor Platt that the reports would probably be of very little value in view of that decision.

Judge Burns, thinking in terms of Multnomah County's sizeable caseload, said that customarily the defendant was indigent and the county was required to pay for his as well as the state's psychiatrist. Allowing both to be present at the examination would increase the expense to the county, he said.

Mr. Knight said he would rather not see the provision entitling the defendant to an attorney and a psychiatrist of his choice written into the statute and suggested that it be discretionary with the court. Chairman Harlan urged that the provision be retained. Senator Yturri commented that the provision would assure observance of the ruling in Shepard v. Bowe. Professor Platt remarked that the examination by the state's psychiatrist was in effect a confrontation between the state and the defendant and was analagous to the police talking to the defendant where the defendant was entitled to have his counsel present as a matter of right. He said he would be inclined to let the subsection go to the Commission without amendment so the members could decide the issue while psychiatrists were present to give their views.

Judge Burns moved, seconded by Chairman Harlan, that subsection (2) be approved for submission to the full Commission provided that the last sentence appear in the alternative; first, with the provision

that the defendant was entitled to have present at the examination an attorney and a psychiatrist of his choice, and, second, with the provision that he was entitled to an attorney only. The motion carried.

Mr. Knight objected to including in the statute a constitutional right that the defendant was not required to answer a psychiatrist's questions because of the Fifth Amendment. He indicated he would like to delete subsection (2) of section 7 entirely. Judge Burns commented that the ruling in Shepard v. Bowe would not go away because the statute remained silent concerning the issue.

The committee recessed for lunch at this point and reconvened at 1:00 p.m. with the same persons in attendance as were present for the morning session.

Section 8. Civil commitment authority of court following defense of partial responsibility. Professor Platt explained that section 8 was designed to allow the judge a civil commitment procedure to cover a very unusual and exceptional kind of case where the defendant was successful in his defense of partial responsibility and was acquitted. The section, he said, contained a built-in safety device to prevent the defendant's release on society when the court found that society needed to be protected.

Mr. Knight asked if section 8 added anything to the civil commitment procedure currently in existence and was told by Professor Platt that under the section the court would initiate the proceedings rather than the district attorney. Judge Burns asked if such a provision was in existence anywhere other than in the proposed California code and received a negative reply from Professor Platt who added that very few states provided for a partial responsibility defense. Judge Burns next asked if the MPC had a similar provision and Professor Platt replied that it did not, probably because it covered a situation which would rarely occur. In most instances, he said, the charge against the defendant would be reduced to a lesser included offense, but it was possible that an acquittal could result, particularly in a case which was dismissed for some reason other than the partial responsibility defense.

Judge Burns inquired whether section 8 would present a constitutional problem by permitting the court to commit a person under ORS chapter 426 even though there was no one willing to say that person was presently mentally ill and in need of care and treatment but rather someone to say that at the time of the crime he was thus afflicted. Professor Platt replied that before the judge could commit the person, a hearing would have to be held to determine his mental condition at the time of the hearing. He said that Judge Burns was correct in stating that the court could not commit him because of his condition at the time of the trial.

To be absolutely certain that the defendant's constitutional rights were not violated, Professor Platt contended that a commitment hearing on the defendant's mental condition should be conducted in every case and, he said, his statement extended to proceedings under ORS 136.730 which did not require a hearing. He noted that the Model Penal Code commentary to section 4.03 suggested that it was necessary in some cases to hold a hearing because the testimony at the trial made it clear that the defendant had a mental disease or defect although, he commented, it was an anomaly to say that a person could be capable of standing trial if he were so afflicted. Judge Burns related that the majority of cases of this type would be non-jury cases and in those circumstances the psychiatrist frequently would have examined the defendant within the last few days so that the diagnosis would be a current analysis of his condition. Professor Platt indicated that section 8 recognized that fact.

