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PART II. PRE-ARRAIGNMENT PROVISIONS

ARTICLE 5. SEARCH AND SEIZURE

Preliminary Draft No. 2; November 1971

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REPORTER'S FOREWORD

Organization of Preliminary Draft No. 1 (January 1971) and Preliminary Draft No. 2 (November 1971), Article 5, Search and Seizure.

For reasons of getting the draft of Article 5 underway early, before the Commission officially ordered it, the Reporter arbitrarily and at random, selected various areas of search and seizure and presented them in draft form in Preliminary Draft No. 1 (January 1971) which was distributed several months ago but which has not yet been reviewed. Preliminary Draft No. 2 (November 1971) which is contained hereinafter, embodies the rest of the search and seizure areas to be covered. For the purposes of review of Preliminary Draft No. 1 and Preliminary Draft No. 2, the material should be taken in the following order:

1. Sections 1 through 3, Preliminary Draft No. 1
2. Sections 1 through 9, Preliminary Draft No. 2
3. Sections 4 through 15, Preliminary Draft No. 1
4. Sections 10 through 32, Preliminary Draft No. 2

The purpose for taking the material in this order is to conform to the organizational arrangement in the MCPP Search and Seizure draft (contained in MCPP Tentative Draft No. 3 (April 24, 1970) and Tentative Draft No. 4 (April 30, 1971). Naturally the Commission is free to pursue any other organization it might deem more useful for future drafts.

SEARCH AND SEIZURE PURSUANT TO WARRANTS

Introductory Note:

Search warrant issuance is one of the few areas of search and seizure law where the legislatures have spoken in some detail. There is, therefore, a tradition of legislative statement of the law in this area which is in sharp contrast to the judicial domination of other areas such as consent searches and searches incident to arrest. Oregon, in ORS chapter 141, like most other states, presently has detailed search warrant provisions. The following draft reflects many of the current Oregon practices and provisions although the language and organization of the proposed draft often departs from that of ORS. Where there are such departures, they are noted specifically in the explanations and commentaries to the following sections.

(All references throughout this Preliminary Draft No. 2 to the Model Code of Pre-Arraignment Procedure (MCPP) are to Tentative Draft No. 3 (May 1970) unless otherwise indicated.)

Section 1. Issuance of search warrant. (1) Who may issue. A search warrant may be issued only by a magistrate authorized by law to issue warrants in the jurisdiction wherein the warrant is to be executed.

(2) Who may apply. Application for a search warrant may be made only by a prosecuting attorney having jurisdiction over the prosecution of the offense or offenses in connection with which the warrant is sought, or by an officer.

(3) Contents of application. The application shall describe with particularity the individuals or places to be searched and the individuals or things to be seized, and shall be supported by one or more affidavits particularly setting forth the facts and circumstances tending to show that such individuals or things are in the places, or in possession of the individuals, to be searched. If an affidavit is based in whole or in part on hearsay, the affiant shall set forth facts bearing on the informant's reliability and shall disclose, as far as possible, the means by which the information was obtained.

COMMENTARY

A. Summary

Subsection (1), in accordance with modern practice, confines the authority to issue search warrants to magistrates. (The type of officials so qualifying in Oregon are listed below in the explanation of this section.)

Under subsection (2) only prosecuting attorneys and officers (yet to be specifically defined but presumably including only peace officers) are authorized to apply for search warrants.

Subsection (3) embodies the Fourth Amendment's requirements of "Oath or affirmation" and particularity. It also

requires that affidavits be in hand at the inception of the proceedings, so as to discourage frivolous or speculative applications based on the chance that a witness may give sufficient supporting oral testimony. The second sentence embodies special requirements of particularity with respect to hearsay affidavits based on the statements of "informers," which the Supreme Court has articulated in cases such as Aguilar v. United States, 378 US 108 (1964), Spinelli v. United States, 393 US 410 (1969), and, most recently, U.S. v. Harris, 91 S Ct 2075 (1971).

B. Derivation

The language of the section comes largely from MCPP section ss 2.01 (1), (2) and (3). The language in subsection (1) reflects the present provision in ORS 141.040.

C. Relationship to Existing Law

Subsection (1) makes no change in Oregon law. Magistrates now authorized to issue search warrants are defined in terms of magistrates who are authorized to issue arrest warrants. Pursuant to ORS 133.030 this means Oregon Supreme Court, Court of Appeals, circuit, district and county judges, a few municipal court judges and justices of the peace.

The requirement in subsection (2) that application for a search warrant be made by a law enforcement officer, and not a private citizen, is in line with the modern reality that the warrant is an instrument for the investigation of crime and the apprehension of criminals.

Argument might be made that no warrant may be obtained by an officer unless he holds a higher rank, such as sergeant or the like. It has also been suggested that no matter what rank the officer, he can obtain a warrant only with the concurrent approval of the prosecuting attorney. To some extent the requirement that the applying officer be of certain rank would tend to complicate police procedures for seeking warrants. This might well create a tendency in the policy agency to seek other search techniques not depending on a warrant. Certainly this would seem to be the result if the prosecutor's permission would first have to be sought before the officer could apply for the search warrant. This seems highly undesirable if, indeed, the policy of encouraging police to seek search warrants is the goal of any well considered codification. The U. S. Supreme Court frequently has stated its predilection for the search warrant.

As to the contents of the warrant application, covered in subsection (3) of the section, the U. S. Supreme Court has decided over a dozen cases dealing with the sufficiency of affidavits to support a finding of probable cause to issue a search warrant. The first case in this line was Byars v. U. S., 273 US 20 (1927), and the most recent is U. S. v. Harris, 91 S Ct 2075 (1971). The matter has generally been treated as one of constitutional dimension for judicial determination with little or no effort being made through state legislation, including that of Oregon, to deal with the problem by statute.

The Court's decisions in this area are closely tied to the particular facts in hand, and the cases are correspondingly easily distinguishable and lend themselves to discretionary disposition. This circumstance makes it difficult to extract rules of general application, suitable for statutory statement.

The Byars case and others in its wake have indicated the Court's disapproval of conclusory statements in the affidavits. The question of probable cause must be decided on the basis of what is put before the magistrate, and he must be given enough to make up his own mind, and not have to rely on the applicant's judgment. Aguilar v. U. S., 278 US 108 (1964). Hearsay evidence which would not be admissible in evidence at the trial may be considered, Brinegar v. U. S., 338 US 160 (1949), but in that event the affiant must set forth the grounds for treating the hearsay as credible. Spinelli v. U. S., 393 US 410 (1969).

It is around the matter of hearsay leads or tips from "informers" that the Court has recently been divided. From the opinions one may gather at least two desiderata: (1) that the affiant state the grounds for his belief that the informer is reliable, and (2) that the affiant indicate how the informer acquired his knowledge. The last sentence of subsection (3) embodies those criteria. The Harris case, decided in 1971, seems to ease some of the more restrictive requirements announced in the Spinelli case. It would seem desirable as a minimum to insure the validity of the affidavit involving hearsay that the following be included, based on suggestions contained in section 20.56, Oregon Criminal Law Handbook (1965):

(1) The information must come from a law enforcement officer or a reliable informant.

(2) If it comes from the reliable informant, the affidavit should contain both an assertion that the informant is reliable and the facts in support of this. (In the Harris case the affidavit did not establish this in the usual way, which consists of a recitation of the times the informant had previously supplied tips leading to valid arrests and seizures. Instead, in the Harris case, the fact, inter alia, that the informant had furnished statements against his own criminal interest were accepted largely as establishing his reliability. Harris also recognizes reputation evidence against the person to be searched.)

(3) Facts and circumstances must be asserted to support the conclusion that criminal conduct is being engaged in or that evidence of crime is contained in the premises at or very near the time of the affidavit. This must come either from the affiant's own observations, those of fellow police officers, or those of the informant. (For a detailed discussion of some of the recent probable cause cases, see Platt, Criminal Procedure, 49 Or L Rev 287, 292-297 (1970)).

It is believed that the language in subsection (3) as to content of the application is approximately and necessarily general enough to reflect the present or future stance of the U. S. Supreme Court. This is clearly an area where there must be considerable play in the joints to allow constitutional interpretation by the courts without freezing into Oregon law a particular holding or view.

Section 2. The hearing. (1) Record of proceedings on application. Before acting on the application, the magistrate shall examine on oath the affiants, and the applicant and any witnesses he may produce, and may himself call such witnesses as he deems necessary to a decision. He shall make and keep a fair summary of the proceedings on the application, and a record of any testimony taken before him.

(2) Basis for issuance. If the authorized official finds that the application meets the requirements of this section and that, in the basis of the record made before him, there is probable cause to believe that the search will discover individuals or things specified in the application and subject to seizure under section 3 of Article 5, Preliminary Draft No. 1 (January 1971), he shall issue a search warrant based on his finding and in accordance with the requirements of sections 1 to 9 of this Article 5. If he does not so find, the magistrate shall deny the application.

(3) Secrecy. The proceedings upon application for a search warrant shall be conducted with secrecy appropriate to the circumstances.

COMMENTARY

A. Summary

Subsection (1) requires the magistrate to whom application is made to take testimony, and authorizes him to call witnesses on his own initiative. If no oral testimony is given the magistrate is required to make a "fair summary" of the proceedings; if testimony is given, it must be recorded.

Subsection (2) embodies the constitutional requirement of "probable cause" in accordance with the definition in section ____ [yet to be drafted]. The requirement is one of probable cause to believe that things (a) specified in the

the application, and (b) subject to seizure under section 3 of Article 5, Preliminary Draft No. 1 (January 1971), will indeed be found by the search proposed. If the magistrate is satisfied that such a showing has been made, and that the application otherwise meets the requirements of the code, he makes a finding to that effect and issues the warrant.

Since the only reason for issuing search warrants ex parte is to avoid giving advance warning to those in control of the premises to be searched, a requirement of secrecy prior to execution of the warrant is desirable. After execution of the warrant there may be no further reason for secrecy, and the proceedings on the return are, of course, adversary in nature. If the magistrate declines to issue the warrant, or if it is returned unexecuted, there may be reason for continued secrecy, and the word "appropriate" is intended to leave such occasional but conceivable problems to the magistrate's discretion.

B. Derivation

The section is based on MCPP section ss 2.01, paragraphs (4), (5) and (6). It is similar in policy to ORS 141.050 which also requires the magistrate to examine affiants and authorizes him to call witnesses.

The language in subsection (2) with respect to the hearing and record keeping generally reflects the present ORS provision. However, the present practice in Oregon, according to the Lane County District Attorney's office, appears to be that the hearing on the application is very informal. Rarely does the magistrate hear or call additional witnesses. At most he might ask some questions of the police officer seeking the warrant. Apparently no record is kept of these questions so that the affidavit is the only record.

The goal of the Commission should be to encourage the police to seek search warrants and to facilitate this in all ways possible. Requiring a more formal record-making procedure tends to make more cumbersome the obtaining of warrants. It may, however, serve another purpose which might be viewed as outweighing the extra burden. If the magistrate causes a record to be kept of all that is said at the "hearing" on the application, it may prove beneficial should the affidavit be challenged later in a motion to suppress.

The provision in subsection (3) on secrecy of the hearings is new to Oregon law in language but not as a practical matter of regular operation. Surprisingly few states (apparently only three) have such a provision, yet the practice clearly is one of secrecy. The draft language reflects this policy.

Section 3. Contents of search warrant. (1) Date and address. A search warrant issued pursuant to section 1 shall be dated, and shall be addressed to and authorize its execution by an officer authorized by law to execute search warrants issued by the magistrate.

(2) Scope of contents. The warrant shall state, or describe with particularity:

(a) The identity of the magistrate issuing the warrant, and the date when and place where application for the warrant was made;

(b) The identity of the applicant and all persons whose affidavits were given in support of the application;

(c) The issuing authority's finding of sufficiency of the application and reasonable cause for issuance of the warrant;

(d) The name of the individual to be searched, or the location and designation of the premises or places to be searched;

(e) The individuals or things constituting the object of the search and authorized to be seized;

(f) The times of day or night and the period of time during which execution of the warrant is authorized; and

(g) The period of time, not to exceed five days, unless otherwise provided under subsection (3) of this section, after execution of the warrant, within which the warrant is to be returned to the issuing authority.

(3) Time of execution. Except upon finding as herinafter provided, the search warrant shall provide that it be executed during the daytime, and within five days from the date of execution. Upon a finding by

the issuing authority of reasonable cause to believe that the place to be searched is difficult of speedy access, or that the objects to be seized are in danger of imminent removal, or that the warrant can only be safely or successfully executed at nighttime, or under circumstances the occurrence of which is difficult to predict with accuracy, the issuing magistrate may, by appropriate provision in the warrant, authorize its execution at times other than those specified in the first sentence of this subsection (3), but not more than ten days from the date of issuance.

(4) Warrants for documents. If the warrant authorizes the seizure of documents (other than lottery tickets, policy slips, and other non-testimonial documents used as instrumentalities of crime), the warrant shall require that it be executed in accordance with the provisions of section 9 of this Article 5, and may, in the discretion of the issuing magistrate, direct that any files or other collection of documents, among which the documents to be seized are reasonably believed to be located, shall be impounded under appropriate protection where found.

COMMENTARY

A. Summary

The contents of the warrant, as described in subsections (1) and (2) of the draft, are in general conformity with existing statutory provisions, except for the requirement that the period within which the return must be made be shown. For anyone who wishes to contest the warrant, this is vital information.

Subsection (3) directs that, in the absence of unusual circumstances, the warrant require that it be executed in the

daytime and within five days. Nighttime or delayed execution may be authorized only on the basis of special findings by the magistrate justifying such action.

Subsection (4) is the first of several which are intended to require a new procedure for the handling of intermingled documents. It should be read in conjunction with section 9, infra, and section 6 of Article 5, Preliminary Draft No. 1 (January 1971), as these sections embody the proposed procedure in its entirety. Subsection (4) itself provides only that if the warrant authorizes the seizure of testimonial documents, the warrant shall require its execution in accordance with section 9 of this Article 5, and may provide for impounding rather than removal of the documents in question.

B. Derivation

The section is based on section ss 2.02 (1), (2), (3) and (4) of the MCPP and in the main incorporates the requirements presently set out in the warrant form contained in ORS 141.080 which is not incorporated as part of this draft. Not included in present Oregon law are the items contained in subsections (2) (b) (identity of the applicant) and (f) (times of day or night execution is authorized).

Subsection (3) has similarity to ORS 141.130 with an important difference as is noted in the explanation below. Subsection (4) has no counterpart in Oregon statutes.

