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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 2

August 15, 1972

Minutes

Members Present: Senator Wallace P. Carson, Jr., Chairman
Attorney General Lee Johnson
Representative Robert M. Stults

Excused: Representative Leigh T. Johnson

Staff Present: Mr. Donald L. Paillette, Project Director
Mr. Bert Gustafson, Research Counsel

Others Present: Sgt. Bill Crooke, Eugene Police Department
Mr. Jim Hennings, Metropolitan Public Defender, Portland
Mr. M. Chapin Milbank, Chairman, Oregon State Bar Committee on Criminal Law and Procedure
Ms. Melinda Woodward, Corrections Division
Dr. Arnold Zweig, State Board of American Civil Liberties Union

Agenda: RELEASE OF DEFENDANTS
Preliminary Draft No. 1; May 1972

Senator Wallace P. Carson, Jr., Chairman, called the meeting to order at 10:15 a.m. in Room 315 State Capitol.

Release of Defendants; Preliminary Draft No. 1; May 1972

[Note: See Minutes, Subcommittee No. 2, July 26, 1972, for discussion of sections 1 to 8.]

Section 9. Security schedules and discharge. Mr. Gustafson explained that section 9 was derived from the Illinois code and described property that could be used in lieu of cash, i.e., stocks, bonds or real property. The section also granted authority to attach a temporary lien in favor of the state. Justification for security under existing law, ORS 140.140, was dependent upon the judge's determination of what was sufficient whereas this draft set out definitive guidelines for the court to follow.

Mr. Gustafson advised that paragraph (e) of subsection (1) was intended as a double security, the first security being deposit of the

stocks and bonds and the second protection being the 12 month rule stating that stocks and bonds could only be pledged once every 12 months as security for someone's release. Subsection (2) dealt with real property as security and was parallel to subsection (1).

Sgt. Bill Crookeexplained that he was attending today's meeting primarily to support the proposed draft and to point out a few areas where the views of the Eugene Police Department differed from that of the draft. He was of the opinion that the 12 month requirement in subsection (1) (e) served no useful purpose; if the property was unencumbered and not being used as security, there was no reason to provide that it could not have been used as security during the preceding 12 month period. Mr. Gustafson replied that its purpose was to make certain that the property was free from any other liens of a security release nature.

Mr. Johnson commented that the only risk was that the defendant was not going to appear, but there was no particular financial risk to the state involved. He noted that section 9 would be used infrequently and said the advisability of including so many detailed provisions in the code was highly questionable. He was of the opinion that the statute should be worded in terms of providing such security as the court deemed necessary and the judge should make the decision as to whether the security was sufficient.

Representative Stults concurred with Mr. Johnson's opinion and said that in his county they had never encountered any problem with the security pledged in accordance with the present law which gave the judge authority to make the decision as to the adequacy of the security. In some instances, he said, parents had pledged homesteads which were not exempt from execution and even this had created no problem. Sometimes farmers pledged caterpillars and other farm machinery and the judge accepted that collateral with no ensuing problems.

Dr. Zweig, representing the ACLU, also believed that section 9 was needlessly burdensome and much too complicated.

Chairman Carson expressed approval of making the requirements more definitive than existing law.

Mr. Milbank said that the most important objective in cases where bail was to be set was to keep the bail as low as possible. He agreed with Mr. Johnson that the matter of determination of what the security should be would best be left to the judges' discretion. His experience had been that the judges were very competent in this area and at the present time seemed to be passing over some of the burdensome mechanics of the present law.

Mr. Johnson moved to provide in subsection (3) of section 8 that the defendant may provide such security as the court deems necessary and to delete section 9.

Mr. Milbank suggested that section 8 (3) could provide for deposit of stocks, bonds, real or personal property and leave the determination of all other questions to the judge. Mr. Johnson agreed with Mr. Milbank's proposal and incorporated it into his motion.

Chairman Carson observed that one of the problems to be considered was whether by placing specifics in the statute, it might inadvertently limit the types of security deposits and might stifle the innovativeness of the defense counsel or the court in reaching the ultimate goal of getting the defendant back on the street. On the other hand, when guidelines were specified, it was easier for an appellate court to judge the issues.