Judge Burns outlined the situation in Multnomah County where Judge Dickson, as probate judge, handled civil commitments. Under section 8, he said, the trial judge in Multnomah County would be required to send a defendant, acquitted by reason of the provisions of section 2, to the probate judge. He also noted that there were counties where the county judge or the district judge conducted mental hearings and still other counties where the circuit judge who tried the case would also be the judge who conducted the mental hearing. He observed that the trial judge had the benefit of observation of the defendant during the course of the trial and would perhaps be in a better position to make a determination as to his mental condition.

Professor Platt indicated that section 8 would permit either the trial judge or another judge to initiate proceedings under ORS chapter 426, but he had personally thought of the trial judge following through on each case rather than sending the defendant to a different judge. Judge Burns noted that the test under ORS chapter 426 was not the person's dangerousness to society but rather whether he was in need of care and treatment.

Senator Yturri asked Judge Burns what he would do today if the situation occurred where a defendant was acquitted because of partial responsibility and the judge was of the opinion that the defendant was suffering from a mental illness. Judge Burns replied that he would turn that person loose unless the district attorney or someone else signed a notice of mental illness. Senator Yturri commented that section 8 would furnish a response to a legitimate public reaction against freeing someone who was potentially dangerous to society.

Professor Platt indicated that section 8 would also give the court the opportunity to decide what the grounds were for the jury's decision and if the court felt the grounds were not mental illness, the decision to invoke section 8 would be in the discretion of the court.

Judge Burns commented that there might be hidden dangers in section 8 but once it was circulated to district attorneys, judges and defense attorneys, the committee would probably learn about them.

Mr. Knight observed that in his own experience a majority of the defendants using the defense of insanity were not civilly committable because they were not mentally ill at the time of the trial and even if they were committed by the court, the State Hospital returned them to society within two or three weeks. Professor Platt replied that even though the defendant was released in a short time, he would have received the benefit of some expert medical attention. Judge Burns said that in the typical situation of a person acquitted by reason of insanity under present law, the State Hospital had examined the defendant prior to trial and determined that he did not qualify under the M'Naghten rule. If the court, following acquittal because of the insanity defense, then committed him to the State Hospital, the psychiatrists would ordinarily say that he was not mentally impaired, did not need care and treatment, and they would release him in a short time. Judge Burns noted that the State Hospital sometimes ignored the rule in Newton v. Brooks, 84 Or. Adv. Sh. 639 (1967), which held that a patient could not be discharged until deemed sane and not dangerous to society. Professor Platt replied that under the proposed draft the criterion for release would be dangerousness to himself or others.

Chairman Harlan asked if the committee wished to insert "trial" before "court" in section 8. Judge Burns proposed to have Professor Platt reword the section to permit the trial judge to conduct mental hearings where probate courts were departmentalized, as in Multnomah County, and in counties where mental problems were held before the county or district court. Professor Platt indicated the section as redrafted would provide that the trial court may initiate and conduct proceedings pursuant to the provisions of ORS chapter 426.

Judge Burns moved that section 8 be approved for submission to the full Commission with the understanding that it would be redrafted as outlined by Professor Platt in the preceding paragraph. Chairman Harlan seconded and the motion carried.

Section 9. Form of verdict following successful defense of insanity. Professor Platt explained that section 9 reflected existing policy in Oregon law but used the test of mental disease or defect rather than insanity. Chairman Harlan commented that the draft in the preceding sections had been concerned with partial responsibility and asked if section 9 should also refer to an acquittal on grounds of partial responsibility. Judge Burns noted that in a partial responsibility defense the court would not be submitting an insanity form of verdict and section 9 would therefore relate only to section 1. Chairman Harlan suggested section 9 might be clarified by inserting "pursuant to the provisions of section 1 of this Article." Professor

Platt agreed this was the intent of the section and said he could see no harm in including that language, particularly since "responsibility" was a new term in Oregon law replacing "insanity."