C. Relationship to Existing Law

Subsection (2) (b), requiring that the identity of the applicant be contained in the search warrant, is highly desirable from the standpoint of the person served so that he can better determine whether or not to contest the warrant. The further requirement in (2) (b) that the warrant contain the names of all persons whose affidavits were given in support of the warrant should cause no difficulty. Routinely in Oregon such affiant is a police officer and no other affidavits are normally submitted. If an informer is involved in the affidavit, the draft in section 32 leaves it open to the magistrate to secure the oral testimony of an informer without divulging the name in the warrant.

Subsection (3) contains an important innovation for Oregon law. Where possible, searches should be conducted in daylight hours. The invasion of private premises in the small hours of the night smacks of totalitarian methods and

is more likely to create the terror that precipitates gun battles. Obviously there are occasions when it is imperative that the search be conducted at night. Subsection (3) permits such searches if the magistrate finds present the factors described in subsection (3).

Subsection (3) generally requires that the warrant be served within five days which is shorter than the basic ten-day execution requirement of ORS 141.100. Subsection (3) of the draft section does, however, provide that upon a special showing that the five days is not enough time, a period of up to ten days may be granted. It seems desirable to keep the time allowed for execution of search warrants as short as possible. This tends to eliminate problems with respect to staleness of the warrant which often form a fruitful basis for attack on the legality of the warrant.

Subsection (4), which is based on section ss 2.02 of the ALI draft has an interesting background. At an ALI Council meeting in February 1969 during the discussion of excluding private writings from items which are seizable, Judge Charles Breitel proposed that special procedural safeguards be devised for documentary searches, so as to minimize the invasion of privacy. The same thought is expressed in Judge Friendly's opinion in the Barnett case, wherein he suggested (409 F2d at 896) "that an approach geared to the objective of the Fourth Amendment to secure privacy would seem more promising than one based on the testimonial character of what is seized."

This draft embodies this approach and is the first of three provisions in which the procedure is set forth, the others being section 9 of this draft and section 3, Article 5, of Preliminary Draft No. 1 (January 1971).

The parenthetical language in subsection (4) is intended to exclude from the new procedure things which are documents only in the sense that they are papers bearing writing, and which therefore raise no problems of testimonial content and carry no privacy values. Overall, the Breitel-Friendly concept is a fruitful one, and it is not believed to be impractical or excessively burdensome procedurally. The proposal is apparently novel, and existing statutes are of little aid in its formulation or evaluation. Essentially, it calls for taking out of the hands of the police the task of sifting through documents to discover those which may be seizable, and remitting the operation to scrutiny in adversary proceedings before a judicial officer.

Section 5. Scope of the search. The scope of search shall be only such as is authorized by the warrant and is reasonably necessary to discover the individuals or things specified therein. Upon discovery of the individuals or things so specified, the officer shall take possession or custody of them and search no further under authority of the warrant. If in the course of such search the officer discovers things, not specified in the warrant, which he reasonably believes to be subject to seizure under section 3 of Article 5, Preliminary Draft No. 1 (January 1971), he shall also take possession of the things so discovered.

COMMENTARY

A. Summary

This section makes explicit the well-established rule that the search must be no broader in scope than the warrant justifies. Once the things specified in the warrant are found, its authority is exhausted providing something does not transpire during the search which justifies a further search outside the warrant's authority.

B. Derivation

The language is drawn from MCPP section ss 2.03 (5). There is no specific provision covering this in ORS.

C. Relationship to Existing Law

This section reflects generally the law of Oregon and other jurisdictions in circumscribing what the police may seize under the authority of a search warrant to the things described in the warrant. The section also recognizes the well-established rule that something may occur during the authorized search which in effect would expand the otherwise limited search authority. For example, what is found may furnish the basis for a valid arrest, and the arrest may provide authority for a further search of the person and immediate vicinity of the individual arrested, in accordance with search incident to arrest provisions.

Section 4. Execution of warrant. (1) Persons authorized. A search warrant may be executed only within the period and at the times specified therein, and only by a peace officer. The peace officer charged with its execution may be accompanied by such other officers, or persons having knowledge of the premises to be searched or the location of the things to be seized, as may be reasonably necessary for the successful execution of the warrant with all practicable safety.

(2) Notice of authority. Except as provided in subsection (3) of this section, the executing officer shall, before entering the premises, give appropriate notice of his authority and purpose to the person to be searched, or the person in apparent control of the premises to be searched, as the case may be.

(3) Execution without notice. If the executing officer has reasonable cause to believe that the notice required by subsection (2) of this section would endanger the successful execution of the warrant, or its execution with all practicable safety, the officer may execute the warrant without such prior notice.

(4) Service of warrant. Before undertaking any search or seizure pursuant to the warrant, the executing officer shall read and give a copy of the warrant to the person to be searched, or the person in apparent control of the premises to be searched, as the case may be. If the premises are unoccupied by anyone in apparent and responsible control, the officer shall leave a copy of the warrant suitably affixed to the premises.

COMMENTARY

A. Summary

The provisions in subsection (1) make the terms of the search warrant binding on the executing officer, described here as any peace officer. Peace officer, as defined in ORS 133.170, includes any city policeman, sheriff, state trooper, constable or marshal. The executing peace officer is authorized to have assistance from other officers and private persons where appropriate.

Subsection (2) embodies the common law rule, found in the statutes of many jurisdictions, that the executing officer's entry upon premises must be preceded by notice of his authority and purpose.

The notice requirement of subsection (2) may, pursuant to subsection (3), be disregarded by the executing officer if he has reasonable cause to believe that giving notice would endanger the successful or safe execution of the warrant.

Subsection (4) requires that a copy of the search warrant shall be given to the individual whose person or premises are searched. Inasmuch as the proceeding on a search warrant is judicial in nature, and may become a contested proceeding, the requirement seems essential, in order to put the possibly aggrieved party on notice of the authority and purported reasons for the search, and enable him to prepare to contest it if he so desires.

The draft also requires that a copy of the warrant be given before the search is begun. This is so that the "searchee" may know that there is color of authority for the search, and that he is not entitled to oppose it by force. It likewise requires that the warrant shall be read to the person searched rather than merely handed to him, so that he will be immediately apprised of what it is, and so that the problems of illiteracy may be mitigated.

B. Derivation

The section follows the language of MCPP section ss 2.03 (1), (2), (3) and (4). Substantively there is little deviation from similar provisions in ORS 141.110 and the knock and announce rules of Oregon based on ORS 133.290.

C. Relationship to Existing Law

The requirement that an officer executing a search warrant for closed premises shall, before attempting an entry, give notice of his authority and purpose to whomever may be within, is the traditional common law requirement. It is also frequently found in state statutes, including Oregon. See ORS 141.110 and 133.290. There appears to be no reason to eliminate the requirement, as stated in subsection (2), absent the emergent circumstances which are the subject of subsection (3).

Subsection (3) is intended to accomplish the same general purpose as the New York statute commonly known as the "no-knock" law. NY Code Crim Proc section 799. The constitutionality of such a provision is supported by Ker v. California, 374 US 23 (1963), approving a California judge-made rule dispensing with the need for notice in emergency circumstances. Oregon has recently approved the no-knock approach in State v. Mitchell, 93 Or Adv Sh 89, ____ Or App ____ (1971).

The two alternative standards in the New York law are that "the property sought may be easily or quickly destroyed or disposed of," and that the giving of notice may result in "danger to the life and limb of the officer or another." The same basic values are embodied in the proposed draft, but the standards are more broadly phrased.

With respect to the successful execution of the warrant, the New York wording seems both too broad and too narrow. Goods which are in fact easily destroyed or disposed of may not actually be in imminent danger of destruction or concealment. Goods not, in an objective sense, easily destroyed or disposed of, may in fact be in danger of such handling as will frustrate successful execution of the warrant. For these reasons, danger to "successful execution" appears to be the appropriate standard.

So far as concerns the matter of safety, the criterion is comparative. Execution of a search warrant may be dangerous whether or not notice is given; the question is whether dispensing with notice will increase or decrease the risk. Warrants should be executed with "all practicable safety" for everyone--the officer, the occupants, neighbors, and passersby. If the giving of notice increases the danger, then, upon a finding to that effect it should be dispensed with.

The question remains whether that finding may be made by the officer executing the warrant, or only by the magistrate issuing it. The New York "no-knock" statute requires that the issuing magistrate must have found, on proper proof, that the circumstances call for dispensing with notice, and must insert such a direction in the warrant itself. The rule of the California courts, on the other hand, authorizes the officer to dispense with notice if he has reason to believe that notice would endanger the safety or success of the undertaking. This view has also been adopted in Oregon in the Mitchell case, supra.

Article 3 of Part I of the MCPP imposes no such requirement in connection with arrests, whether or not under warrant, if the officer has reasonable cause to believe that notice would enable the suspect to escape, or endanger the officer or others. (Although the arrest portion of this Code has not yet been completed, it is assumed the same provisions will be incorporated from the MCPP arrest sections.)

The provisions with respect to the requirement of prior approval ought to be the same with respect to both arrests under warrant and searches under warrant. Clearly, too, circumstances may arise where officers making a warrantless arrest may need to make an unannounced entry. In the light of these considerations, there is no sufficient reason to require predetermination by a magistrate in search warrant cases, and the draft is based on that conclusion.

It is possible that, in the course of conducting a search for things specified in the warrant, the officer may observe things not so specified which are contraband, or which for some other reason appear to be things subject to seizure under section 3 of Article 5, Preliminary Draft No. 1 (January 1971). If the officer's basis for such belief is reasonable, he should be entitled to seize them, just as when he observes such things elsewhere in the lawful conduct of his duty. This latter authority is limited, however, by Coolidge v. New Hamp., 91 S Ct 2022, 2040-41 (1971). The Court said that if the initial intrusion is bottomed upon a search warrant which fails to mention a particular object, though the police know its location well ahead of time and intend to seize it, then there is a violation of the express constitutional requirement of "warrants...particularly describing...the things to be seized." Pursuant to Coolidge, then, police must be much more careful about what they list. They will not now have the wide latitude they supposed existed under the plain view rule.

Section 6. List of things seized. Upon completion of the search, the officer shall make a list of the things seized, and shall deliver a receipt embodying the list to the person from whose possession they are taken, or the person in apparent control of the premises from which they are taken, as the case may be. The list shall be prepared in the presence of the person to whom the receipt is to be delivered. If the premises are unoccupied by anyone in apparent and responsible control, the executing officer shall, if possible, secure the presence of one or more apparently credible persons to witness the preparation of the list, and shall leave the receipt suitably affixed to the premises.

COMMENTARY

A. Summary

The requirement of this section that a list of things seized be given by the executing officer to the person from whose possession they are taken, is part of the classical common law of search and seizure.

B. Derivation

The section is based on MCPP section ss 2.03 (6).

C. Relationship to Existing Law

The requirement that a receipt, listing everything seized, be given to the occupant of the premises is a common law feature of search warrant procedure, which is usually found in statutory form, including Oregon in ORS 141.120. All the reasons for giving the occupant a copy of the warrant apply likewise to the requirement of a receipt. Since there may be problems of quantity or proper description, the requirement that its preparation be witnessed is desirable. And here, as in the case of the warrant, a copy should be left affixed to the premises if no responsible person is on hand to receive it.

Section 7. Use of force in executing warrant. The executing officer, and other officers accompanying and assisting him, may use such degree of force, short of deadly force, against persons or to effect an entry or open containers, as is reasonably necessary for the successful execution of the search warrant with all practicable safety. The use of deadly force in the execution of a search warrant, other than in self-defense, is justifiable only if the executing officer reasonably believes that there is a substantial risk that the individuals or things to be seized will suffer or cause or be used to cause death or serious physical injury if their seizure is delayed, and that the force employed creates no substantial risk of injury to persons other than those obstructing the officer.

COMMENTARY

A. Summary

The notion, embodied in this section, that some degree of force may, if necessary, be used to effect the execution of the warrant, is basic to the nature of the process, and is generally recognized. Under the criteria in the proposed draft, deadly force is not permissible unless there is no substantial risk to innocent bystanders, and there is substantial risk that failure to effect a prompt seizure of the things sought will result in death or serious bodily harm. The phrase "other than in self-defense" is inserted in order to make it clear that an officer may use such degree of force as is reasonably necessary to defend himself.

B. Derivation

The section is taken from MCPP section ss 2.03 (7).

C. Relationship to Existing Law

The present Oregon law embodied in ORS 144.110 provides that the amount of force which may be used to execute a search warrant, both as to breaking into premises and in overcoming resistance, is the same as that allowed for the execution of an arrest warrant. The quantifying of the authority to break into premises and containers with the same authority under arrest law is unexceptional. But it appears desirable to differentiate the use of force in the execution of a search warrant.

Under the draft the officer may use such force, short of deadly force, as may be reasonably necessary for execution of the warrant. But such force shall not extend to use of deadly force except (1) where the officer is acting in self-defense, or (2) where the things a person authorized to be searched for and seized will suffer or be used to cause death or serious bodily harm if the search is delayed, and (3) there is, in the reasonable opinion of the officer, no risk to innocent bystanders.

It will be seen that this standard of use of deadly force is premised on a different concept than that which provides for use of deadly force in effecting arrests as provided in the Oregon Criminal Code of 1971, sections 27 and 28. Under these sections the policeman's authority to use force is equated generally to the dangerousness of the kind of crime for which he is attempting to make an arrest. For instance, section 28 (2) provides that the officer may use deadly force if he reasonably believes the person to be arrested has committed the crime of kidnapping or rape. However, the seizure of evidence of either of these crimes may not in any common sense view warrant the use of deadly force in connection therewith unless there is cause to believe that failure to seize the evidence, due to inability to use deadly force, would create danger of serious harm or death. Basically, what the section's policy says is that if the police have to choose between getting evidence under a warrant by using deadly force or losing that evidence, the value of human life outweighs the deadly acquisition of the evidence (barring the exceptional circumstances stated in the draft section).

Section 8. Return of the warrant. (1) Unexecuted warrant. If a search warrant is not executed within the time specified therein, the officer shall return the warrant to the issuing magistrate on or before the date so specified, together with a written report of the reasons why it was not executed.

(2) Executed warrant. An officer who has executed a search warrant shall, as soon as is reasonably possible and in no event later than the date specified in the warrant, return the warrant to the issuing magistrate together with a verified report of the facts and circumstances of execution, including a list of things seized.

(3) Filing of record. Subject to the provisions of subsection (4) of this section, the issuing magistrate shall file the warrant, report and list returned to him, pursuant to subsections (1) and (2) of this section, with the record of the proceedings on the application for the warrant made pursuant to section 2 (1) of this Article.