Mr. Hennings commented that in Multnomah County the vast majority of defendants required to post bail went through bail bondsmen. In some of the cases he had handled, the parents of the defendant put up their house as security. He suggested it might be advisable to include a provision covering that specific situation so the parents could put up their house as security instead of having to go through a bail bondsman or hiring another attorney to handle the process. Mr. Paillette replied that section 9 as drafted would permit that procedure.

Mr. Gustafson suggested that the subcommittee might prefer to place a proviso in section 9 to provide for "any other reasonable circumstances" or, as an alternative, "shall contain" in subsection (1) could be changed to "may contain." Either of those proposals, he said, would add more flexibility to the section.

Mr. Johnson renewed his motion and Mr. Gustafson pointed out that adoption of the motion would result in a reversion to the existing law.

Chairman Carson suggested another possibility would be to make the listing in section 9 the strictest standard that a judge could follow but permit the court discretion in establishing lesser standards. Representative Stults said that the statute would undoubtedly be interpreted to set out guidelines to be followed in every case and lesser standards would be the exception rather than the rule.

Mr. Paillette suggested that the subcommittee consider the rest of the draft before voting on Mr. Johnson's motion in order to see what effect adoption of the motion would have. The whole concept of the draft, he said, was to encourage ROR and to use it wherever possible. It was not inconsistent in those cases where the court considered it necessary to obtain some security to set out definitive guidelines since the provisions of section 9 would only come into play in a last resort kind of release. If at all possible, the court would follow a procedure short of security release. However, once this point had been reached, he believed it was a good idea to have something in the statute to spell out for the court what kind of security would be required. If nothing else, he said he would at least like to see a list similar to the one in section 9 placed in the commentary.

Chairman Carson indicated that the vote on Mr. Johnson's motion would be postponed and the subcommittee would return to the question later. See page 19 of these minutes for further discussion and final action.

Section 10. Taking of security by peace officer. Mr. Gustafson pointed out that the current statute provided for deposit of bail with the clerk of the court. What actually happened in practice, however, was that the officer would take the security deposit himself and turn it over to the court clerk. Section 10 would codify that practice.

One of the effects of section 10 was that there would be no predetermination by a magistrate that for a certain crime there would be a set amount of bail. The commentary explained the rationale behind this provision which was a result of Ackies v. Purdy, 322 F Supp 38 (S.D. Fla 1970), where the court held that the bail schedule resulted in discrimination against the poor person who could not afford the scheduled amount. He believed that if a speedy release decision occurred within 24 to 48 hours, the Ackies v. Purdy problem could be solved and there would be no discrimination against the person who was without funds. One problem that might be created by not having a bail schedule was that a person who had the assets to pay the bail might have to remain in jail over a week end, for example, if no judge were available to set bail. That situation, however, could be avoided by providing for a telephonic release decision.

The principal decision to be made in connection with section 10, Mr. Gustafson said, was whether to give the magistrate authority to set bail for a particular offense. This could be accomplished by amending section 10 to read, "When a security amount has been set by a magistrate for a particular offense or for a defendant's release . . . . "

Chairman Carson asked why "peace officer" was used in section 10 as opposed to the term "police officer." Mr. Gustafson suggested that it could be amended to read "peace officer who is employed in a correctional facility."

Sgt. Crooke pointed out that Lane County employed "correctional officers" and the term "police officer" would exclude them. It would be easier for the defendants if they could post bail with the correctional officers who were at the jail rather than requiring them to find a police officer. This was a problem at the present time, he said, and could be corrected by permitting bail to be accepted by a peace officer, by an employe of the corrections division or by someone designated by the magistrate.

Mr. Gustafson proposed the addition of a subsection (2) to section 10 which would read:

> "A person employed in any correctional facility as a corrections officer is a peace officer for the purpose of receiving the security deposit in accordance with this Article."

Chairman Carson suggested that section 10 be amended to provide for "a person designated by the court" to accept bail. The judge could then designate someone who would be available at any hour of the day or night or on a week end.

Mr. Johnson moved to amend section 10 by substituting "person designated by the magistrate" for "peace officer" in the two places the term appeared. Motion carried unanimously.

Chairman Carson said the next question to be decided was whether to include a provision permitting a bail schedule.