Mr. Knight asked why the term "insanity" should not be used and was told by Professor Platt that insanity and mental disease or defect did not mean the same thing. The entire draft, he said, employed the term "irresponsibility" in order to be consistent with the title of the Article itself. Mr. Paillette was of the opinion that "insanity" should not be used in the draft at all and should be deleted from the title in section 9 as well as sections 3 and 10.

Judge Burns asked how a verdict form would be worded under section 9 and was told by Professor Platt that the verdict would say, "The defendant is found not guilty on the grounds of mental disease or defect excluding responsibility." He suggested that the section might be amended to read ". . . and the verdict and judgment shall state the defendant is found not guilty by reason of mental disease or defect excluding responsibility." Judge Burns said that the verdict form traditionally stated that the defendant was "found not guilty by reason of insanity" and without specifically calling a change in verdict form to the attention of the judges, many of them might continue to use the traditional form. After further discussion, the committee agreed that the form of verdict should be included in the commentary.

Judge Burns questioned the need to include "and judgment" in section 9 inasmuch as the verdict was included in the judgment in most areas. Senator Yturri commented that it would do no harm to retain the phrase and the committee agreed.

Judge Burns moved, seconded by Mr. Knight, that section 9 be adopted with the following amendments:

(1) Insert "pursuant to the provisions of section 1 of this Article" after "responsibility".

(2) Substitute "irresponsibility" for "insanity" in the title.

(3) Insert in the commentary a statement to the effect that the Commission believes it desirable to stress the different form of verdict to be used by the courts because of the change in language in section 1 of this Article, the correct verdict form being: "The defendant is found not guilty on the grounds of mental disease or defect excluding responsibility."

(4) Substitute "irresponsibility" for "insanity" in the titles of sections 3 and 10.

Chairman Harlan objected to the use of the term "irresponsibility" in the section titles and said he would prefer to use "not responsible" or "mental disease or defect" because of the unfavorable connotation inherent in the word "irresponsible." Professor Platt said that the term to be employed should be as short as possible and he was of the opinion that "irresponsibility" was an accurate term.

Vote was then taken on Judge Burns' motion which carried. Chairman Harlan voted against the motion because of his objection to the term "irresponsibility" in the headings of sections 3, 9 and 10.

Section 10. Acquittal by reason of irresponsibility; release or commitment; petition for discharge. Professor Platt explained that section 10 was derived, with very minor changes, from the proposed California draft and grants discretion to the court to choose one of several courses following a verdict of not guilty by reason of irresponsibility. If the court considers the defendant to be dangerous to others or to himself (not to property), it may release him to probation officers with conditions for his surveillance or treatment. If the court feels his problem is more serious, it may commit him to the institution. In the first instance if it has committed him to supervision, the court must within five years review that commitment and if his condition has worsened, he may then be committed to the Oregon State Hospital. This course provides a maximum of flexibility, he said, and provides open ended commitment power in the unusual case. Under section 10 it would no longer be the doctor at the State Hospital who makes the final determination concerning the patient's release but changes the policy to require the court to make the final decision. The reason for the change in policy, he explained, was that the decision to release the patient was a community decision where factors other than medical considerations were involved, and the court should reflect the community's position. Such a policy would tend to remove pressures on the medical staff at the State Hospital and in close cases where they were reasonably convinced that the man should be released but were not willing to assume the risk of returning him to society, the burden would be placed on the court.

In reply to a question by Judge Burns, Professor Platt explained that subsection (5) would force the court to release a person from supervision if he had been in custody for more than five years and was no longer dangerous. Judge Burns contended that the subsection did not clearly state that if a person had been placed under supervision for a time and then committed to the State Hospital, at the expiration of five years it was the court's function to make a determination as to his fitness for release. He said he understood the subsection to mean that the Oregon state Hospital made that decision, and Professor Platt replied that he could amend that section to make the intended meaning more clear.

Senator Yturri asked if it was appropriate to include the court at that stage in every case. Professor Platt replied there were so many factors that varied from one psychiatrist to another and so much conflict within the profession itself that no one could be really sure, as a community matter, that the particular judgment of those experts was the kind of judgment to be totally relied upon, and this was one reason for inserting the courts and legal processes into the situation. Mr. Paillette indicated approval of Professor Platt's comment and said the law had put the defendant into the hospital and the law should say when he was to be released.