(4) Transmittal to court having jurisdiction. If the issuing magistrate does not have jurisdiction to inquire into the offense in respect to which the warrant was issued or the offense apparently disclosed by the things seized, the magistrate shall transmit the warrant and the record of proceedings for its issuance, together with the documents submitted on the return, to the clerk of the appropriate court having jurisdiction to inquire into such offense.

COMMENTARY

A. Summary

Subsection (1) requires the return of unexecuted warrants on or before the date the warrant expires. The

reasons for failure of execution must also be given in a written report. Inasmuch as the proceedings on issuance of an unexecuted warrant, or the events connected with an unsuccessful attempt to execute a warrant, may both be relevant in subsequent tort or criminal litigation, the requirement that a return be made on an unexecuted warrant appears desirable.

Subsection (2) embodies and formalizes the traditional common law requirement for return of a search warrant to the issuing magistrate.

Subsections (3) and (4) are routine filing provisions. In some jurisdictions the magistrates that issue search warrants may not have jurisdiction to try the offenses in connection with which the warrants are issued, and in those circumstances the records should be filed with a court having jurisdiction to proceed in the matter. This is true in Oregon counties like Lane where the district court issues almost all search warrants yet has no jurisdiction over many serious crimes in which the warrants may be involved.

B. Derivation

The section follows the language of MCPP section ss 2.04.

C. Relationship to Existing Law

Unexecuted warrants. ORS presently includes very little of the provisions of this section. All ORS 141.100 says about unexecuted warrants is that after the time expires in which they may be served, they become void.

Apparently Georgia and Illinois are the only states that require return of a warrant which has not been executed. Still, the procedure appears to be desirable. In two states the improper issuance of a search warrant is criminally punishable, (North Carolina and Virginia), and in other jurisdictions the proceedings for issuance of an unexecuted warrant, and the reasons for its non-execution, might be relevant in subsequent tort or criminal litigation.

Return. The return of an executed search warrant is an historic and elemental part of the proceedings; the lack of a return was one of the oppressive features of the general warrants in our colonial days. In many states, however, the characteristics of the return remain a matter of common law practice, as the statutes do little more than require that a return be made. Some 15 states, however, have statutory provisions comparable to those in the draft, and the federal rule is of the same sort.

The requirement that the return include an inventory of seized property is universal, including Oregon under ORS 141.130, but the requirement of a report descriptive of the process of execution appears to be the rule only in Rhode Island and Texas. It seems a highly desirable provision, in order that a contemporaneous account be obtained against the event of subsequent challenge to the lawfulness of the execution process.

The provision in subsection (2) requiring return of the executed warrant is more precise than the present Oregon provision. Under ORS 141.130 it is required that the officer executing the warrant "shall forthwith return" it to the issuing magistrate. Although this imperative bespeaks a need for considerable promptness, State v. Cortman, 251 Or 566 (1968), refused to apply the exclusionary rule to evidence seized under a warrant which was not promptly returned. The opinion sets no time limits, not even one in terms of "reasonable delay." Thus apparently in Oregon if the search warrant and the search are valid, the Oregon court does not consider a delay in return of the warrant a relevant matter as to admissibility of evidence seized. This could very well work hardships on defendants who would be frustrated in challenging the seizure process by dilatory returns. To obviate this problem, the proposed draft sets a definite time limit on the return. Section 3 makes it clear that the warrant, when issued, shall indicate the time during which the warrant may be served and the outside date (not to exceed five days after execution of the warrant providing an additional five days has not been granted under the terms of section 3).

It may be that even this more specific requirement for return of a warrant might not or ought not trigger the exclusionary rule in case of its violation. In line with the policy announced in the Cortman case, supra, a future Oregon court might view exclusion of evidence as too great a penalty. This would not be objectionable perhaps, if the delay in the return was not overly long; in short, if the delay beyond the statutory limits could be viewed as "reasonable" under the particular circumstances it would seem to make good sense not to invoke the harsh penalty against the state of exclusion of the otherwise legally obtained and trustworthy evidence. Nevertheless, a statutory statement of preference for early return would seem best to exhort police to make returns promptly so as to avoid possible loss of seized evidence on the motion to suppress or cause unfairness to defendants because of unreasonable delay.

Subsections (3) and (4) are fairly routine but may work a change in at least some Oregon counties. For example, the district court in Lane County issues almost all search warrants as a matter of practice. The affidavit and a copy of the warrant, and any other record of the hearing, are held in a file in the district court. Unless the files are requested later by the circuit court in a case beyond the criminal jurisdiction of the district court (e.g., all felonies), the district court keeps the files. It seems better procedure to have all such files transmitted by the district court to the court which has exclusive jurisdiction over the particular crime involved.

Section 9. Execution and return of warrants for documents. (1) Identification of documents to be seized. If the warrant authorizes documentary seizure as specified in section 3 (4) of this Article, the executing officer shall endeavor by all appropriate means to search for and identify the documents to be seized without examining the contents of documents not covered by the warrant. If such identification is effected, the documents covered by the warrant shall be seized and dealt with in accordance with the provisions of sections 5, 6, 7 and 8 of this Article.

(2) Intermingled documents. If the documents to be seized cannot be searched for or identified without examining the contents of other documents, or if the documents to be seized constitute items or entries in account books, diaries, or other documents containing matter not specified in the warrant, the executing officer shall not examine the documents but shall either impound them under appropriate protection where found, or seal and remove them for safekeeping pending further proceedings pursuant to subsection (3) of this section.

(3) Return of intermingled documents. An executing officer who has impounded or removed documents pursuant to subsection (2) of this section shall, as promptly as possible, report the fact and circumstances of the impounding or removal to the issuing official. As soon thereafter as the interests of justice permit, and upon due and reasonable notice to all interested persons, a hearing shall be held before the issuing magistrate, or if he have no jurisdiction, before a judicial officer having such jurisdiction, at which the person from whose possession or control the documents were taken, and any other person

asserting any right or interest in the documents, may appear, in person or by counsel, and move for the return of the documents under sections 21 to 23 of this Article, in whole or in part, or to specify such conditions and limitations on the further search for the documents to be seized as may be appropriate to prevent unnecessary or unreasonable invasion of privacy. If the motion for the return of the documents is granted, in whole or in part, the documents covered by the granting order shall forthwith be returned or released from impoundment. If the motion is not granted, the search shall proceed under such conditions and limitations as the order shall prescribe, and at the conclusion of the search all documents other than those covered by the warrant, or otherwise subject to seizure, shall be returned or released from impoundment.

(4) Handling and disposition of seized documents. Documents seized shall thereafter be handled and disposed of in accordance with the other provisions of this section and of sections 21 through 32 of this Article. No statements or testimony given in support of a motion made pursuant to this section shall thereafter be received in evidence against the witness in any subsequent proceeding, other than a prosecution for perjury or contempt in the giving of such statements or testimony.

COMMENTARY

A. Summary

This section embodies the new procedure for documentary searches conducted under authority of a warrant. The first subsection is intended to exclude from the new procedure those situations where the documents specified in the warrant

can be sought and identified without going through other documents with which they are intermingled. To this end the officer might, for example, ask the possessor of the documents to pick out those covered by the warrant, without consenting to the search and seizure, but in order to avoid invasion of his privacy with respect to the other intermingled documents.

If, however, it appears that there is no way to search for the documents covered by the warrant without examining others, the special procedure prescribed in subsections (2) and (3) must then be followed. The same is true if only one document is involved, but it consists of multiple parts or entries, only one or some of which are sought under the warrant.

When the "intermingling" problem is inescapably present, the search is taken out of the hands of the officer executing the warrant, who becomes a custodian of the intermingled documents, charged with their safekeeping until the provisions of subsection (3) come into play. Depending upon the circumstances, the executing officer may take steps to safeguard the documents where found, or he may remove them under seal to a more suitable place for handling pursuant to subsection (3).

Once the intermingled documents are impounded or removed, the circumstances are to be at once reported to the issuing authority. As soon thereafter as is possible, having regard to notice to those interested, an adversary hearing is held before the issuing authority if competent, or otherwise before a judicial official having jurisdiction to determine the matter.

The hearing has two purposes: (a) to dispose of motions for restoration of the documents under the provisions of sections 20 through 23, and (b) to impose such limitations on the search among the intermingled documents as may be appropriate to prevent excessive invasions of privacy. In support of such limitations, the moving party might request that the search be conducted in the presence of counsel; might show that certain files or other discreet portions of the intermingled documents could not possibly contain the particular documents or entries sought under the warrant; might request that the search be carried out by a special master or other qualified and judicially-designated examiner rather than by the police; or might suggest other safeguards against unnecessary scrutiny or disclosure of the contents of the documents.

To the extent that a motion for return might be granted, the documents covered by the granting order would be restored at once to the individual entitled to possession. To the extent such a motion were to be denied, the search would then go forward, subject to whatever limitations the court would have imposed.

Subsection (4) relates to details of handling and disposing of seized items. Documents covered by the warrant, and other documents or things discovered in the search and subject to seizure, would be seized by the officer or official conducting the search, and would then constitute the things to be listed and returned to the issuing authority under section 8. They would also constitute the things seized for purposes of custody and disposal under section 21, and motions to suppress under sections 24 through 32.

Testimony offered in support of motions under subsection (3) might, it is apparent, be of a self-incriminating nature. The last sentence of subsection (4) forecloses subsequent use of such testimony against the witness, subject to the customary exception for perjury or contempt prosecutions.

B. Derivation

The section is based on MCPP section ss 2.05.

C. Relationship to Existing Law

No provision in ORS is comparable to the draft of this section which is apparently novel throughout the country.

The most difficult problem presented by this section is to determine and intelligibly describe the circumstances that will trigger the special procedure. Theoretically, a single document may present "intermingling" in the sense that only part of the document is responsive to the warrant, and that part cannot be discovered without reading the whole. In the case of lengthy documents such as diaries or ledgers, therefore, the invasion of privacy may be just as great as with a file-drawer of correspondence.

Accordingly, it seems impracticable to put any quantitative floor under the provision. At the same time it appeared to be administratatively cumbersome to stipulate that any documentary search would trigger the procedure. Accordingly, the draft adheres to a general and circumstantial test. Whether the intermingled mass is large or small, if the documents or entries sought cannot be identified without reading other matter not within the warrant, then the special procedure must be utilized unless the possessor of the documents is willing and able to pull out all those covered by the warrant.

INSPECTORIAL SEARCHES

Introductory Note. The following sections apply to administrative inspections common under public health and safety laws. These inspections may be viewed as having a common source of authority - the public law itself. However, these public laws take two major forms - one where an activity or particular kind of building or premise is licensed under the public law, and one where no license is involved but inspections are authorized. Examples of the former would be taverns, restaurants, and the like. Examples of the latter would be zoning, housing, food, health and building code regulations. The first four sections, sections 10 through 13, cover the type of inspections normally associated with zoning, food, fire and housing code regulations. Section 14 concerns itself with inspection of licensed premises and activities.

The Reporter is not certain that this separate treatment is conceptually correct or practical. It does seem apparent, however, that traditionally licensed activities have had a more careful scrutiny, and inspection activity has usually been more intense based largely on the implied consent to search which goes with the issuance of the license. But even here certain kinds of searches can be characterized as more intrusive than others, e.g., the inspectorial search by the game warden of a fisherman's car or house trailer to insure compliance with the game laws, may be a far more serious and abrasive invasion than the search of the premises of a restaurant to insure proper cleanliness. This distinction is attempted in section 14. See its accompanying commentary.

The provision for inspectorial searches contained in these sections is intended to supplant the provisions scattered throughout ORS in several areas. The authority to inspect and the regulation of such inspections varies considerably from one specific area to the next and for this, as well as other reasons, uniformity seems advisable. There follows a list of some ORS provisions and the description of the specific area of inspection involved as appears in the ORS Index under the subject heading of Search and Seizure. Only a partial listing is set out here to demonstrate the wide variety of inspectorial and seizure powers currently granted: egg inspection, ORS 632.795; day care facilities, 418.850; commercial fishing, 506.595; forest insect disease control, 527.335; potatoes, 632.351; game, 496.675; onions, 632.246; racing enforcement, 462.277.

The provisions contained in the draft sections would also supersede the inspectorial procedures of cities and counties which license and inspect large numbers of businesses.

Section 10. Definitions. As used in sections 10 through 14:

(1) "Inspectorial search" means an entry into and examination of premises or vehicles, for the purpose of ascertaining the existence or non-existence of conditions dangerous to health or safety or otherwise relevant to the public interest, in accordance with inspection requirements prescribed by fire, housing, sanitation, zoning, conservation and other laws or ordinances duly enacted for the promotion of public well-being.

(2) "Inspection officer" means an official authorized by law or ordinance to conduct inspectorial searches.

(3) "Inspection order" means an order issued by a magistrate authorizing an inspectorial search.

COMMENTARY

A. Summary

These are the definitions suggested to lay the basis for the ensuing substantive and procedural sections, intended to deal with the constitutional and policy issues precipitated by Camara v. Municipal Court, 387 US 523 (1967), and See v. City of Seattle, 387 US 541 (1967).

The definitions are cast in broad terms, with the thought that they may be made applicable, by cross-reference or incorporation, to whatever public well-being codes (fire, housing, etc.), calling for enforcement by inspection, may be in effect in a given jurisdiction.

Ordinarily such inspections are made in buildings, private or commercial, but they may call for inspection of open land or vehicles, and the language is intended to cover all such possibilities. So, too, while one ordinarily thinks of inspection in connection with nuisances or hazards, they may also be necessary in connection with public housing or other construction projects. The phrase "otherwise relevant to the public interest," and use of the word "promotion" rather than "protection" of public well-being, are intended to embrace such situations.

B. Derivation

The section is based on MCPP section ss 5.01.

C. Relationship to Existing Law

Oregon presently has no overall statutory provisions similar to this section although, as noted in the introductory portion, a number of individual, non-uniform inspection provisions are scattered throughout ORS.

Inspection laws and ordinances authorizing the entering of premises, and imposing criminal sanctions for denying entry to the inspection officer, exist in great variety and profusion. Most of them, of course, antedate the Camara case, and are of little help in dealing with the issues there raised.

The conditions disclosed by an inspectorial search may, to be sure, constitute evidence of a crime, if violations of the fire or other codes are criminally punishable in the jurisdiction in question. Awareness of this factor appears to have been one of the principal reasons for the conclusion reached by the majority in the Camara case, and for the overruling of the earlier cases which had held inspectorial searches outside the reach of the Fourth Amendment.

In the See case, decided the same day as the Camara case, the Court made the same constitutional principle applicable to commercial buildings as well as to dwellings. The present definition covers "premises" generally, including open land as well as buildings.

In consequence of these decisions, five states have enacted statutes providing for inspectorial search warrants. The contents of these statutes have been considered in preparing the present draft.