Sgt. Crooke indicated that the Eugene Police Department strongly favored a bail schedule. At the present time, he said, probably 30% of those arrested in the Eugene area were in custody less than four hours and it would be difficult to convince them that it was better justice to require them to stay in jail overnight in order to be given a hearing the following day. In addition, a separate hearing on each case would involve approximately 4,000 more separate decisions for the judges each year and would require every person in this category to remain in jail longer, many of whom could be substantial citizens.

Representative Stults commented that the uniform traffic bail schedule had worked satisfactorily. Mr. Hennings observed that the schedule was quite high and he also pointed out that if a bail schedule were set, the judges would not be likely to reduce bail, particularly after a person had posted his 10% deposit.

Mr. Paillette observed that apparently everyone present at today's meeting was in favor of accentuating ROR but at the same time recognized that the person who did not want to wait for a hearing at which the release decision would be made should be able to obtain an immediate security release. He added that he did not believe the statute could constitutionally prevent him from doing so; he was entitled to post bail and obtain his release. He said he was inclined to agree with Sgt. Crooke that it was necessary to know in advance the amount the defendant was going to be required to deposit in order to obtain his release immediately without being required to wait 24 or 48 hours.

Mr. Hennings said he agreed there should be a bail schedule but he hated to see a person locked into a particular deposit if there were a later determination that he should have been released on his own recognizance or the bail should have been lower.

Mr. Milbank remarked that another trouble with the bail schedule was that it would necessarily be tied in with the categorization of the initial charge made by the officer which might have been made very hurriedly and often tended to be high because the officer knew that the district attorney could later compromise and reduce the charge. Representative Stults commented that even so it was preferable to having the defendant locked up if he had the 10% deposit to be released and Mr. Milbank agreed.

After further discussion, the subcommittee agreed that the draft should provide for a bail schedule.

Section 11. Forfeiture and apprehension. Mr. Gustafson explained that there was a 30 day grace period on a forfeiture in present law. Section 11 retained the grace period but added a guideline in subsection (2), namely, "appearance and surrender by the accused is impossible and without his fault." Another change from existing law would require a notice to the defendant and, if applicable, to his sureties. He suggested adding "to" after "if applicable," in the fifth line of subsection (2) as a matter of clarification. This amendment was adopted by unanimous consent.

Mr. Paillette advised that there were two other minor changes in section 11 that should also be made:

(1) In subsection (1) after "failure" insert "of a person".

(2) In subsection (3) after "section 8" insert "of this Article".

The above amendments were adopted by unanimous consent.

Mr. Hennings objected to the phrase "without his fault" in subsection (2). He said a person might be arrested in another jurisdiction and be unable to appear in court because he was being held in jail. That could be construed to be his fault because he had committed another crime while out on bail.

Mr. Paillette said that when a defendant was released and then allegedly committed another crime, it would be impossible for him to show up regardless of the question of fault. Mr. Hennings suggested substituting "or" for "and" before "without his fault." Mr. Paillette contended that the defendant should certainly be required to have a good reason for not being in court at the appointed time. After further discussion, the subcommittee decided to make no revision in the language Mr. Hennings had criticized.

Mr. Milbank said that he would prefer to have his client forfeit bail in certain types of cases, i.e., drunk driving, indecent exposure and shoplifting. He wanted to make sure that voluntary forfeiture would still be possible under this draft. Mr. Gustafson assured him that the draft made no change in existing law in that regard; it would still be up to the discretion of the magistrate.

Mr. Gustafson proposed to reword the first sentence of subsection (3) to read:

> "When judgment is entered in favor of the state, or any political subdivision of the state, on any security given for a release, the district attorney shall have execution issued on the judgment forthwith and deliver same to the sheriff to be executed by levy on the deposit or security amount made in accordance with section 8 of this Article."

The above language was adopted by unanimous consent.

Chairman Carson asked why the phrase, "or any political subdivision of the state," had been included and was told by Mr. Gustafson that it was intended to cover cities. Chairman Carson was of the opinion that the phrase referred to counties whereas Mr. Johnson said it had reference to cities.

Mr. Johnson commented that if his motion to delete section 9 and amend section 8 (3) were adopted, the references to stocks, bonds and real property in section 11 would need to be changed to conform to that motion by adding "personal property."