Senator Yturri commented that the judge couldn't be expected to follow a defendant's progress through two or three years of treatment at the State Hospital. When the Superintendent recommended a person for release, it seemed likely that the judge would rely upon that recommendation because he was in a better position than the judge to make that determination having followed the defendant's progress on a day-by-day basis. Professor Platt agreed that the judge would probably take the recommendation of the Hospital in a great majority of cases, but the safeguard remained that he was not required to do so.

Mr. Knight noted there would be an automatic hearing at the end of the five year period and asked how often thereafter a hearing would be required in the event the person was not released at that time. Professor Platt replied that the hearing was not automatic because the state was not required to keep track of the lapse of time, but the defendant did have the right to be discharged after five years unless it could be shown that he was still dangerous to other persons.

Judge Burns commented that the Superintendent might find the procedure outlined in section 10 to be clumsy in that every time the State Hospital wanted to parole or release a person in this category, the recommendation would have to be justified to the court. He also advised that the procedure might add a sizeable burden to the case-load of the courts, to the staff of the Hospital, and to their space requirements.

Judge Burns said that as he read section 10, after five years had elapsed, the defendant would be discharged unless the state proved he was dangerous to the person of others. Professor Platt replied that it was his intent to keep the burden on the defendant even at the end of the five year expiration period. Judge Burns commented that the draft appeared to say that when he sought his release prior to the end of the five years, he had the burden; on the other hand, if the state sought his release short of five years, it was not clear where the burden of proof lay. Professor Platt commented that after 90 days if the person requested release, he had the burden of proof. After five years, the committee should decide who had the burden and who was to trigger the hearing process because at the end of that time the State Hospital was required to make a determination as to his suitability for release.

Mr. Knight commented that the defendant was placed in the State Hospital because of the act he committed and during his stay in the institution there was little evidence to show whether he was still dangerous because he would have no opportunity to commit another crime. He urged that the burden of proof be placed on the defendant at any stage of the process. Senator Yturri remarked that there were many ways the Hospital could gauge a patient's reliability--through his association with other patients and his general demeanor at the hospital, to name only two.

Judge Burns was of the opinion that if the Hospital recommended release, the burden should not then be on the defendant to prove he was no longer dangerous. If the defendant himself requested release short of five years, he should have the burden to prove he was not dangerous and the same thing should be true at the end of the five year period. If, however, he were sent back to the State Hospital at the end of the five year period, Judge Burns asked what procedure for release was to be followed subsequent to his return to the institution. Professor Platt replied that he could still apply for a discharge under subsection (3) (b). Senator Yturri contended that subsection (3) (b) would require some clarification by inclusion of a statement to the effect that after the five year period, he was entitled to apply for discharge under that subsection. Judge Burns expressed agreement and added that subsection (3) (a) should also be clarified to state that the Superintendent's authority extended following commitment after the initial five year period. Professor Platt expressed concurrence with these suggestions and asked what the committee wished to do with the question on burden of proof.

Chairman Harlan expressed concern over requiring the defendant to prove his fitness for release by a preponderance of the evidence, since this was not a criminal proceeding and he was not being punished, and asked if a constitutional question was involved. Senator Yturri was of the opinion that since public safety was involved, there would be no constitutional problem. The committee agreed that if the defendant raised the issue, the burden would be on him but if the Hospital recommended his release, the burden was on the state.

Judge Burns pointed out that at the end of five years the draft said the person could be released if he was no longer dangerous to others; prior to the expiration of the five year period the criterion was danger to himself or to others. He asked why this distinction was made in section 10. Mr. Knight was of the opinion that the criterion for danger "to himself" should be deleted. If he was dangerous to himself, he said, he should be committed under a civil commitment rather than under criminal proceedings. Professor Platt replied that there was a matter of humanity involved and suggested that the draft should be consistent and retain danger to himself or to others as a criterion both before and after the five year period.