Section 11. Inspectorial search by consent. (1) Voluntary consent. Within the scope of his authority with respect to the places to be inspected and the purpose for which inspection is to be carried out, an inspection officer may conduct an inspectorial search, with the voluntary consent of an occupant or custodian of the premises or vehicles to be inspected, who reasonably appears to the inspection officer to be in control of the places to be inspected or otherwise authorized to give such consent.

(2) Evidence of authority. Before requesting consent for an inspectorial search, the inspection officer shall inform the person to whom the request is directed of the authority under and purposes for which the inspection is to be made and shall, upon demand, exhibit a badge or document evidencing his authority to make such inspections.

(3) Convenience of occupants. Inspections undertaken pursuant to this section shall be carried out with due regard for the convenience and privacy of the occupants, and during the daytime unless, because of the nature of the premises, the convenience of the occupants, or other circumstances, there is a reasonable basis for carrying out the inspection at night.

(4) Prior notice. Except in accordance with the provisions of subsection (5) of this section, adequate notice of the time and purpose of an inspection shall be sent to the occupants or custodians of premises or vehicles to be inspected not less than seven days before the inspection is undertaken.

(5) No prior notice. The notice required by subsection (4) may be dispensed with if, because of the nature of the inspection to be undertaken, the conduct of the occupants, or other circumstances, there is a reasonable basis for belief that such notice would obstruct, or seriously diminish the utility,of the inspection in question.

COMMENTARY

A. Summary

Under subsection (1), the consent required to validate an inspection and search must be (a) voluntary, and (b) given by someone apparently authorized to consent to such inspections. Pro tanto these are the same as for consent searches under sections 12 through 15, Article 5, Preliminary Draft No. 1 (January 1971), but the remaining provisions and requirements are quite different, as they are based on the premise, more fully explained below, that, unlike other searches, most inspectorial searches will be carried out with the consent of those affected.

The difference appears clearly in connection with subsection (2), which specified a wholly different and more limited type of "warning" than the Miranda-type statements called for by section 14 of Article 5, Preliminary Draft No. 1 (January 1971). Under the present paragraph, all that is required is a statement of authority and purpose supported, if necessary, by a documentary or other physical badge of authority.

Inasmuch as most inspectorial searches are not carried out in the expectation that criminal conduct will be exposed, and in order to encourage public acceptance of and general consent to such searches, subsection (3) provides for accommodation to the convenience of the occupants. A general practice of daytime inspection is no doubt desirable, but there are many circumstances where evening or night inspections may be preferable, as where a commercial establishment is in operation at night, or occupants of private dwellings are absent during working hours.

For the same reasons that underlie subsection (3), subsection (4) provides for a general requirement of advance notice. As is more extensively discussed in the explanation below, most kinds of inspections do not require surprise to be effective, and there is a strong trend to conduct inspections after notice to the occupants, by telephone or mail.

Subsection (5) states in general terms the circumstances under which prior notice need not be given. These may relate either to the category of inspection, or the record of the particular occupant. For example, effective inspection of small food stores may sometimes require dispensing with notice and it would be totally inappropriate in situations involving hunting and fishing regulations.

B. Derivation

The language is taken from MCPP section ss 5.02.

C. Relationship to Existing Law

Oregon presently has no comparable statutory provisions.

While it is true that an inspectorial search may disclose a condition which is evidence of a criminal violation of public well-being laws, violations of such laws are not generally serious offenses, and they are usually punishable by fine only. Oftentimes a violation leads only to a compliance order.

Furthermore, most inspectorial searches are made on a routine "area" basis, without expectation of discovering a particular violation. Upon occasion, as in Frank v. Maryland, 359 US 360 (1959), and the Camara case, supra, the inspection officer may have been tipped off to, or have been able to detect from the outside, a probable violation. But it appears that these are exceptional cases, for refusal of permission to inspect, though by no means non-existent, is comparatively rare. But Mr. Justice Clark, dissenting in the Camara and See cases, cited figures from Portland showing refusal in one out of six home inspections. 387 US at 552-53. In commercial buildings the refusal rate probably would be the lowest.

For all these reasons, it appears to be both legitimate and desirable to relax the requirements for valid consent to an inspectorial search, as compared to a "regular" search where the probable discovery of evidence of crime is an essential element of the entry and search. In line with this conclusion, the present section embodies no requirement of advice or warning to the occupant. Cooperation with fire and housing inspectors is, after all, a civic "duty" much more normal in its incidence than the "duty" to give police officers free access to one's cupboard and files, on suspicion of crime. Its performance should not be discouraged by handling the inspection as if it were an incipient criminal proceeding.

As a matter of fair and relaxed administration, it appears desirable to require that advance notice of an inspection visit be given in all situations where surprise plays no part. Most people are reluctant to turn an inspector away even if his visit occurs at an inconvenient or even awkward moment. They may also fear that a refusal of access will aggravate the inspector so that, on a return visit, he may be more inclined to "discover" violations.

It would also appear that advance notice may in many respects work administrative savings, by decreasing the number of occasions when the inspector is frustrated because no one is on hand to admit him.

Section 12. Inspection orders. (1) Application. Upon sufficient showing of the circumstances required under subsection (2) of this section, an inspection officer may make application for an inspection order. Such application shall be made to any magistrate authorized to issue search warrants.

(2) Lack of consent. No inspection order shall be issued except upon sufficient showing to the issuing magistrate that consent to an inspectorial search has been refused or is otherwise unobtainable within a reasonable period of time.

(3) Notice and hearing. Due notice and opportunity to be heard in the proceedings upon the application shall be given to the owner and the person in apparent control of the premises or vehicles to be inspected.

(4) Basis for grant of application. The application shall be granted and the inspection order issued upon a sufficient showing that inspection in the area in which the premises or vehicles in question are located, or inspection of the particular premises or vehicles, is in accordance with reasonable legislative or administrative standards, and that the circumstances of the particular inspection for which application is made are otherwise reasonable. The issuing authority shall make and keep a record of the proceedings on the application, and enter thereon his finding in accordance with the requirements of this section.

(5) Issuance and execution. (a) Upon final approval of an application under this section, the issuing authority shall issue an

order authorizing the applicant, or any other inspection officer duly authorized to conduct inspectorial searches of the type in question, to conduct the search in accordance with the terms of the order.

(b) The officer conducting the search shall, if authorized by the issuing authority on proper showing, be accompanied by one or more law enforcement officers who may use such degree of force, short of deadly force, to effect an entry, as is reasonably necessary for the successful execution of the order with all practicable safety.

(c) The inspection officer executing the order shall, if the premises or vehicle in question are unoccupied at the time of execution, be authorized to use such force as is reasonably necessary to effect entry and make the inspection.

(d) Subject to the provisions of paragraph (b) of this subsection (5), force shall not be used to overcome resistance to the inspection on the part of the occupants.

(e) After execution of the order or after unsuccessful efforts to execute the order, as the case may be, the inspection officer shall return the order to the issuing authority with a sworn report of the circumstances of execution or failure thereof.

COMMENTARY

A. Summary

Subsection (1) provides for the issuance of inspection orders, previously defined in section 10. Such orders are to be issued by magistrates the same as for search warrants.

Under subsection (2), inspection orders are to be sought only if consent under section 11 has been refused, or is unobtainable because the occupants cannot be found, or for some other reason.

The reasons for ex parte issuance of search warrants do not apply to inspection orders. Accordingly, notice and opportunity to be heard are appropriate incidents of the procedure. Notice by registered mail or other reasonable means should be deemed constructive notice sufficient as a basis for the hearing.

In specifying the standards to be applied by the issuing authority in acting on the application, the draft in subsection (4) borrows from the Camara case (387 US at 538) the phrase "reasonable legislative or administrative standards." In addition the general circumstances of the proposed inspection must be "otherwise reasonable."

Subsection (5) provides in subparagraph (a) for the formal authorization to the inspection officer to carry out the inspection covered by the order. Only if the issuing authority has been shown reasons why the use of force may be necessary and appropriate may the inspection officer avail himself of police assistance to overcome resistance on the part of the occupants, as provided in subparagraphs (b) and (d). However, if the premises are unoccupied, subparagraph (c) authorizes him to use force to effect an entry and make the inspection. Subparagraph (e) requires a return of the inspection order with a report of the action taken thereunder.

Penal sanctions for obstructing authorized inspectorial searches should be provided for elsewhere.

B. Derivation

The section is based on MCPP section ss 5.03.

C. Relationship to Existing Law

There are no comparable provisions in ORS.

Necessity of prior refusal of consent. In the See case, the Supreme Court expressly left open the question whether or not prior request and refusal is an essential preliminary to the issuance of a "warrant" for an inspectorial search. 387 US at 545 note 6. In the great majority of cases, it would appear, surprise would not be essential to effective enforcement of the inspection laws. Accordingly, subsection (2) of this section requires an initial effort to obtain access by consent, as the basis for applying for an order.

Ex parte or adversary hearing. Probably because search warrants have always been issued ex parte, the statutes enacted in the wake of the Camara and See cases provide for ex parte proceedings for issuance of inspection orders or warrants. But the justification for ex parte issuance of a search warrant is the probability of criminal behavior associated with the articles sought, which makes surprise an essential element of effective search. In the majority of inspectorial search cases the element of surprise will be unnecessary, and accordingly there will be no need for an ex parte proceeding. Subsection (3) therefore, requires due notice of the proceedings on the application, so that an adversary proceeding may be held if necessary. Notice by any reasonable means should suffice, in order to facilitate prompt disposal of the matter.

Standards of reasonable cause. The issue most sharply contested in the Camara case was the appropriate application of the Fourth Amendment's "probable cause" standard to inspectorial searches. In ordinary searches, there must be probable cause with respect to the particular persons or premises to be searched, and the appellant argued strongly that the same standard must apply to inspectorial searches - a result which would have outlawed "area" or "spot-check" searches of a preventive and "checking" nature, and confined inspection to places where it is reasonably believed that violations already exist.

The Court rejected this argument, and clearly intended to bring about a relaxation of the probable cause standard as applied to inspectorial searches. The precise nature of the relaxation is far from clear; the relevant passage from Mr. Justice White's opinion reads as follows: (387 US at 538)

> "Having concluded that the area inspection is a 'reasonable' search of private property within the meaning of the Fourth Amendment, it is obvious that 'probable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. Such standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (e.g., a multi-family apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling."

The draft incorporates the phrase "reasonable legislative or administrative standards" from the opinion, and uses it as the key to the test. But it does not follow the implication in the opinion, perhaps unintentional, that only an area

inspection justifies departure from the requirement of probable cause vis-a-vis the particular building. Surely there are other kinds of "routine" or "spot-check" inspection systems, other than by area, which would be reasonable, and the draft seeks to leave the matter open, always subject to the requirement of "reasonable standards."

The final clause appears to be necessary to guard against abusive and oppressive visitations from the standpoint of frequency, time of day, scope of search, and so forth.

Section 13. Emergency inspectorial searches. (1) Conditions warranting emergency search. (a) Whenever it reasonably appears to an inspection officer that there may be a condition, arising under the laws he is authorized to enforce and imminently dangerous to health or safety, the detection or correction of which requires immediate access, without prior notice, to premises for purposes of inspectorial search, and if consent to such search is refused or cannot be promptly obtained, the inspection officer may make an emergency inspectorial search of the premises without an inspection order.

(b) The provisions of section 12 (5) (b) of this Article shall apply to emergency searches made pursuant to this section 13.

(c) Upon completion of the emergency inspectorial search, the inspection officer shall make prompt report of the circumstances to the judicial or administrative authority to whom application for an inspection order would otherwise have been made.

(2) Use of deadly force. If, in the course of an emergency inspectorial search under subsection (1) of this section or an inspectorial search under section 12, it reasonably appears that the use of deadly physical force is necessary in order to effect the search, and that failure to effect the search will cause imminent danger of death or serious physical injury, and that the force employed creates no unnecessary risk of injury to persons other than those obstructing the inspection, the inspection officer and any law enforcement officers assisting him may use deadly force in order to effect the search.

COMMENTARY

A. Summary

(1) The basic standard for the emergency inspection is the reasonable conclusion that a condition imminently dangerous to health or safety requires an immediate entry to premises, for detection or correction of the condition. Assistance of law enforcement officers may be engaged. A report in lieu of return, to the authority who would have been called upon for an order if time had permitted, is required.

(2) There may be circumstances justifying the use of deadly force to carry out an inspectorial search, whether under an order, or under emergency authority. The standard is expressed in terms of the danger to life and limb which is likely to result from a failure to make the search, and the risk of injury to others if deadly force is used.

B. Derivation

The language comes from MCPP section ss 5.04.

C. Relationship to Existing Law

Oregon has no comparable ORS provisions.

The constitutional questions raised by this section are comparable to those raised by section 19, dealing with other emergency searches of premises. However, the standard here is different from and more relaxed than the standard in the latter section, insofar as it envisages generally unhealthful or unsafe conditions, rather than an actual present risk of death or serious injury. The latter standard is, however, utilized in subsection (2), as it is also in section 7, as the necessary basis for the use of deadly force.

Explicit case authority for the substance of this section is lacking, but the tenor of the opinion in the Chimel case lends encouragement to a belief that it will survive constitutional scrutiny.

Section 14. Miscellaneous special searches and seizures. (1) Premises licensed for the sale of liquor, meats and other inspected foods, drugs, and other commodities the sale of which is licensed, or for entertainment, or other licensed activities, may be searched by inspectors and other officials authorized to enforce the licensing laws in question to the extent stipulated by the law under which the particular license was issued.

(2) To the extent authorized by statute, game wardens, rangers, and other officials charged with enforcement of game conservation and comparable laws may search premises, vehicles, and gamebags and comparable containers, in accordance with reasonable legislative or administrative standards for the enforcement of such laws.

COMMENTARY

A. Summary

The language of this section is tentative. The principal constitutional problem here, discussed below, is unconstitutional conditions. With respect to the commercial enterprises covered by subsection (1), these seem minimal, and the license in substance embodies a consent to the search. But the intrusions which might be attempted in connection with the activities described in subsection (2) are much more serious, and it may be that the safeguard in the last clause is insufficient.

B. Derivation

The section is based on MCPP ss 6.04.

C. Relationship to Existing Law

There is no single comparable provision in ORS.

Insofar as the statutes described in this section authorize inspections, they are comparable to those dealt with in sections 10 through 13, inspectorial searches, as was pointed out in the introductory note preceding section 10.

Inspections of the type to which the present section is directed relate to activities or enterprises traditionally subjected to a high degree of legislatively-authorized regulation and inspection.