Mr. Gustafson pointed out that the second sentence of subsection (3) used "crime" for a specific reason. "Offense" would include traffic violations and there was no intent to affect the forfeiture of bail in traffic offenses by this draft.

Mr. Paillette said he was not certain that the problem of traffic violations was completely resolved by using "crime" in subsection (3). There were, he said, traffic offenses that carried sentences of imprisonment that were handled by bail forfeitures and because they were punishable by imprisonment, they were by definition also a crime. He said he was not disagreeing with the concept of the draft but wanted to make certain that some requirement not meant to be included was not inadvertently written into the draft. He suggested it might be better to use "offense" in place of "crime" and then write in a specific exclusion relating to traffic offenses.

Representative Stults asked if he would also want to exclude fish and game violations. Mr. Paillette said that the exclusion should apply to any of the offenses outside the criminal code that were now handled under the uniform citation procedure -- traffic, fish and game, boating and any others that might be affected.

After further discussion, the subcommittee unanimously agreed to adopt Mr. Paillette's recommendation.

In connection with subsection (1), Ms. Woodward asked if it would be possible to insert a provision permitting warrants to be served anywhere in the state, or at least within the county. Chairman Carson indicated that a bill to that effect had been introduced at the last session of the legislature but it had failed to pass. Mr. Paillette advised that the bills at the last session dealt with bench warrants and the proposal might meet with greater success in the legislature if the scope of serviceability were more limited. Instead of general bench warrants, it might be made applicable to a warrant issued for failure to appear and tied in with ROR. His recommendation was that such a provision could be added to the arrest draft rather than this draft by saying that a warrant under section 11 of Article 6 may be served by any peace officer within the state of Oregon.

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The subcommittee agreed to adopt Mr. Paillette's recommendation and also agreed that the question of permitting extrajurisdictional service of warrants for failure to appear should be submitted to the Commission for a final decision.

Section 12. Release decision review. Mr. Gustafson advised that subsection (1) of section 12 provided that the releasing magistrate was to review the release decision after two days, a provision which related back to section 4. If the subcommittee favored the concept of a review of the defendant's release decision, the time limit could be changed to read two days after the initial release decision. As drafted, it could be interpreted to mean within two days after he was taken into custody.

The reason for the review would be, for example, to correct a hasty decision made at the beginning of the case which might not have been based on verified information or where more information had come forth in the meantime.

Chairman Carson said that subsection (1) should be considered by the subcommittee as referring to two days after the initial hearing because it made no sense otherwise. The determination to be made was whether the decision should be automatically reviewed in two days in any event when the defendant was still in custody or whether the review should be initiated by the defendant or his lawyer.

Mr. Hennings commented that the provision would permit an appeal to the circuit court on a felony charge prior to the time the case went to the grand jury.

Mr. Paillette noted that subsection (2) contemplated an initial decision in, for example, district court and the defendant could then seek further modification in circuit court.

Mr. Hennings again pointed out that it would allow the case to get into circuit court even before the bindover and, while he had no

objection to such a provision, he thought that the subcommittee should consider the fact that it would be possible for an office such as his to completely tie up the circuit court. Mr. Gustafson advised that Judge Burns had written a letter expressing concern about that very point.

Mr. Hennings added that, as a practical matter, in Multnomah County the release decision was automatically reviewed at the time of the preliminary hearing. The two day requirement would add another hearing procedure there. He also pointed out that under ORS 140.090 once a judge had refused to lower bail, it was contempt to raise that issue again before another judge. He said he would prefer to have the ability to raise it every time he went into court with the defendant. Mr. Milbank agreed and added that he did not believe the review should necessarily be automatic. Mr. Paillette advised that ORS 140.090 would be repealed by this draft.

Rep. Stults moved to delete the automatic review in subsection (1) of section 12. Motion to delete subsection (1) carried unanimously.

Chairman Carson recalled Mr. Hennings' point that the way subsection (2) was drafted, the defendant might be in circuit court on his release review even before he was bound over to circuit court. The suggestion was made that it might be better to take a different approach and state statutorily that the defendant may seek modification of the conditions of his release whenever he appeared in court and at the same time repeal ORS 140.090 which said an attorney could be held in contempt of court for reraising the issue of reduction of bail. The Chairman observed that the subcommittee appeared to be in favor of doing away with the appeal and allowing the defendant to reassert his claim for reduction of bail either in district court or after bindover in circuit court.