Judge Burns noted that the commentary on page 20 of the draft said that a five year period under supervision plus a five year commitment could result in a ten year maximum period of detention before the provisions of subsection (5) could be invoked. Professor Platt replied that the commentary was in error.

Mr. Knight suggested, and Judge Burns agreed, that the section should contain a limitation on how often a person could file for release. He called attention to section 4.08 (5) of the MPC which said:

" . . . if the determination of the Court be adverse to the application, such person shall not be permitted to file a further application until [one year] has elapsed . . . "

Professor Platt indicated it would be a simple matter to insert a provision to that effect in subsection (3) (b) and suggested that six months be inserted as the time limit pending suggestions from psychiatrists and judges as to whether that period of time would be too long or too short.

Judge Burns called attention to subsection (2) which used the term "probation officers of the court." This term, he said, would be applicable in California but not in Oregon and suggested the draft should say "State Board of Parole and Probation" although he was not certain that agency's workload would permit them to assume this further duty or even that they were the ones who should assume this responsibility. Professor Platt was of the opinion that the draft should contain as much flexibility as possible and suggested that it be amended to provide that the defendant be released to an agency chosen by the court. Judge Burns commented that typically the court would release him to the supervision of the county mental health clinic but the supervision under those conditions was very minimal. Mr. Paillette indicated that parole and probation officers dealt only with defendants who had been found guilty and Judge Burns added that if he was released to a probation officer, the State Board of Parole and Probation would have to approve the order and because of their heavy caseload, might not choose to accept the defendant into their care. Professor Platt said this same point might be true of other agencies as well.

Mr. Paillette suggested deletion of the phrase "including supervision by the probation officers of the court." The subsection would then allow the court to place him under such supervision as it deemed proper.

Mr. Knight suggested the subsection say "supervision and conditions" in order to permit the court to place certain conditions upon the defendant's release just as it did when a defendant was

released on probation. Professor Platt was of the opinion that the judge had this discretion under section 10 without further amendment.

Professor Platt asked if the committee wanted to bring in an automatic provision for a hearing instituted by the state after five years. Judge Burns recommended that the State Hospital be required to notify the court that the five year period had expired because the defendant would be in the custody of the Hospital and they would have his active records on file. At the end of five years the Hospital should send a notice to the court saying he had been under supervision or commitment for five years. The notice should also include a determination as to whether he was still dangerous to himself or to others.

Professor Platt said that in the situation where the defendant was in the community under supervision for five years the Hospital would not necessarily have his records and would have no way of knowing that the five years had expired. Judge Burns indicated that an analagous situation was a person who was free on probation; in those cases the court did not sign an order terminating probation when the period expired. The court, he said, received a report from the probation officer saying the fellow was getting along fine and termination would occur on a certain date. He suggested that the same situation could apply in the cases under discussion. If the defendant was in the community and the five year period expired, the supervision would automatically terminate without further action by the court.

Judge Burns moved that section 10 be adopted with the following amendments:

(1) Delete ", including supervision by the probation officers of the court," in subsection (2).

(2) In subsection (3) (b) insert a provision that the defendant may not file an application for release until six months has elapsed from the time of the previous filing.

(3) Make clear that subsections (3) (a) and (3) (b) are applicable to subsection (5) in the event the defendant is committed to the Oregon State Hospital after the five year period has expired.

(4) In subsection (5) after "present a substantial danger" insert "to himself or".

(5) Make clear that there will be a court hearing at the end of five years and the decision to discharge at that time is a court decision.

(6) The Oregon State Hospital is required to give notice to the court that the defendant's five year period has expired and the

notice shall request a hearing and contain a statement that he should be released or should not be released. If the State Hospital said he was dangerous to himself or the person of others, the burden shall be on the defendant; if he is determined to be not dangerous, the burden to prove otherwise shall be on the state.