Considering the number of statutes of this type, and the frequency of prosecutions based on violations of regulatory statutes disclosed by inspections, it is surprising that the case authority on the constitutional limits on these inspections is both scanty and foggy. It is clear that the Camara and See cases do not require warrants in all inspection operations, for at the end of the opinion in the See case, Mr. Justice White wrote that the Court was not questioning the validity of "such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product." On the other hand it seems equally clear that the state cannot, by licensing statutes, force valid implied consents to unlimited searches from everyone who wishes to drive a car, receive welfare payments, or hunt for game.

The line between the two is not easy to discern. In a recent case the Court of Appeals for the Second Circuit, reversing District Judge Weinstein, held valid statutes authorizing the warrantless search of liquor dispensaries to detect violation of the laws against the re-use of liquor bottles. Colonnade Catering Corp. v. United States,410 F2d 197 (2d Cir 1969). The court justified its inclusion by the "highly regulated" nature of the liquor traffic.

The draft undertakes to draw a comparable distinction between the activities described in the two paragraphs. But it is far from clear that the question has been sufficiently worked out, and the present language needs careful attention.

EMERGENCY AND OTHER SEARCHES AND SEIZURES

Section 15. Emergency and other searches; general. (1) Use of force. The provisions of section 7 with respect to the use of force shall be applicable to searches and seizures conducted pursuant to sections 15 to 20 of this Article.

(2) Search of the person. Search of an individual's person conducted pursuant to sections 15 to 20 shall be subject to the provisions of subsections (2), (3) and (5) of section 9 of Article 5, Preliminary Draft No. 1 (January 1971).

(3) List of things seized. Upon completion of a search undertaken pursuant to sections 15 to 20, the customs or other officer making the search shall, if any things be seized, make a list of such things, and deliver a receipt embodying the list to the person from whose possession the things are taken.

COMMENTARY

A. Summary

These provisions apply to emergency, open land and other such searches and seizures with the same requirements for the use of force, search of body cavities, etc., as are applicable to other warrantless searches and seizures.

B. Derivation

The section is based on MCPP section ss 6.01.

C. Relationship to Existing Law

Oregon presently has no comparable provisions.

Section 16. Vehicular searches. (1) Reasonable cause. An officer who has probable cause to believe that a moving or readily moveable vehicle, on a public way or waters or other area open to the public or in a private area not open to lawful entry by the vehicle, is or contains things subject to seizure under the provisions of section 3 of Article 5, Preliminary Draft No. 1 (January 1971), may, without a search warrant, stop, detain, and search the vehicle and may seize things subject to seizure discovered in the course of the search.

(2) Search of the occupants. If the officer does not find the things subject to seizure by his search of the vehicle, the officer may search the suspected occupants if:

(a) The things subject to seizure are of such a size and nature that they could be concealed on the person; and

(b) The officer has reason to suspect that one or more of the occupants of the vehicle may have the things subject to seizure so concealed.

(3) Subsection (2) of this section shall not apply to individuals travelling as passengers in a vehicle operating as a common carrier.

(4) Stopping of persons. This section shall not be construed to limit the authority of an officer under section ____ [stop and frisk provision not yet drafted] of this Code.

COMMENTARY

A. Summary

This section embodies the rule, based on Carroll v. United States, 267 US 132 (1925), that a vehicle may be searched without a warrant if the officer undertaking the search has probable cause to believe that the vehicle contains

contraband or other things subject to seizure. It is to be distinguished from the search of a vehicle incident to the arrest of its occupant, as provided for in section 10 of Preliminary Draft No. 1 (January 1971).

B. Derivation

The language is based on MCPP section ss 6.03, Tentative Draft No. 4 (April 1971).

C. Relationship to Existing Law

No similar provision is found in ORS but the doctrine embodied in the section, at least insofar as the emergency vehicular search is concerned, if not the personal search, is well established in Oregon. See the discussion in State v. Keith, 90 Or Adv Sh 531, 540-41, _____ Or App _____ (1970).

The decision in the Carroll case was based in part (267 US at 150-53) on the long-standing rule that vessels can be searched without a warrant, and in part on the ground that, in the case of vehicles "...it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." Is this last factor a presumption of automatic application, or must it be shown in each case that it would not have been feasible to get a warrant? Subsequently the Court held that the fact that sufficient time to get a warrant had elapsed between tip and search did not ban the search, since the officers could not be sure at the time of the tip that they would have enough time. Husty v. United States, 282 US 694, 701 (1931).

The authority given by this section is limited to vehicles on a public way. If the vehicle is on private premises, then an entry must be made to gain access to the vehicle and the rules applicable to the search of premises will be applicable to search of the vehicle. However, subsection (1) has been broadened to include vehicles unlawfully on private premises, to cover situations such as those where a suspect vehicle turns off a public way onto a private driveway, in order to avoid search. Subsection (4) has been added to ensure that the "stop and frisk" provisions will be available to officers stopping vehicles under the Carroll rule.

A more difficult question is whether or not the right of vehicular search extends to the persons of individuals

occupying the vehicle, as provided in this section. The Supreme Court has squarely held that officers may not enter premises without a warrant, even with probable cause to believe that seizable things are within, except to make an arrest based on probable cause with respect to a particular individual. Agnello v. United States, 269 US 20 (1925). The Carroll case lays down a different rule for vehicles. If the Carroll rule is to be accepted at all, it seems both illogical and impracticable to exempt from search the occupants themselves. If they were not in the vehicle, and there was probable cause to believe that they were in unlawful possession of things, they would be liable to arrest on probable cause. Why should there be a different result if they are in a vehicle, assuming probable cause to believe that within the vehicle - whether in the trunk or in their pockets - seizable things are to be found?

However, the Court has held pretty squarely to the contrary in United States v. Di Re, 332 US 581 (1948), at 589:

> "The government says it would not contend that, armed with a search warrant for a residence only, it could search all persons found in it. But an occupant of a house could be used to conceal this contraband on his person quite as readily as can an occupant of a car. Necessity, an argument advanced in support of this search, would seem as strong a reason for searching guests of a house for which a search warrant had issued as for search of a guest in a car for which none had been issued....How then could we say that the right to search a car without a warrant confers greater latitude to search occupants than a search warrant would permit....By mere presence in a suspected automobile, a person does not lose immunities from search of his person to which he otherwise would be entitled."

There are some difficulties with this reasoning, which takes analogy from a search of fixed premises under a search warrant to an emergency search without a warrant, justified as "reasonable" by the mobile character of the thing to be searched. Under the rejuvenescent Trupiano rule and the thrust of the Chimel case, one might reasonably say that if the officers want to search people as well as premises, they should get a warrant that says so. But this will not do for emergency searches of vehicles, and it seems absurd to say that the occupants can take the narcotics out of the glove compartment and stuff them in their pockets, and drive happily away after the vehicle has been fruitlessly searched.

The draft in subsection (2) attempts to confer a broader right of search of persons found in the vehicle, broader than the right that would be based on probable cause but somewhat less than a right based upon their mere presence in the car. The search is limited by the physical size of the object sought plus a requirement that the officer has "reason to suspect" the item will be found on one of the persons in the car.

Passengers on a common carrier are not, of course, in the same sort of association as the occupants of a private vehicle. Such public passengers are excepted from the coverage of the section.

Section 17. Emergency search of the person. An officer may search a person without a search warrant and without arresting such person if:

(1) The officer has probable cause to arrest the person; and

(2) The officer has probable cause to believe seizable items will be found on the person to be searched; and

(3) The officer reasonably believes that a delay in the search would result in the loss of any item subject to seizure under section 3 of Article 5, Preliminary Draft No. 1 (January 1971).

COMMENTARY

A. Summary

The police are authorized to search the person of anyone whom they have probable cause to believe is carrying seizable items even though they do not arrest the person contemporaneously to the search. The only limitation is that there must be probable cause to arrest the person, to believe evidence will be found and reasonable belief that a delay in the search may result in loss or destruction of the evidence.

B. Derivation

The language of the section is based on the Oregon Court of Appeals holding, apparently a novel one, in State v. Murphy, 90 Or Adv Sh 679, ___ Or App ____ (1970), and subsequently applied in State v. Peterson, 90 Or Adv Sh 1285, ____ Or App ____ (1970), and State v. Murphy, 90 Or Adv Sh 1793, ____ Or App ____ (1970), (a different Murphy was involved in this case).

C. Relationship to Existing Law

The doctrine announced in the first Murphy case, supra, is novel to Oregon law, and apparently is novel to the established body of search and seizure law elsewhere. The concept is a simple and utilitarian one - if the police have enough on someone to arrest him but choose to search him for easily disposable evidence which they have probable

cause to believe they will find on him, they may search. No one has the constitutional right to be arrested, according to Hoffa v. United States, 385 US 293 (1966). Therefore, the rationale of the Murphy case seems to be analogous to the Carroll emergency car search rule. Unfortunately, the Oregon Court of Appeals fails to cite or analyze emergency search case opinions of the U. S. Supreme Court existing at the time Murphy was decided. If the provision in this section is to stand it would seem that it would have to be likened most closely to the Carroll type search, i.e., the object to be searched, a person, is highly mobile, there is probable cause to search because there is probable cause to arrest, and if the search is not made, the evidence would be lost.

The trouble with applying the Carroll doctrine to the search of a person under this section is readily apparent. In the Carroll situation, the police have no authority, at least prior to the search, to arrest anyone they may find in the car they stop. Thus the car cannot be detained initially in the sense that a person may be detained who is subject to arrest. Nevertheless in the Murphy case the person, who could have been arrested and searched incidental to arrest (fingernail scrapings were the object of the search in a wife strangulation case), was held not to be under arrest. Thus, even though the police had a right to legally hold Murphy and perform the warrantless search under the search-incidental-to-arrest rule, they chose to hold him forcibly only long enough to obtain fingernail scrapings. He was not arrested for his wife's murder until a month later.

The section allows police a greater flexibility than is perhaps warranted, a flexibility which may easily result in abuses virtually impossible to restrain. For instance, the police may only have the equivalent of "reasonable suspicion" or strong hunch that the person has committed a particular crime. The search without an arrest may confirm this suspicion and time and further investigation may disclose facts the police might have known at the time of the search which would have given them probable cause to arrest but which they in fact did not know until later. Then, too, letting a person whom they have probable cause to arrest, walk around until the police believe it a particularly fruitful time to undertake an "emergency probable cause" search smacks of the staged search condemned again by the Supreme Court, most recently in Chimel v. California, 395 US 752 (1969).

Despite these doubts about a search and seizure doctrine not thoroughly established in state or federal decision, the provision seems reasonable and may ultimately earn U. S. Supreme Court approval, especially in light of the current trend of the Court's recent criminal procedure decisions.

Section 18. Search of open lands. An officer may, without a search warrant, search open lands and seize things which he reasonably believes subject to seizure, if:

(1) The lands are not fenced or posted in such a manner as reasonably manifests the proprietor's desire to exclude trespassers; and

(2) The officer has reasonable cause to believe that things subject to seizure are located within the general area to be searched.

COMMENTARY

A. Summary

This section embodies, in part, the so-called "open fields" doctrine established by Hester v. U. S., 265 US 57 (1924). As drafted, the section authorizes officers to search without a warrant on lands, which ordinarily will be unimproved fields or forests from which the proprietor has made no apparent effort to exclude trespassers. Under the second clause the probable cause requirement is relaxed so as not to require a belief that the particular field or grove contains seizable things, but that the general area to be searched does.

The section makes no specific provision for entry on open lands for purposes of making an arrest, a situation which will normally involve hot pursuit of a suspect. The draft dealing with arrest should make it clear that the principle of the provision (found in MCPP, Tentative Draft No. 2, section 3.06) which permits entry on private premises to make an arrest applies, with appropriate procedural modifications, to open lands. Once the officer is lawfully on the premises to make an arrest, his right to seize property would be governed by section 20, infra.

B. Derivation

The language is taken from MCPP section ss 6.04.

C. Relationship to Existing Law

No ORS provision presently embodies this provision, but it is well-established law.

The Fourth Amendment speaks of "persons, houses, papers, and effects," and the rationale of Hester v. U.S.,

265 US 57 (1924), was that these categories do not extend to "open fields," which therefore lie entirely outside the protection of the Fourth Amendment. In the application of this rule, the old word "curtilage" has been commonly accepted as marking the geographical ambit of the Amendment's coverage.

It is questionable whether the reasoning of the Hester case can be harmonized with Katz v. United States, 389 US 347 (1967), in which the Court rejected the concept of the "constitutionally protected area" and announced that "the Fourth Amendment protects people not places." There is a limit to this privacy doctrine in the Katz case, however, which requires the government not to be an intruder where a person might reasonably expect to enjoy privacy. Owners of unposted open fields and forests may not qualify under this last condition in the Katz decision. However that may be, as a matter of policy the old "open fields" rule in its full sweep no longer seems advisable. There was a trespass in the Hester case; rights of quiet enjoyment attach to fields as well as to dwellings, and clandestine trespasses, provocative of self-help if discovered, are not conducive to good order.

Police can,of course,go upon private lands to the same extent as the public generally, and the draft so provides.

Officers under this section are implicitly given authority to use helicopters or other surveillance devices to scrutinize private lands in ways not open to the public generally. The same applies to rangers, wardens, and other officials who may need to go on private lands to enforce fire, conservation, or hunting and fishing laws.

It should also be borne in mind that nothing in this section relates to or restricts the right of officers to pursue a fugitive into private grounds.

Section 19. Emergency searches of premises. An officer who has probable cause to believe that premises contain individuals or things subject to seizure under the provisions of section 3 of Article 5, Preliminary Draft No. 1 (January 1971), may, without a search warrant, enter and search such premises for the purpose of seizing such individuals or things, if the officer reasonably believes that there is a substantial risk that the individuals therein will suffer, or that things to be seized will cause or be used to cause, death or serious bodily harm if their seizure is delayed.

COMMENTARY

A. Summary

This section extends the rule of the Carroll case on probable cause searches of automobiles in that it authorizes officers to enter premises without a search warrant, and without probable cause to make an arrest, if they have probable cause to believe that the premises contain seizable things which, if not seized, will cause or be used to cause serious bodily injury or death.

B. Derivation

The section is based on MCPP section ss 6.05.

C. Relationship to Existing Law

There are no present ORS provisions covering this provision. Indeed, there probably is no decisional law in Oregon or elsewhere that goes as far as this section. The provision is in doubt constitutionally because of the holding of the U. S. Supreme Court in Agnello v. United States, 269 US 20 (1925). Agnello squarely held that officers may not enter premises without a warrant, even with probable cause to believe that seizable things are within, except to make an arrest based on probable cause with respect to a particular individual.