Mr. Milbank said he would still want an avenue of relief to the Court of Appeals prior to trial on abuse of discretion by a bail-setting magistrate. He believed that right was guaranteed by the Constitution, however, so it posed no problem. Mr. Hennings advised that relief from an arbitrary magistrate could be sought under the mandamus statute.

Mr. Hennings commented that the statute should limit the right of the defendant to come in every day to ask for another custody hearing. Chairman Carson cited some of the difficulties in writing such a provision. If, however, the provision were open ended, then the court could decide the issue.

Representative Stults commented that once the defendant had made his first appearance in court, he would have an attorney who would handle the case from that point forward which should alleviate the problem cited by Mr. Hennings.

Chairman Carson suggested that subsections (1), (2) and (4) be deleted from section 12. The proposal was adopted by unanimous consent.

Mr. Gustafson pointed out that he had amended subsection (3) at the direction of the subcommittee at its meeting on July 26 to include the provisions of ORS 140.030. As redrafted, it would read:

> "(3) After judgment of conviction in municipal, justice or district court, the court shall order that the original release agreement, and if applicable, the security, stand pending appeal or deny, increase or reduce the release agreement and the security. If a defendant appeals after judgment of conviction in circuit court for any crime other than murder or treason, release shall be discretionary. The circuit court shall consider release criteria and any danger that defendant's release might pose to any other person or the community."

At this point the subcommittee recessed for lunch and reconvened at 1:00 p.m. The same members of the subcommittee and staff were in attendance during the afternoon session as had been present for the morning session. Others present were Sgt Crooke, Mr. Hennings and Dr. Zweig. Senator Anthony Yturri, Commission Chairman, attended the meeting briefly during the discussion of section 4.

Representative Stults pointed out that the amendment proposed by Mr. Gustafson to subsection (3) of section 12 would change ORS 140.030 which was amended by the last session of the legislature and allowed the court to deny bail on appeal on certain charges. The amended section referred only to murder and treason whereas ORS 140.030 added "the infliction upon another of personal injury likely to produce death under such circumstances that, if death should ensue, the offense would be murder." He asked if the subcommittee wanted to add that restriction.

Mr. Johnson said he would delete "other than murder or treason" so the sentence would read, " . . . for any crime release shall be discretionary." Mr. Gustafson pointed out that the Constitution said that murder was not a bailable offense.

Mr. Johnson moved to delete the last sentence from the amended version of subsection (3) of section 12. Motion carried. Voting for the motion: Johnson, Stults. Voting no: Mr. Chairman.

Chairman Carson recapitulated the subcommittee's action on section 12: a provision was to be drafted to the effect that the defendant may reassert his request for reduction or modification of bail after bindover or after preliminary hearing in circuit court. ORS 140.090 would be repealed. The amended version of subsection (3) would also be included minus the last sentence.

Mr. Johnson questioned the advisability of deleting subsection (4). He said he understood that the purpose of that subsection was to make it clear that bail was a matter of discretion and the decision

could only be reviewed at the appellate level for arbitrary reasons. Mr. Hennings added that it was also designed to keep a person from going back into court time and time again.

Chairman Carson directed that the commentary be revised to point out that when the circumstances change, the defendant shall be entitled to seek a modification of his security at the trial court level but not to appeal the decision on the amount of the bail. However, if there were an abuse of discretion on the part of the magistrate, the defendant should be able to seek mandamus. He did not, however, have a right of appeal at the trial court level.

Section 13. Penalties. Mr. Gustafson suggested amending subsection (1) of section 13 to read:

> "Any supervisor [~~, pursuant to section 7 of this Article,~~] of a defendant on conditional release who knowingly aids the defendant in breach of the conditional release is punishable by contempt."

The amendment was approved by unanimous consent.

Mr. Gustafson said the undertaking for bail set forth in ORS 140.100 was to place money with the court. The concept of this draft was to get away from dependence on money and to substitute a criminal sanction.

Chairman Carson proposed to delete "subsection (3) of" from subsection (2) so that the provision would refer to section 7 rather than to a portion thereof. The amendment was adopted by unanimous consent.