Mr. Knight seconded the motion and it carried unanimously.

A recess was taken at this point.

Section 11. Mental disease or defect excluding fitness to proceed. Professor Platt explained that section 11 added nothing new to existing Oregon law but it did clarify the kind of evidence which would be appropriate in a trial on the issue of fitness to proceed.

Chairman Harlan asked why subsection (2) was included in the draft and Judge Burns commented that it was his impression that a man who was insane could not be sentenced under the existing law. He thought that inclusion of subsection (2) might increase delaying tactics in the courts and Mr. Paillette indicated that under present law the court could order an examination of the defendant before sentencing to determine if the defendant understood the proceedings against him. He was of the opinion that section 11 would accomplish everything that was intended to be accomplished if subsection (2) were deleted because the preamble said "cannot be proceeded against or sentenced."

After a further discussion, Judge Burns moved, seconded by Mr. Knight, that section 11 be adopted with subsection (2) deleted in its entirety and that the subsection number "(1)" be deleted with subsections (a) through (d) renumbered (1) through (4). The motion carried. Chairman Harlan voted no because he wanted to give more thought to the policy involved in section 11.

Section 12. Psychiatric examination of defendant on issue of fitness to proceed. Professor Platt indicated there were many similarities between section 12 and present Oregon practice, but one dissimilarity was specification of what the report of the psychiatrist should include which was a practical matter not presently dealt with in the statutes. He expressed the view that this provision would be beneficial to the courts in helping them to get the kind of psychiatric reports which would be most useful to them. Judge Burns volunteered to send copies of several psychiatric reports to members of the committee so they could see what the reports normally contained.

Senator Yturri asked if subsection (1) should be in some way related to section 11 in addition to the statement in subsection (2) (c). He suggested that subsection (1) read ". . .the defendant's fitness

to proceed by reason of incompetency as defined in section 11." Professor Platt agreed that the addition of that phrase would clarify the meaning of subsection (1).

Professor Platt explained that under section 12 the defendant was again entitled to have his own psychiatrist at the hearing and since the committee had agreed to submit a similar provision in section 7 to the full Commission, he recommended that it be retained in section 12.

Judge Burns expressed the opposing view for the reason that the defendant at this stage was not engaged in an adversary proceeding. The psychiatric examination was sometimes made at the request of the defense attorney and oftentimes at the request of the district attorney, but the procedure was not an adversarial one. The psychiatrist conducted the examination on behalf of the court, not the state, he said, and he questioned the necessity for two examinations. Professor Platt agreed because the court, rather than the jury, would receive the report of the examination.

Professor Platt said that the committee could speculate about whether Shepard v. Bowe would apply in this situation and he was inclined to think it would apply because any testimony that later stemmed from the examination would be within the doctrine of self-incrimination. Judge Burns said that if the defendant were examined by a "hanging psychiatrist", there should be some loophole or escape hatch for the defendant to obtain an examination by a psychiatrist of his choice to determine the question of his fitness to proceed, but he opposed the provision entitling him to a psychiatrist in every case.

Professor Platt indicated that if that provision were deleted, the thought contained in the present statute should be inserted in section 12: "Other evidence regarding the defendant's mental condition may be introduced at the hearing by either party." This would permit the defendant to argue before the court on the basis of his own psychiatrist's findings.

Senator Yturri commented that if an examination were requested in the middle of a trial, it would be unfair for the defendant to be denied the opportunity to have his own psychiatrist present and participating at the examination conducted by the psychiatrist which the court appointed at the behest of the district attorney. The defendant's psychiatrist, he said, should be given an opportunity to testify as to what was done at the examination, how it was conducted and the reason that the state psychiatrist was in error.

Judge Burns commented that if the court, on its own motion or on the motion of either party, entertained any doubts of the defendant's fitness to proceed, it would order an examination regard-

less of whether the doubt arose before or during the trial. If the doubt was in the court's mind, he asked, why was it necessary to have two psychiatrists examine the defendant since the examination was conducted on the court's behalf. Professor Platt explained that the provision granting the defendant the right to have his psychiatrist present at the examination was contained in section 12 because it related to subsection (1) of section 13 and continued the policy of existing law that the court, rather than the jury, heard the issue of fitness to proceed.