The Court's recent decision in the Chimel case, supra, certainly does not reflect any eagerness on the Court's part to expand the authority for warrantless searches. The principle of the Carroll case is not properly transferable

to premises - especially dwellings - because the privacy value of premises is much higher than that of vehicles, and the entry into premises is correspondingly a more grievous and provocative intrusion. The dangers of police abuse or oppressive over-use of such an authority appear to be prohibitive.

Despite the formidable constitutional doubt about this section, it is included here because some future court may decide that the express limitations imposed - the police may not enter premises unless they reasonably believe they will find items which may cause death or serious bodily injury if not seized - are special enough to distinguish it from the Agnello limitation. Nonetheless it is easy to see that the limitation in the draft section as to the officer's reasonable belief may lead to police abuse or excessive over-use of the authority.

Section 20. Seizure independent of search. An officer who, in the course of otherwise lawful activity, observes or otherwise becomes aware of the nature and location of things which he reasonably believes to be subject to seizure under section 3 of Article 5, Preliminary Draft No. 1 (January 1971), and which therefore can be seized without a search, may seize such things.

COMMENTARY

A. Summary

This section expresses the widely accepted and firmly established "plain view" doctrine. An officer is not supposed to ignore the evidence of his senses, and if while engaged in the lawful discharge of his duties (including "off-duty duties") he observes things which he reasonably believes are subject to seizure, he is authorized to seize them. Harris v. United States, 390 US 234 (1968). Unless the things are abandoned, such observation will ordinarily, of course, furnish probable cause for arrest and search incidental to an arrest.

B. Derivation

There is no comparable ORS provision but the plain view doctrine is solidly established in Oregon case law. See State v. Laundy, 103 Or 443 (1922).

C. Relationship to Existing Law

The authorization with respect to the seizure of things plainly observable in private premises does raise some question under Johnson v. United States, 333 US 10 (1948). There the opium was not visible, but it was plainly observable by order, perceptible off the premises. Nonetheless, entrance and seizure without a warrant was held unlawful.

The case was decided just before the Trupiano case, supra, and the outcome appears to have been heavily influenced by the Court's belief that a search warrant could have been obtained - a consideration later ruled irrelevant in United States v. Rabinowitz, 339 US 56 (1950), but now revived by the Chimel case. However, although the presence of opium in the Johnson case was observable, its location was not evident, and a search was in fact necessary; the authorization in the draft does not cover a search, but only an entry for things already perceived and ready to hand.

DISPOSITION OF THINGS SEIZED

Section 21. Scope. The provisions of sections 21 to 23 shall apply to things seized:

(1) In the course of a search of any kind dealt with in, or under any other authority given by, this Article 5; and

(2) In the course of a search for dangerous weapons pursuant to section ____ [stop and frisk provisions] of this Code.

COMMENTARY

A. Summary

This section is applicable to all things seized in any search including frisks under the stop and frisk provisions of section ____ (yet to be drafted).

B. Derivation

The section is based on MCPP section ss 7.01.

C. Relationship to Existing Law

See the commentary following section 23.

Section 22. Custody of things seized. (1) Order governing custody. Except as provided in subsection (6) of this section, an order providing for the custody of things seized shall be entered:

(a) In the case of the things seized in the course of a search pursuant to a search warrant, by the judicial official to whom the warrant is returned, or to whom the warrant proceedings are transmitted pursuant to subsection (4) of section 8 of this Article; or

(b) In the case of things seized incidental to an arrest, or in the case of things otherwise seized and in which the seizure is the evidentiary basis of an arrest, by the judicial official before whom the arrested person is arraigned, or by a judge of a court having jurisdiction of the offense for which the person is arrested; or

(c) In the case of things seized otherwise than pursuant to a warrant or incidental to an arrest, and in which there is no arrest connected with the seizure, by a judge of a court having jurisdiction of the offense disclosed by the seizure.

(2) Report of seizure. (a) In all cases of seizure other than under a search warrant, if an arrest is made, the officer making the seizure shall, as soon thereafter as is reasonably possible, report in writing the fact and circumstances of the seizure, with a list of things seized, to a judicial official specified in paragraph (b) of subsection (1) of this section. If no such arrest is made, the report shall be made to a judicial official specified in paragraph (c) of subsection (1) of this section.

(b) The judicial officer to whom the report is made shall thereupon enter the order required by subsection (1) of this section.

(3) Notice of list. A copy of the list required by subsection (2) of this section shall be given to the defendant or his counsel and, whether or not an arrest is made, the list shall be given such public notice as the custody order shall prescribe in the discretion of the issuing official.

(4) Duration of safekeeping. The custody order shall provide for the safekeeping of the things seized, in conditions of appropriate privacy for documents and other records, for as long as the issuing official finds necessary:

(a) For the production of such things for offering in evidence in any court; or

(b) In order to hear and determine motions for return or restoration of the seized things, pursuant to section 23 of this Article.

(5) Disposition of things seized. At such time as the issuing official finds that there is no further need for custody of the seized things under paragraph (a) of subsection (4) of this section, and if no claim to rightful possession has been established pursuant to section 23, the issuing official shall order the things to be delivered to the officials charged with responsibility under the applicable laws for the sale, destruction, or other disposition of contraband, forfeited, and unclaimed goods in official custody.

(6) Stolen goods and perishables. Recently stolen things seized pursuant to an arrest or under section 20 of this Article, may,if the identity of the person having a rightful claim to possession can be promptly established beyond a reasonable doubt to the satisfaction of the seizing officer, be promptly returned to the rightful possessor.

Perishable things seized may be disposed of by the seizing officers as justice and the necessities of the case dictate. In all such cases, a full report of the facts and circumstances of the seizure and disposition of the things seized shall be made to a judicial official as provided in subsection (2) of this section.

COMMENTARY

A. Summary

(1) This subsection requires that the custody of things seized be formalized by court order, emanating from the magistrate before whom the search warrant was returned, or the arraigning magistrate, or the court having jurisdiction over the offense charged or disclosed by the nature of the things seized.

(2) This subsection imposes on seizures, other than under warrant, listing and reporting requirements comparable to those applicable to warranted searches under section 6 and subsection (2) of section 8 of this Article.

(3) If an arrest has been made, the list of things seized is to be furnished to the defendant or his counsel. There may, of course, be many circumstances in which no arrest is made. Some circumstances may call for notice by publication, as where stolen goods are recovered by a seizure with or without an arrest, and the rightful ownership of the goods is unknown to the authorities.

(4) Here are specified the two reasons for retaining the things seized under judicial control: evidentiary use, provided for in sections 24 through 32, and disposition of any motions for delivery of the property to those rightfully entitled to possession, as provided in section 23.

(5) If no claim to restoration of the seized things is established, and when they are of no further use for evidentiary purposes, the seized things may be treated as official property, and sold or destroyed in accordance with the applicable statute or administrative practice. Presently in Oregon these provisions are found in ORS chapter 142 and 141.180.

B. Derivation

The language is taken from MCPP section ss 7.02.

C. Relationship to Existing Law

See the commentary following section 23.

Section 23. Motions for the return or restoration of seized things. (1) Who may file. Upon the return of a search warrant or within 30 days thereafter, or within 30 days after actual notice of a seizure or notice by publication, whichever is earlier, or at such later date as the court in its discretion may allow:

(a) The individual from whose person, property, or premises things have been seized may move the court to whom the warrant was returned, the arraigning magistrate, or the court having jurisdiction of the offense in question, as the case may be, to return things seized, pursuant to warrant or otherwise, to the person or premises from which they were seized; and

(b) Any other person asserting a claim to rightful possession of the things seized may move the court having jurisdiction of the matter to restore the things seized to such person.

(2) Grounds. Motions for return or restoration of seized things shall be based on the ground that the moving party has a valid claim to rightful possession of things seized, because:

(a) The things had been stolen or otherwise converted, and the moving party is the owner or rightful possessor thereof; or

(b) The things seized were not in fact subject to seizure under section 3 of Article 5, Preliminary Draft No. 1 (January 1971); or

(c) The moving party, by license or otherwise, is lawfully entitled to possess things otherwise subject to seizure under section 3 of Article 5, Preliminary Draft No. 1 (January 1971); or

(d) Although the things seized were subject to seizure under section 3 of Article 5, Preliminary Draft No. 1 (January 1971), the

moving party is or will be entitled to their return or restoration on the Court's determination that they are no longer needed for evidentiary purposes.

(3) Postponement of return. In granting a motion for return or restoration of seized things, the Court may postpone execution of the order for return or restoration until such time as such things need no longer remain available for evidentiary use.

(4) Appellate review. An order granting a motion for return or restoration of seized things shall be reviewable on appeal in regular course. An order denying such a motion, or entered under subsection (5) of this section, shall be reviewable on appeal upon certification by the court having custody of such things that they are no longer needed for evidentiary purposes.

(5) Disputed possession rights. If, upon consideration of a motion or motions for return or restoration of seized things, it appears that the things should be returned or restored, but there is a substantial question whether they should be returned to the person from whose possession they were seized or to some other person, or a substantial question among several claimants to rightful possession, the Court hearing the matter may, in its discretion, return the things to the person from whose possession they were seized, or impound the things seized and remit the several claimants to appropriate civil process for determination of the claims.

COMMENTARY

A. Summary

(1) This subsection distinguishes the two sources from which challenge to the seizure itself, and demands

for return or restoration of the property, may issue: (a) the person who was the object of the search and from whose possession the seizure was made, and (b) some other person asserting rights of possession, generally on the ground that the person who was the object of the search had stolen the things. The subsection also sets time limitations and identifies the tribunal which is to hear the motion.

(2) Existing statutes do not discriminate between grounds which may support a motion for return of seized things, as compared to a motion to suppress evidence. Yet there is plainly a great difference. A narcotics pusher from whom a quantity of heroin has been seized by an unlawful search may be entitled to suppress the heroin as evidence, but not to get it back.

In most if not all circumstances, the legality of the search or seizure is not relevant to disposition of a motion for return or restoration of the property. If possession of the things seized is unlawful, the state retains the things no matter how it got them. If stolen goods are involved and the true owner is on hand with undisputed evidence of title, he should have them restored whether or not their seizure by the police from the thief was proper or improper. If the seizure is for evidentiary purposes of things innocent in themselves, as for example an identifying garment or incriminating records, the lawfulness of the seizure goes only to the question of when they should be returned; when their evidentiary utility is exhausted, the owner should have back his overcoat or his business ledger.

The grounds are set forth in subsection (2) in conformity with the above assumptions.

(3) This subsection provides the necessary flexibility for the contingency provided for in subsection (2) (d).

(4) Since an order granting a motion for return of seized things is a final order, it should be appealable in accordance with general statutory provisions for appeal. The same is true of an order denying such a motion, but for administrative convenience the appeal should be delayed until the things are no longer needed for evidentiary purposes.

(5) Infrequently there will arise cases where it is clear that the state has no lawful claim to possession of the things seized, but it is not clear who has the rightful

claim to possession. The proceedings on motion for return or restoration, collateral as they are to criminal process, are not an appropriate forum for the determination of conflicting claims between or among rival claimants. In some such situations the most satisfactory solution may be to restore the status quo by returning the things to the person from whom the things were seized. In other circumstances, however, adequate protection of the claims of others may require impounding pending settlement, or resolution of the dispute by civil litigation.

B. Derivation

The section is based on MCPP section ss 7.03.

C. Relationship to Existing Law

All but a handful of states have enacted statutes containing provisions for the disposition of things seized by law enforcement officers. They are two types, each followed by about a dozen states; otherwise, both in form and substance, there is great variety but little evidence of a considered approach to the matter.

The Oregon statute, like those in some thirteen other states, clearly betrays its ancestry in the common-law warrant for stolen goods. If the seized property has been stolen, it is delivered to the owner "on satisfactory proof of his title"; if the warrant is issued without probable cause or does not cover the property seized, it is returned to the person from whom it was seized; if the property was used for criminal purposes, it is retained for evidentiary use at the trial. See ORS 141.170 and ORS chapter 142.

Oregon and some eight other states also provide that if, on motion, the seizure is shown to be unlawful, the property shall be returned to the person from whom it was taken, "unless otherwise subject to lawful detention." The quoted clause is to ensure that contraband is not returned, even if taken by an unlawful seizure. No provision is made for return of stolen property to the true owner. See ORS 141.160.

In only a few states do the statutes manifest an awareness of the three principal purposes of seizure: to restore stolen property to the owner, to confiscate contraband or other unlawfully possessed things, and to use the seized things as evidence in a criminal trial. The Kansas statute, perhaps more than any other, is discriminating in these respects, and the draft, though different in form, approximates the Kansas law in substance.

It should also be remarked that, in many states, the disposition provisions relate only to property seized pursuant to a search warrant, and are silent with respect to arrest or other seizures without a warrant. It is important to regularize the post-seizure procedures for seizures without a warrant, since these comprise the great majority of seizures, and the draft is constructed with that end in view.

EVIDENTIARY EXCLUSION

Section 24. Motions to suppress evidence. (1) Where made. Objection to the use in evidence of things seized in any of the ways specified in section 21 of this Article shall be made by a motion to suppress evidence. Such motion shall be made to the court having jurisdiction of the offense in connection with the trial of which the things seized may be offered in evidence.

(2) When made. (a) In any criminal proceeding in which the prosecution proposes to offer in evidence things seized in any of the ways specified in section 21 of this Article, the prosecution shall give notice to that effect to the defendant as soon as is reasonably possible and not more than 30 days after arraignment or the seizure, whichever is later. If no such notice is given within the time so specified the seized things shall not be received in evidence, unless the court finds that there was good cause for such failure, and that the defendant has not been prejudiced by such failure.

(b) If, after receipt of the notice required by paragraph (a) of this subsection (2), the defendant objects to use in evidence of the seized things to be offered, he shall, within 15 days, unless the time is extended by the court for good cause shown, after receipt of the notice, file a motion to suppress evidence, which shall be heard and determined by the court in advance of trial. If, despite the prosecution's failure to give notice as required by paragraph (a), the court permits the offer in evidence of seized things at the trial, the court shall, upon request, allow the defendant a reasonable time to prepare and file a motion to suppress. If the defendant fails to

file such a motion within the time required after giving notice, or within such reasonable time as is allowed in the absence of notice, the court shall entertain a subsequent motion to suppress only if it finds that there was good cause for such failure, or that the interests of justice so require.

(3) Renewal. A motion to suppress which has been denied may be renewed, in the discretion of the court, on the ground of newly discovered evidence, or as the interests of justice require.

COMMENTARY

A. Summary

This section provides the procedural framework for motions to suppress evidence.

Subsection (1) limits the jurisdiction to handle motions to suppress to a judge of the court having jurisdiction of the offense to be tried, in connection with which the seized things will be offered.