Chairman Carson next asked if there was any possibility that imposition of the sanction of "punishable by contempt" could be construed to mean that the defendant's release could not be revoked if he breached any of the conditions of his release. Mr. Paillette replied that his release could be revoked under the earlier sections of the draft and also, if he failed to appear, he could be charged with the crime of bail jumping.

Mr. Hennings observed that the draft should be clear that the defendant need not always be punished by contempt. If the judge brought the defendant into court, he should not have to punish him by contempt when he just wanted to give him a lecture. Representative Stults replied that the court could find him in contempt and release him again.

Chairman Carson suggested that the commentary should stress that subsection (2) of section 13 was designed to give the judge a choice of a lesser punishment than revoking release. It did not necessarily mean that he had to be sent to jail or fined.

The subcommittee then returned to the beginning of the draft for the purpose of adopting the sections not previously adopted and picking up any loose ends on which decisions had not yet been made. Chairman Carson noted that section 1 had been approved at the subcommittee meeting on July 26.

Section 2. Release assistance officer. Chairman Carson recalled that at its meeting on July 26 the subcommittee had amended section 2 to read:

> "(1) Any magistrate may designate a Release Assistance Officer who shall, except when impracticable, interview every person detained pursuant to law and charged with an offense.
>
> "(2) The Release Assistance Officer shall verify release criteria information and timely submit a written report to the magistrate containing, but not limited to, an evaluation of the release criteria and a recommendation for the form of release.
>
> "(3) The magistrate may appoint Release Assistance Deputies who shall be responsible to the Release Assistance Officer."

Mr. Johnson asked if anyone was particularly interested in this section and was told by the Chairman that Multnomah County was the most concerned about it. Mr. Paillette added that the subcommittee had heard testimony to the effect that Multnomah County was presently following this procedure and this section would give them statutory authority to continue.

Mr. Gustafson noted that the direction given to the staff by the subcommittee was to add a subsection (3) to section 2 which would allow the Release Assistance Officer to appoint deputies. As drafted, it would give the magistrate control over appointing the deputies yet the Release Assistance Officer himself would be the one who was primarily responsible for the conduct of the recognizance or the verification of the information.

In reply to a question by Mr. Johnson, Mr. Gustafson advised that section 2 would give the Release Assistance Officer authority to go into a jail, talk to the defendant and obtain information along the lines of the release criteria.

Mr. Johnson asked why they could not follow that procedure at the present time. Mr. Hennings replied that the jailers had raised questions about the authority of Release Assistance Officers to be in the jail. The only time that authority came into question was when the officer was actually going to release someone on his own recognizance, and they would like to be able to release defendants without having to go back to the court.

Mr. Paillette recalled that Tanya Enders, Multnomah County recognizance officer, had told the subcommittee the Release Assistance Officers would like to see a provision such as this in the statute. Probably, he said, the courts did have authority to follow this procedure if they had the courage to do so. In Multnomah County they were doing this at the present time and it was also being done in Lane County. Not all judges, however, would do something like this unless they were sure they could point to some authority for initiating the procedure. The draft proposed to place the authority in the statute to encourage the use of this type of device. He said that Mr. Johnson could be right and the courts did have authority to go ahead under existing law but on the other hand perhaps they did not.

Mr. Johnson criticized the practice of using the statutes to express ideas which a judicial officer had authority to follow under statutes that already existed. He moved to delete section 2.

Mr. Gustafson said that if section 2 were deleted and the judge appointed a Release Assistance Officer, the county commissioners might question his authority to make the appointment and the judge would be unable to point to any statutory authority.

Sgt. Crooke urged retention of section 2 both to give the judge statutory authority to fall back on and also to recognize that this was an officially accepted procedure.

Mr. Johnson said he was sympathetic with the policy but objected to using legislation to grant authority the judges already had.

Vote was taken on Mr. Johnson's motion to delete section 2. Motion carried. Voting for the motion: Johnson, Stults. Voting no: Mr. Chairman.

Mr. Paillette asked if there was any objection to indicating in the commentary the reason for the deletion of section 2 and to stating that a majority of the subcommittee believed the statutes were abundantly clear that the courts had authority to follow this procedure. There was no objection.