Senator Yturri called attention to the first sentence of ORS 136.150 (1) and suggested that the draft follow this same type of procedure and add the provisions with respect to the type of psychiatric reports to be required. If this course were followed, the defendant would then have an opportunity to be examined by his own psychiatrist and his rights would be fully protected. Professor Platt concurred with Senator Yturri's suggestion.

Judge Burns remarked that the present statute clearly permitted the court to appoint more than one psychiatrist but if it did so, which it normally did not, they would both be court psychiatrists. Existing law did not, however, prevent the defendant's hiring his own psychiatrist; however, the court appointment of the second expert was within the discretion of the court. Professor Platt observed that this was an unsettled area in the law. The indications were, he said, that the United States Supreme Court was moving in the direction of a full panoply of experts for the defendant. Whenever a new law provided a defendant with the right to an expert, that law was forecasting, and he thought it was forecasting correctly, what the law would ultimately be. Chairman Harlan asked if a possible compromise would be to let the defendant's attorney attend the examination. Judge Burns objected to extending the rule in Shepard v. Bowe when it was not necessary to do so, and Chairman Harlan suggested that a period be placed after "as the court determines to be necessary for the purpose" in section 12 (1).

Chairman Yturri proposed to substitute ORS 136.150 for subsection (1) of section 12 and retain subsections (2), (3) and (4) of section 12. Professor Platt contended that ORS 136.150 was unnecessarily cumbersome and much of it was covered in subsection (1). Other than the amendment suggested earlier by Senator Yturri in subsection (1), Professor Platt said, the only change he advocated would be to delete the phrase suggested by Chairman Harlan at the end of the subsection after "necessary for the purpose" and insert in its place the last sentence of ORS 136.150 (1). He also called attention to the fact that the draft extended the period for an examination to 60 days rather than 30 days as provided in ORS 136.150. The committee agreed to delete "60" and insert "30" in subsection (1) and to leave to the discretion of the judge a commitment for a longer period.

Mr. Knight suggested the last sentence in ORS 136.150 (1) be included in section 13 rather than section 12 and the committee agreed.

Judge Burns moved that section 12 be adopted with the following amendments:

(1) In subsection (1) after "defendant's fitness to proceed" insert "by reason of incompetency as defined in section 11".

(2) At the end of subsection (1) delete "and may direct that a qualified psychiatrist retained by the defendant be permitted to witness and participate in the examination."

(3) In subsection (1) delete "60" and insert "30".

(4) See page 21 of these minutes for amendment to section 13.

The motion was seconded by Mr. Knight and carried.

Section 13. Determination of fitness to proceed; effect of finding of unfitness; proceedings if fitness is regained; pre-trial legal objections by defense counsel. Judge Burns noted that the last sentence of section 13 (1) contemplated two psychiatrists and suggested that language be corrected when the section was redrafted.

With respect to subsection (2) Mr. Knight noted that the second sentence made provision for the court, the Superintendent or the district attorney to move to resume the proceeding and indicated there was a possibility that the defendant might feel he was competent to stand trial and should be included in those permitted to so move. To solve the problem Judge Burns suggested "of either party" be substituted for "the district attorney".