Especially since the disposition of a motion to suppress may be decisive of the outcome of a case, it is desirable that such motions be determined prior to trial, and as soon as possible after arraignment. Subsection (2) provides in paragraph (a) for a general 30-day period after arraignment, unless (which is uncommon but possible) the seizure has itself occurred after arraignment, in which case the 30 days runs from the seizure. Within that time the prosecution must give the defendant notice of intention to offer seized things in evidence, and if no such notice is given, the things cannot then be received, unless the court finds good cause for the failure, and no prejudice to the defendant.

Paragraph (b) of subsection (2) requires the defendant, within 15 days after notice, to file a motion to suppress. Failure to do so will bar a subsequent objection to receipt of the evidence at the trial, unless there is good cause for the failure, or the judge in his discretion and in the interests of justice, entertains the objection. Provision is made for extension of the defendant's time to file a motion in the event that the prosecution has not complied with the 30-day rule and the court nevertheless entertains an offer of the evidence.

Subsection (3) makes provision for the renewal of a motion to suppress, previously denied. Evidence of the illegality of a search may be difficult for the defendant to obtain, and he should not be foreclosed from a renewed effort to suppress on the ground of newly-discovered evidence, or other considerations of fairness.

B. Derivation

The section is based on MCPP section ss 8.01 (1), (2) and (3).

C. Relationship to Existing Law

When and where made. Under the statutory provisions in some states, motions to suppress may be heard and determined by magistrates having no jurisdiction over the criminal proceeding itself; in such cases, the defendant may be given the right to a hearing de novo on his motion in the circuit court. In Oregon, pursuant to ORS 141.150 and 141.160 and the decision in State v. Harris, 119 Or 427 (1926), an attack can be made on a search warrant before the magistrate who issued it. It is probably more common practice, however, in Oregon to challenge the search by filing the motion in the trial court. The draft provides for disposition of such a motion only by a judge of the court having jurisdiction of the offense to be tried, and in connection with which the seized things are to be offered in evidence. Since the motion is to be disposed of by a court and not a jury, it appears that the ruling should be made by the same court that will rule on other evidentiary issues at the trial - especially since the ruling on the motion to suppress will often, in effect, be decisive for the outcome of the case. It will be recalled that in subsection (4) of section 8 the issuing magistrate is required to transmit a copy of the warrant and other documents to a court with jurisdiction to hear the charge.

Time of making. Existing statutory procedures show wide variation with respect to the time at which motions to suppress may or must be filed. Under the federal rule, it is to be made before trial unless the defendant's failure is for good cause, but the court has full discretion to hear it at the trial as well; this is the pattern for many states. If the motion is permitted at trial, it is commonly required to be made when the evidence is offered; in a somewhat unusual context, the Court has shown a disposition to relax this requirement where constitutional claims are involved.

Disposition of the motion prior to trial seems highly desirable as a general proposition. In many cases, a grant may result in abandonment of the prosecution, and a denial in a guilty plea. If the case goes to trial, the necessity of interruption - possibly prolonged - is avoided. Accordingly, the draft provides for disposition in advance of trial, unless the prosecution or defense, as the case may be, can show good cause to the contrary, or unless the interests of justice require that the defendant be allowed an otherwise tardy hearing. This provision is in line with present Oregon law which requires that the motion to suppress be filed prior to trial unless the defendant is unaware of the seizure and had no opportunity to present his motion. In addition, the defendant must also obtain a ruling on his motion before trial. See the authorities collected in section 20.63, Oregon Criminal Law Handbook.

Section 25. Appellate review of motions to suppress evidence. (1) An order granting a motion to suppress prior to trial shall be reviewable prior to trial upon certificate by the prosecuting attorney to the judge who granted the motion that the appeal is not taken for purposes of delay and that the evidence is substantial proof of the charge pending against the defendant.

(2) An order denying a motion to suppress prior to trial shall be reviewable prior to trial if the judge who denied the motion, or a judge of the Oregon Court of Appeals, shall certify that the question determined by the order is substantial, and that a prompt appeal will materially expedite the termination of the case or otherwise serve the ends of justice.

(3) An order denying a motion to suppress shall be reviewable by a defendant thereafter convicted of the offense to which the evidence involved in the motion relates, irrespective of whatever plea the defendant entered in response to the charge.

COMMENTARY

A. Summary

The section deals with the question of the appealability, prior to trial, of orders granting or denying motions to suppress. Subsections (1) and (3), respectively authorizing prosecution appeals from orders granting motions to dismiss, and allowing the defendant to appeal from an order of denial even if he has plead guilty, are in line with modern statutory practice. Subsection (2) is novel in that it allows the defense a pre-trial appeal from a denying order only by permission of the judge issuing the order, or an appellate judge, to be granted in the exercise of discretion, if the question is substantial.

B. Derivation

The section is based on MCPP section ss 8.01 (4).

C. Relationship to Existing Law

The appealability in the federal courts of orders on motions for the return of property or to suppress evidence has been a troublesome question for some years. Are such orders "final" within the meaning of the statute governing appeals from the district courts to the courts of appeal? In Di Bella v. United States, 369 US 121 (1962), the Supreme Court imposed a rigorous rule, overruling decisions below that had previously treated all pre-indictment motions to suppress as independent and appealable, in contrast to post-indictment motions, which were regarded as ancillary to criminal proceedings, and thus interlocutory and non-appealable. In the Di Bella case it was declared that only motions for the return of property, antedating any preliminary criminal proceedings, were to be regarded as appealable.

The practice in the states varies, and in many jurisdictions the statutes do not speak to the point. In 1953 the Judicial Conference recommended legislation which would have authorized direct Supreme Court review of district court orders, entered after indictment but prior to trial, granting motions to suppress. In 1968, this was substantially accomplished by Title VIII of the Crime Control Act, which added a new paragraph to 18 USC 3731 authorizing a direct appeal to the Supreme Court from district court orders granting pre-trial motions for the return of seized property or the suppression of seized evidence.

Many of the same considerations that argue for disposing of the motion in advance of trial likewise support pre-trial review of the disposition. If the question is at all close, the losing side will want review, and if that can only be had by going to trial, many trials will be held that might be avoided by pre-trial review of the ruling on the motion. Likewise, the state is thus enabled to get appellate rulings on points of law that otherwise might be lost to it through acquittal of the defendant.

The new federal procedure is illustrative of a trend. At least six states (including Oregon under ORS 138.060) now permit prosecution appeals from orders granting motions to suppress, and the procedure is approved in a report of the American Bar Association Project on Minimum Standards of Criminal Justice. Subject to the prosecution's filing the certificate called for in subsection (2) of the draft (as it is in the new federal provision), the interlocutory appeal, presently allowed in Oregon, is continued.

How effective this interlocutory appeal in favor of the state will be is in doubt. Only rarely is an appeal taken because, as the Lane County District Attorney's office indicated, it may take too long to get a ruling on appeal thus endangering the prosecution on grounds of unreasonable delay by the state.

Should the defendant be entitled to appeal from the denial of a pre-trial motion to dismiss? Subsection (2) answers this in the positive in providing a closely limited procedure for review of the motion to suppress.

Most states do not allow such an interlocutory appeal by the defendant. Oregon is apparently in this group. It is strongly contended that allowing such an appeal would invite defendants to take advantage of the procedure for purposes of delay. Because of this and the existing strong set against the appeal by the defendant, the ALI has eliminated it from its draft. Nonetheless it is presented here for the consideration of the Commission because there are persuasive arguments to be made for it.

The goals to be achieved here are avoidance of unnecessary trials, of trial delays, and of trial interruptions. Despite provisions for an appeal on the search and seizure point after a plea of guilty, some defendants may prefer to go to trial although they would not if their motion to suppress were irretrievably lost. And, in jurisdictions where the trial calendar is months in arrears, it may be possible to settle the search and seizure point on appeal without delaying the trial.

Whether or not the defendant is allowed an interlocutory appeal, he should be allowed review of his motion to suppress regardless of what plea he enters at the trial. Otherwise, a defendant with a search and seizure point which is his sole reliance would be obliged to stand trial, quite unnecessarily, in order to preserve it for appeal. This provision would change present Oregon practice which limits appeal following a conviction on a guilty plea to the question of excessiveness of punishment. See section 15.4, Oregon Criminal Law Handbook.

Since motions for return or restoration of property are treated independently of any criminal proceedings (under sections 21 through 23), there appears to be no need for action on motions to suppress until the defendant has been arraigned, and the prosecution has manifested intent to offer the seized things in evidence. Indeed, until this point is reached, it is hard to discern a controversy ripe enough to warrant its judicial determination.

Section 26. Standing to file motion to suppress. A motion to suppress may be made by any defendant against whom things seized are to be offered in evidence at a criminal trial, if such things were obtained by a search or seizure from:

(1) The defendant; or

(2) A spouse, parent, child, brother, or sister of the defendant, or any member of his household; or

(3) Any person with whom the defendant resides or sojourns; or

(4) A co-defendant, co-conspirator, or any person chargeable with the same crime with which the defendant is charged; or

(5) Any person with whom the defendant conducts a business; or

(6) Any other person if, from the circumstances, it appears that the search or seizure was intended to avoid the application of this Article 5 to any of the persons described in subsections (1) to (5). inclusive.

COMMENTARY

A. Summary

This section imparts a broader standing to defendants who desire to challenge introduction of seized evidence. Subsections (1) through (6) define this broader right.

B. Derivation

This section is based on MCPP section ss 8.01 (5), Tentative Draft No. 4 (April 30, 1971).

C. Relationship to Existing Law

The "standing" requirement of United States v. Jones, 362 US 697 (1960), allows a defendant against whom seized evidence is offered to move its suppression only if the evidence has been taken in violation of the defendant's own Fourth Amendment rights. The Oregon decisions apparently follow the Jones rule. See Oregon Criminal Law Handbook, sections 20.49 through 20.53.

The applicable federal language, copied in a number of states, permits challenge to the evidentiary use of seized things by any person "aggrieved by an unlawful search and seizure." In the federal system, this has been construed to mean that the challenger must have been aggrieved by the search and seizure, not by the fact that the evidence is offered against him. Thus if an unlawful search of X's premises turns up evidence incriminating Y, the latter has no "standing" to challenge the use of such evidence against himself. United States v. Jones, supra.

The Jones case was decided the year before the Mapp case made the exclusionary rule a constitutional requirement, primarily on the basis of its necessity as the only apparently effective means of enforcing the Fourth Amendment. In California, immediately after the exclusionary rule was adopted, the Supreme Court of California rejected the "standing" doctrine on the ground that it diminished the deterrent effect of the exclusionary rule. People v. Martin, 45 Cal 2d 755 (1955).

Commentators have been divided in their views on the point. The Supreme Court continued to give lip service to the standing rule, but twice found ways to frustrate its effect, and approached its tacit abandonment in Berger v. New York, 388 US 41 (1967). However, the general doctrine of the Jones case was explicitly reaffirmed in Alderman v. United States, 394 US 165.

The Jones and Alderman cases settle the point that, on the constitutional level, the right to raise Fourth Amendment claims can be limited to those whose own Fourth Amendment rights have been invaded. On the policy level, the views expressed by Judge Traynor in the Martin case, supra, are more convincing. The problem of standing has been a vexing one conceptually, productive of aridly technical discussion and decision. In the sense of "case or controversy," certainly the accused has standing to object to the use of evidence which may send him to jail, and which was obtained by unlawful means. The logic of the exclusionary rule, and the deterrence objectives on which it is based, apply equally whether or not the search itself "aggrieved" the defendant. The true thrust of Mr. Justice Holmes' "dirty business" comment in the Olmstead case is felt here in the same way.

Thus the choice, if the Martin reasoning is to obtain, might result in the complete abolition of any standing requirement. Such a solution probably goes too far for most people. As a result, the language in the proposed draft greatly relaxes the present requirements as to standing without completely abandoning them.

The new proposal specifies five categories of defendants, in addition to the defendant, whose own Fourth Amendment rights have been violated, who would be accorded standing to move to suppress evidence. Three of those cover family members and residential or business associates. Another covers persons who are co-defendants or co-conspirators, or are chargeable with the same crime as the moving defendant. The fifth category is determined not by the nature of the individual in question, but by the intent of the officers who invaded his Fourth Amendment rights; if it appears that the purpose of the search was to provide evidence against any of the persons described in the other clauses, the defendant against whom the evidence is offered will have standing to move to suppress it.

Section 27. Determination of motions to suppress evidence; grounds. A motion to suppress evidence may be based upon a violation of any of the provisions of this Code, including that:

(1) The things seized were not subject to seizure under section 3 of Article 5, Preliminary Draft No. 1 (January 1971); or

(2) In the case of a seizure based on the authority of a search warrant:

(a) The issuing magistrate was not authorized to issue warrants in the jurisdiction wherein the warrant was executed; or

(b) On the record before the issuing magistrate, there was no probable cause to believe that the search would discover the individuals or things specified in the application; or

(c) The warrant was invalid for failure to describe with sufficient particularity the place to be searched, or the persons or things to be seized; or

(d) The warrant was executed at a time not authorized therein, or was executed at nighttime or more than five days from the date of issuance without there having been made the findings required by subsection (3) of section 3 of this Article; or

(e) The warrant was executed without giving the notice required by subsection (2) of section 4 of this Article; and without the reasonable belief required by subsection (3) of section 4 of this Article; or

(f) The scope of the search by which the things seized were discovered exceeded that authorized by warrant; or

(g) The search was for intermingled documents, and the procedures required by section 9 of this Article were not observed; or

(3) In the case of a seizure based on the authority of an arrest:

(a) The arrest was invalid; or

(b) The arrest was on a charge which, pursuant to section 7 of Article 5, Preliminary Draft No. 1 (January 1971), did not authorize the search; or

(c) The search was for intermingled documents and the requirements of section 6 of Article 5, Preliminary Draft No. 1 (January 1971),were not observed; or

(d) The search by which the things seized were discovered, or the seizure, were not authorized by the provisions of sections 10 or 11 of Article 5, Preliminary Draft No. 1 (January 1971); or

(4) In the case of a seizure based on consent:

(a) The consent was not voluntary; or

(b) The consent was not given by any person apparently authorized to give consent binding on the moving party; or

(c) The warning required by subsections (1) or (2) of section 14 of Article 5, Preliminary Draft No. 1 (January 1971), as the case may be, was not given; or

(d) The scope of the search by which the things seized were discovered exceeded the scope of the consent; or

(5) In the case of a seizure resulting from the emergency search of a person, pursuant to section 17 of this Article, there was no probable cause to arrest the person, there was no probable cause to believe that a seizable item would be found on the person searched and that such item was likely to be lost if the search was delayed.