Section 2 was subsequently reinstated and further amended. See page 17 of these minutes.

Section 3. Releasable offenses. Chairman Carson indicated that section 3 had been adopted at the July meeting with an amendment in subsection (2) deleting "circumstances indicate a fair likelihood of conviction and".

Section 4. Release decision. Mr. Gustafson called attention to the two rewrites of section 4 that had been prepared by the staff.

Alternative No. 1 would retain subsections (2), (3) and (4) of the original draft and amend subsection (1) to read:

"(1) A release decision for all persons in custody should be made during the first 24 hours of custody, but in no case shall a person be in custody longer than 48 hours without a magistrate's release decision. A magistrate may release a defendant through a telephonic order which shall be reduced to writing within 72 hours."

Mr. Gustafson explained that Alternative No. 1 reflected the idea that a release decision should be made within 24 hours if possible. If not possible, it should be no longer than 48 hours. If further problems were encountered, it contained a proviso that the release of the defendant could be made through a telephonic order within 72 hours.

Alternative No. 2 would completely rewrite section 4 to read:

"(1) Except as provided in subsection (2) of section 3 of this Article, a person in custody shall have the immediate right to security release or shall be taken before a magistrate without delay. If the person is not released under the provisions of section 10 of this Article, or otherwise released before his arraignment, the magistrate shall advise the person of his right to a security release as provided in sections 8 and 9 of this Article.

"(2) If a person in custody does not request a security release at the time of arraignment, the magistrate shall make a release decision regarding the person within 48 hours after the arraignment.

"(3) The magistrate shall impose the least onerous condition reasonably likely to assure the person's later appearance. A person in custody, otherwise having a right to release, shall be released upon his personal recognizance unless release criteria show to the satisfaction of the magistrate that such a release is unwarranted.

"(4) Upon a finding that release of the person on his personal recognizance is unwarranted, the magistrate shall impose either conditional release or security release.

"(5) This section shall be liberally construed to carry out the purpose of relying upon criminal sanctions instead of financial loss to assure the appearance of the defendant."

Mr. Gustafson advised that Alternative No. 2 would give a right to an immediate security release. If a person were not released under

section 10 which contained the bail schedule, then the magistrate was required to advise the person of his right to a security release. Subsection (2) would be dependent upon a speedy arraignment and the release decision would follow within 48 hours after arraignment.

Senator Yturri arrived at this point.

Chairman Carson indicated that the first alternative was one of the approaches discussed at the last meeting of the subcommittee and was closest to the original draft. Some objection had been expressed to that procedure, however, and he had received a letter from Mr. Milbank indicating that Judge Foster felt the draft was confusing magisterial responsibilities with trial responsibilities. The second approach would grant an immediate right to a security release and would provide that the person be taken before a magistrate without delay.

Dr. Zweig said he thought the original section 4 was preferable to the proposed revision because it made clear the order of priorities. The emphasis was changed in Alternative No. 2, he said, by stressing the right to bail as the first move rather than the right to be released with the burden of proof on the district attorney.

Chairman Carson said the first decision he would like the subcommittee to make was one concerning the release decision itself. Originally section 4 provided that the defendant had a right to be before a magistrate for a release decision within 24 hours from the time he was taken into custody. He also pointed out that Alternative No. 1 said "should" so the provision was not mandatory but was intended to state legislative policy.

Mr. Paillette recalled that the Multnomah County recognizance officers had indicated to the subcommittee that they could not possibly within 24 hours furnish the criteria that the judge would need to make a decision.

Mr. Paillette indicated his preference for Alternative No. 2. It was, he said, consistent with the present law on arraignments, and it clearly indicated that there was no intent in this draft to say that a man had to await a release decision before he could post his security and be released from custody nor would he have to await an appearance before a magistrate before he could bail himself out. Furthermore, it provided that when the defendant was arraigned, even though the court did not yet have all information available on which to make a decision as to whether the person was a good ROR risk, the court must advise him of his right to a security release at that time. If the defendant did not want a security release, the 48 hours began to run from that point and the recognizance staff could then obtain the information needed by the court. In other words, Mr. Paillette said, Alternative No. 2 took all these facts into consideration, gave the defendant a chance to bail out immediately, ensured his prompt appearance before a magistrate,