Senator Yturri expressed the view that the next sentence in the draft imposed quite a responsibility on the court by permitting the judge to either discharge or commit the defendant if he felt that too much time had elapsed since the defendant's commitment. Professor Platt explained that the district attorney could be under great public pressure to prosecute the case even though a great deal of time had elapsed, and this provision would allow the court to make the decision. Mr. Paillette expressed opposition to the provision and said he did not see how the mere passage of time would make it unjust to resume the criminal proceeding. He agreed with Judge Burns' statement that it would involve a rare case and added that it was also a rare case that improved for the state as the years went by. The state had the burden of proof, he said, and passage of time usually worked in favor of the defense which was one more reason why the decision to proceed should rest with the district attorney. If the district attorney chose to ask for a dismissal, he said, he could do so with-

out a specific provision written into this section. Judge Burns replied that if the district attorney moved for dismissal, he could not imagine a judge denying his motion. Senator Yturri said that if a person had been in the State Hospital for four years for a murder in which there was considerable public interest, the judge was not going to dismiss that case if the defendant regained his competency at the end of the four years. He said that if the section were amended to say that the court could dismiss upon the application or motion of the district attorney, the section would, at least by implication, say that the court could not dismiss except upon such application or motion. He expressed the view that it was preferable to include the provision granting the judge discretion to dismiss the case rather than to take the chance of permitting a district attorney to go through a trial needlessly. Mr. Knight said that if a person had been in the State Hospital for an extended period, there was not much question but that the trial would result in a verdict of not guilty by reason of insanity, and Judge Burns noted that the cases of this kind were so rare as to be hardly worthy of consideration.

As a compromise, Mr. Paillette suggested that "on motion of either party" be inserted after "the court" in the third line from the bottom of page 29 of the draft and the committee accepted this revision.

With respect to subsection (3) Judge Burns commented that if the defendant was in the State Hospital because he was so mentally defective as to be unfit to proceed, the chances were good that he would be in the State Hospital anyway under a civil commitment procedure. Professor Platt replied that if he was there because he was unfit to proceed, the test applied to that commitment was not one of dangerousness to society. He could be completely harmless and still be unable to understand the evidence or assist his counsel. Mr. Paillette commented that the provision in subsection (3) would do no harm to either side, procedurally or as a matter of right to the defendant.

Judge Burns moved that section 13 be approved with the following amendments:

(1) At the end of subsection (1), insert the last sentence of ORS 136.150 (1): "Other evidence regarding the defendant's mental condition may be introduced at the hearing by either party."

(2) Revise subsection (1) to reflect the fact that there will not necessarily be two psychiatrists involved in every examination.

(3) In subsection (2), line 7, delete "the district attorney" and insert "of either party".

(4) In subsection (2), line 12, after "the court" insert "on motion of either party".

Mr. Knight seconded and the motion carried unanimously.

Intoxication section. Professor Platt asked if the committee wished to include a section on intoxication in the Responsibility Article. The committee agreed that Commission action on the Responsibility Article should not be postponed for that reason and the intoxication section could as logically be included under Principles of Liability.

Next Meeting

Mr. Paillette said he would check with Professor Arthur within the next few days to determine when he would be ready to submit his next draft to the subcommittee. A date for the next meeting was discussed and Judge Burns suggested the committee delay a future meeting until after the full Commission met on November 21 and 22.

Miscellaneous Matters

Mr. Paillette called attention to a letter he had received from Judge Gus J. Solomon of the U. S. District Court in Portland inviting Subcommittee No. 3 and the Reporters to a seminar on "Psychiatry and the Courts" to be held in his courtroom on Saturday, November 9. He asked anyone who might be attending to communicate directly with Judge Solomon.

Senator Yturri said he had received a letter from Mr. Robert Chandler indicating his inability to attend the Commission meeting in November and giving his proxy vote to Senator John Burns. He pointed out that the Commission had no rule on proxy votes and should adopt one at the full Commission meeting. Chairman Harlan indicated he would be opposed to permitting proxy votes at Commission meetings.

Judge Burns advised that he and Senator Burns had discussed the advisability of inviting all Senate and House members from Multnomah County to a meeting to explain to them the function and importance of the Criminal Law Revision Commission, to apprise them of the Commission's progress and amount of time spent thus far and to impress them with the necessity of its continuation during the coming biennium. Senator Yturri expressed approval of this suggestion.

The meeting was adjourned at 5:00 p. m.

Respectfully submitted,

Mildred E. Carpenter, Clerk  
Criminal Law Revision Commission