(6) In the case of a seizure resulting from an emergency search of a vehicle or premises, there was no basis for the reasonable belief required by sections 16 and 19 of this Article,as the case may be; or

(7) In the case of a seizure resulting from the search of open lands, or made without a search, or made pursuant to inspection or licensing statutes, the search violated the requirements of sections 11, 13 and 14 of this Article, as the case may be; or

(8) In the case of a seizure resulting from a search for dangerous weapons of a person stopped pursuant to section ____ of Article ____ (Stop and Frisk) of this Code, such search or the stop was not authorized by or did not comply with section ____.

COMMENTARY

A. Summary

This section lists the specific grounds upon which a motion to suppress may be based.

B. Derivation

The section is based on MCPP section ss 8.02 (1), Tentative Draft No. 4 (1971).

C. Relationship to Existing Law

The specificity with which the grounds to suppress are listed here is unprecedented in Oregon and generally elsewhere. It should be emphasized, however, that even if the defendant moves to suppress on one of these grounds and establishes a violation by the police, he still may not be successful in having the evidence suppressed because of the provisions in section 28, infra, dealing with substantiality of the evidence-producing infraction.

Section 28. Determination of substantiality of motion to suppress. A motion to suppress evidence based upon a violation of any of the provisions of this Code shall be granted only if the court finds that such violation was substantial. In determining whether a violation is substantial the court shall consider all the circumstances, including:

(1) The importance of the particular interest violated;

(2) The extent of deviation from lawful conduct;

(3) The extent to which the violation was wilful;

(4) The extent to which privacy was invaded;

(5) The extent to which exclusion will tend to prevent violations of this Code;

(6) Whether, but for the violation, the things seized would have been discovered; and

(7) The extent to which the violation prejudiced the moving party's ability to support his motion, or to defend himself in the proceeding in which the things seized are sought to be offered in evidence against him.

COMMENTARY

A. Summary

The section lists a number of circumstances which the judge is authorized to consider when presented with a motion to suppress. If he finds that the violation of the particular section on search and seizure is established but is not "substantial" he may deny the motion to suppress.

B. Derivation

This section is based on MCPP section ss 8.02 (2), Tentative Draft No. 4 (1971).

C. Relationship to Existing Law

The section is novel. It is an attempt to ameliorate the Draconian effect of the exclusionary rule. In another

context it is an attempt to move Fourth Amendment violations into the "harmless error" doctrine and out of the "automatic reversal" concept.

The time for this provision may be at hand if analogous reference is made to some recent cases in the U. S. Supreme Court. The entire concept of the exclusionary rule, announced in Mapp v. Ohio in 1961, is under increasing criticism from some current members of the Court. For example, see the statements in Coolidge v. New Hampshire, 91 S Ct 2022 (1971), of Justice Blackmeier (p. 2060). Justice White does not express much enthusiasm for the rule. Chief Justice Burger launches a major attack on the exclusionary rule in his dissenting opinion in Bivens v. United States, 91 S Ct 1999, 2012-20 (1971). Especially significant in this dissent is the Chief Justice's direct and approving references to section ss 8.02 (2) of the MCPP upon which the draft section is based. (See the dissent at p. 2019).

Although it cannot be said with certainty that the exclusionary rule is about to expire, it can be asserted that it is in for reappraisal. Until then the present constitutional stature of the exclusionary rule will hold sway.

The grounds for exclusion specified in section 27 are descriptive only, and their determination is entirely governed by this section 28. If exclusion is constitutionally required, under Mapp, as often will be the case, that is the end of the matter. But the constitutional issue itself may be affected by the factor of substantiality, and the presence or absence of the criteria set forth in this section.

The constitutional "floor," of course, achieves nothing substantive, but it recognizes that, in this area, the controlling law ultimately rests with the U. S. Supreme Court, and that individual states may have particular constitutional provisions or interpretations that will be governing.

The criteria relate to the extent of violation of Fourth Amendment or other constitutional rights (subsections (1) and (4)), the flagrancy of the officers' violative conduct (subsections (2) and (3)), furtherance of the deterrent policy (subsection (5)), causal connection between the violation and the discovery of the evidence (subsection (6)), and the extent to which the violation has damaged the defendant's case (subsection (7)).

Section 29. Fruits of prior unlawful search. If a search or seizure is carried out in such a manner that things seized in the course of the search would be subject to a motion to suppress under section 27 of this Article, and if as a result of such search or seizure other evidence is discovered subsequently and offered against a defendant, such evidence shall be subject to a motion to suppress unless the prosecution establishes that such evidence would probably have been discovered by law enforcement authorities irrespective of such search or seizure, and the court finds that exclusion of such evidence is not necessary to deter violations of this Code.

COMMENTARY

A. Summary

This section undertakes a statement of the "fruit of the poisonous tree" doctrine as applied to search and seizure, under the requirements first laid down in Silverthorne Lumber Co. v. United States, 251 US 385 (1920).

B. Derivation

The section is based on MCPP section ss 8.02 (3), Tentative Draft No. 4 (April 1971).

C. Relationship to Existing Law

This section reflects fairly well-established concepts. If the police illegally seize a notebook which contains information which leads to other evidence which they in due course seize under a search warrant, the section, based on the "fruit of the poisonous tree" doctrine, would allow the defendant to suppress such evidence. But the section provides that the prosecution can defeat such a motion to suppress if it can show it probably would have discovered the evidence anyway.

Section 30. Evidence of probable cause unlawfully obtained. Any evidence obtained in the course of a search, the validity of which is dependent upon probable cause, whether pursuant to a search or arrest warrant, a warrantless arrest, or other authority specified in this Article 5, shall be subject to a motion to suppress if the finding of probable cause, or the officer's reasonable belief, as the case may be, was based in necessary part on information unlawfully acquired from the defendant by an officer.

COMMENTARY

A. Summary

If an officer comes by information illegally (such as trespassory snooping or obtaining it by physical coercion) and this information is used as the basis of obtaining a warrant based on probable cause to search (or arresting without a warrent, etc.), a motion to suppress the evidence subsequently obtained will be allowed.

B. Derivation

The section is based on MCPP section 8.02 (4), Tentative Draft No. 4 (April 1971).

C. Relationship to Existing Law

This section involves extending the exclusionary rule from the trial itself to the hearing on probable cause, on "fruit of the poisonous tree" principles.

The U. S. Supreme Court seems never to have squarely faced the issue. There are implications cutting against the proposed rule in McDonald v. United States, 385 US 451 (1948), and in the dissenting opinions of Justices White and Harlan in Berger v. New York, 338 US 41 (1967). There are lower court cases which support his conclusion. Hair v. United States, 389 F2d 894 (1961); McGinniss v. United States, 222 F2d 598 (1955). But other cases say that probable cause may be based on evidence obtained from "mere technical trespasses." United States v. Buchner, 164 F Supp 836 (1957); United States v. Halsey, 257 F Supp 1002 (1966); United States v. Conti, 361 F2d 153 (1966).

The question is not free from difficulty. Certainly the road would be opened for wholesale violation of the Fourth Amendment guarantees, and the effect of the exclusionary rule largely nullified, if illegally acquired information were to be freely allowed as an ingredient of probable cause for a search or an arrest. But how far is the rule to be extended? If an officer by unlawful means obtains information that a serious crime of violence is planned for a particular time and place, surely that ought not give the criminals a license to proceed unimpeded by the police. Perhaps one might say the information so obtained should not be used against them at their trial on an attempt charge, but if that is to be the rule, then would there have been probable cause for their arrest? Or, to take another example, must a large cache of heroin be left undisturbed because the police used illegal means to learn of its existence? Should the line be drawn between preventive or protective police measures on the one hand and criminal sanctions on the other?

The ramifications of this section's concept plainly extend beyond the area of search and seizure, and call for consideration in a broader context. So far as concerns search and seizure, unlawfully acquired essential ingredients of a probable cause finding ought to provide grounds for a motion to suppress. Nevertheless, prevention of unlawful conduct must dictate flexibility of administration. If a magistrate is asked to issue a search warrant, and the police produce unlawfully acquired evidence establishing with certainty that there is contraband at a given place, a warrant should issue for the seizure, but the contraband should not be admissible in evidence.

Section 31. Challenge to truth of the evidence. (1) Subject to the provisions of subsection (2), in any proceeding on a motion to suppress evidence the moving party shall be entitled to contest, by cross-examination or offering evidence, the truthfulness of the evidence presented to establish probable cause. For the purposes of this section, truthful testimony is testimony which reports in good faith the circumstances relied on to establish cause.

(2) If the evidence sought to be suppressed was seized by authority of a search warrant, the moving party shall be allowed to contest the truthfulness of the evidence presented before the issuing authority only upon supplementary motion, supported by affidavit, setting forth substantial basis for questioning such truthfulness.

(3) In any proceeding under subsection (2), the moving party shall have the burden of proving that the evidence presented before the issuing authority was not truthful.

(4) Where the motion to suppress challenges evidence seized as the result of a warrantless search, the burden of proving the validity of the search is on the prosecution.

COMMENTARY

A. Summary

Subsection (1) permits the defendant to challenge the good faith but not the objective truth of testimony offered in support of probable cause, whether the testimony was given before the magistrate issuing a search warrant, or is given for the first time at the hearing on the motion, if it was a warrantless search. The defendant can press his challenge both by cross-examination of prosecution witnesses, or by presenting evidence of his own.

Subsection (2) relates only to motions to suppress evidence seized by authority of a search warrant, where evidence on probable cause has already been considered by the issuing magistrate. In order to discourage frivolous or routine challenges, a preliminary showing of substantial basis for the challenge is required.

Subsection (3) puts the burden of proof on the moving party where a search warrant is challenged.

Subsection (4) provides that the state has the burden to show valid search where there was no search warrant authorizing the police action.

B. Derivation

The language is based on MCPP section ss 8.03 (1), Tentative Draft No. 4 (April 1971).

C. Relationship to Existing Law

This section fairly closely reflects present Oregon law and practice. See ORS 141.150 and 141.160 and sections 20.58, 20.66 and 20.68 of the Oregon Criminal Law Handbook.

Section 32. Identity of informants. In any proceeding on a motion to suppress evidence wherein, pursuant to section 31, the truthfulness of the testimony presented to establish probable cause is contested, and wherein such testimony includes a report of information furnished by an informant whose identity is not disclosed in the testimony, the moving party shall be entitled to be informed of such identity unless:

(1) The evidence sought to be suppressed was seized by authority of a search warrant and the informant testified in person before the issuing authority; or

(2) There is substantial corroboration of the informant's existence and reliability, independent of the testimony, with respect to such existence and reliability, of the person to whom the information was given, and the judge hearing the motion finds that the issue of probable cause can be fairly determined without such disclosure. For purposes of such finding the judge may, in his discretion, require the prosecution, in camera, to disclose to him the identity of the informant, or produce the informant for questioning. If the judge does so require, the information or testimony so obtained shall be kept securely under seal and made part of the record in the event of an appeal from the judge's disposition of the motion.

COMMENTARY

A. Summary

This section requires that the identity of an informant whose information is relied on to support probable cause must,in all cases,be divulged unless the judge hearing the motion to suppress finds that it can be fairly determined without divulgence. In addition, the identity must be

disclosed unless the evidence sought to be suppressed was seized by authority of a warrant and there was substantial corroboration of the informant's "existence and reliability," or that the informant shall have testified before the magistrate who issued the warrant. If the judge requires that the informant's identity be disclosed in camera the information is to be put under seal as part of the record for review in the event of an appeal.

B. Derivation

The section is based on MCPP section ss 8.03 (2), Tentative Draft No. 4 (April 1971).

C. Relationship to Existing Law

The moving party on motion to suppress may seek the identity of informants in order to destroy the probable cause basis for issuance of a search warrant, or for an arrest on which the validity of the search not authorized by warrant depends. And the identity may be sought either to discredit the truth of testimony given directly to the issuing magistrate or arresting officer, in order to show that in fact there was no informant or that he did not give the information described to the magistrate, or that the hearsay information described to the magistrate as emanating from the informer was itself false.

In Roviaro v. United States, 353 US 53 (1957), while holding that an informant's identity must be disclosed if he is a material witness on the issue of guilt or innocence, the Court by dictum observed (353 US at 61) that "most of the federal cases" required such disclosure on the issue of probable cause. There had been a like suggestion in Jones v. United States, 362 US 257, 271 (1960). However, the subsequent decision in McCray v. Illinois, 386 US 300 (1967), must be taken as establishing that, in a hearing on motion to suppress evidence obtained by a search incident to an arrest, with no warrant, the moving party has no constitutional right to have disclosure of an informant's name, even if the information so furnished was essential to a finding that the officers had probable cause to make an arrest.

The Sixth Amendment guarantees "the right....to be confronted with the witnesses against him" in "all criminal prosecutions." As a matter of wording, one might construct plausible arguments both ways on the question whether or not

this applies where the factual issue is the existence of probable cause under the Fourth Amendment. In the McCray case, by a vote of five to four, the Court returned a negative answer. Yet in another context the Court (including Justice Stewart, who wrote the majority opinion in the McCray case) has held that procedural due process may require confrontation in other than criminal proceedings. Willner v. Committee on Character, 373 US 96 (1963); see also August v. Dep't. of Motor Vehicles, 70 Cal Rptr 172 (Cal Apps 1968).

It may well be, as indicated in the McCray and other cases, that the procedural values to be considered under the exclusionary rule in a hearing on probable cause are not the same as those at stake in a trial of guilt or innocence. Nevertheless, one must start with the proposition that the defendant who moves to suppress evidence for want of probable cause is entitled to a fair disposition of his motion. And it must follow that, if the motion cannot be fairly determined without disclosing the identity of the informant, disclosure must be had or the motion must be granted.

Presumably all would agree that, if the police have shown abundant probable cause for a warrant or an arrest without in any way relying on the information of an informant, the fact that they also had such information makes no case for disclosure of the informant's identity. And the same conclusion should follow even if the informer's tip led the arresting officer to the scene of the crime, if the officer's own observations are then independently sufficient for probable cause.

The problem is much more difficult where there is a measure of independent corroboration, but the informer's reliability is still vital to finding probable cause. There may, for example, be independent testimony of the informer's reliability, as in People v. Coffey, 12 NY2d 443, 191 NE 2d 263 (1963), where identity divulgence was not required. Or there may be corroboration by observed events, as where the informer predicts that at such a time and place a truck of such and such description will drive up and cartons will be unloaded, which contain stolen goods.

The draft section has the goal of providing the defendant with a fair hearing on his motion which raises the validity of the informer-produced probable cause evidence. Yet to protect the informer, and the informer system, so important to day-to-day police work, very stringent restrictions are imposed. It is felt that the section thus achieves a fair balance.

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