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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

June 9, 1972

Minutes

Members Present: Mr. Robert W. Chandler, Chairman
Senator John D. Burns
Representative George F. Cole

Excused: Mr. Bruce Spaulding

Staff Present: Mr. Donald L. Paillette, Project Director

Others Present: Kenneth Behrend, Eugene Police Department
Lt. Harold Berg, Oregon State Police
David Burks, Lane County Sheriff's Office
Marcia Haven, Portland Police Department
Sgt. Roger Haven, Portland Police Department
Sgt. Wayne Inman, Portland Police Department
Mark Johannessen, Chief of Police, Springfield
Mr. M. Chapin Milbank, Chairman, Oregon State Bar Committee on Criminal Law and Procedure
Mr. John W. Osburn, Solicitor General, Department of Justice
Sgt. Larrie G. Prociw, Springfield Police Department
Capt. B. S. Riley, Springfield Police Department
Sheriff John Truett, Douglas County

Agenda: ARRESTS
Preliminary Draft No. 1; June 1972

The meeting was called to order at 1:30 p.m. by Mr. Robert W. Chandler, Chairman, in Room 112 State Capitol.

Arrests; Preliminary Draft No. 1; June 1972

Mr. Paillette indicated that at the meeting of Subcommittee No. 1 on May 24, 1972, two major questions had been posed with respect to arrests by those who testified. One was the need for authority to make probable cause arrests and the other was what he referred to as the "bailiwick problem" where the officer, if not in his own bailiwick, could not at the present time act as a peace officer. The latter problem, he said, was the more difficult one. The subcommittee appeared to be generally agreed that the reasonable cause or probable cause basis for an arrest should be extended at least as far as Class A misdemeanors.

Mr. Paillette advised that the draft on today's agenda took the approach that such authority would extend to all misdemeanors, as well as felonies, because of the use of the term "crime" which was defined in the criminal code to include both felonies and misdemeanors. This, with respect to the warrantless arrest, would represent a significant change in the law and one which he personally felt was desirable. It would retain the "in presence" requirement in the present law with respect to misdemeanors for the non-criminal offense of a violation which was non-criminal from the standpoint of the penalty because the only penalty authorized for a violation was a fine. He said it was implicit in the new criminal code that an officer could arrest for a violation, but the proposed draft would make it express. At the same time, because of the relatively less serious nature of a violation, arrest for a violation would not be based on probable cause but on the "in presence" requirement.

Section 1. The draft, Mr. Paillette continued, contained four entirely new sections -- 2, 3, 8 and 10 -- which, by means of section 1, would be added to ORS chapter 133. The balance of the revisions contained in the draft were made by way of amendment to existing statutes.

Section 2. Definitions. Mr. Paillette advised that not all of the definitions in section 2 would be of particular interest to police officers, and the definitions relating to accusatory instruments fell into this category. They attempted to spell out the types of formal charging documents used by prosecutors and to distinguish between an information filed by a district attorney charging an individual in an inferior court with a crime other than a felony and an information which was the initiating document that started the criminal process with respect to a felony that would not be tried in the lower court but would eventually end up in circuit court. The definitions also distinguished between the document a district attorney would file by way of an information as opposed to one a private citizen might file before a magistrate. It was possible, Mr. Paillette said, that the definition of "accusatory instrument," if approved, might ultimately be placed in the general definition section of the procedure code because it was also applicable to ORS chapter 132 relating to grand juries as well as to the procedural requirements of pleadings.

The definition of "arrest" was new in the sense that it referred to actual or constructive restraint. Arrest was presently defined in ORS 133.210 and 133.250 whereas the draft used one general definition for the term.

Representative Cole asked if it would cause a problem to codify constructive restraint as an arrest so far as false arrest suits, etc., were concerned. Mr. Paillette was of the opinion that the proposal would make no change in this area because constructive restraint was sufficient under existing law for purposes of a false arrest suit. He advised that it was not his intent to change the substantive meaning of arrest but merely to set out the definition in one statute rather than two.

Mr. Osburn called attention to the definition of a "stop" in Article 2, "Stopping of Persons." He asked whether a stop under that Article included stops under State v. Cloman, 254 Or 1, 456 P2d 67 (1969), as well as those under Terry v. Ohio, 392 US 1 (1968). Where a person was not stopped for the purpose of holding him to answer for a crime, Mr. Osburn said it made a great deal of difference whether that kind of stop was called an arrest because in an arrest situation Miranda warnings must be given as well as warnings about Fourth Amendment rights as to search, etc.

Mr. Paillette answered the question by referring to the definition of a stop in the Stopping of Persons Article which said a stop was "a temporary restraint of a person's liberty by a peace officer lawfully present in any place." He believed that would include both Cloman and Terry type stops. The "stop" definition was drafted specifically with the Terry case in mind and used the standard of "reasonably suspects" rather than the standard of "reasonable cause" in the arrest draft. The standard for a stop imposed a lesser requirement than for an arrest, he said. He added that the last phrase in ORS 133.250, "or by his submission to the custody of the officer," was not necessarily constructive restraint but it could involve an actual laying of hands on the accused and holding him. If the officer said, "You are under arrest," or if he took some other appropriate action to indicate clearly that the accused was not to flee, it was not actual restraint but it was constructive restraint.

Senator Burns asserted that it was not, however, physical restraint and "constructive restraint" could be construed to mean that the officer said nothing. He was of the opinion that notice to the defendant was an essential ingredient of arrest and if a person were placed under arrest as defined under the existing statute, it was manifest that there was knowledge on his part. However, when talking in terms of constructive restraint, the arrest might be in the officer's mind but not the defendant's.

Chairman Chandler expressed approval of the language of the proposed definition and added that if "actual restraint" were to be included in the statute, it would be necessary to add "or constructive restraint" because without that phrase it would be necessary to handcuff everyone who was picked up by the police.

Mr. Osburn referred to the clause "so that he may be held to answer for a crime" in ORS 133.210. He asked if the deletion of that language in the proposed definition was significant and, if so, what it was intended to achieve. Mr. Paillette replied that because the Article on grand juries talked in terms of holding someone to answer for a crime, the phrase might have a double meaning and he had therefore omitted it for purposes of clarity. Furthermore, he thought it added nothing to the meaning of the statute because the following sections laid out the foundation for an arrest. The person arrested

had to be the subject of a reasonable cause arrest or a warrant involving an offense or a crime. Were the clause to be retained, it should be changed to "held to answer for an offense" because the draft contemplated an arrest for a violation as well as for a crime.

Mr. Osburn said he was fearful of taking from the police the right to stop someone and talk to him and wanted to make certain that the language of this draft would not be construed to mean that the officer must arrest an individual before he would be permitted to stop him and talk to him.

Sgt. Haven interjected that on numerous occasions officers stopped people on the street just to find out who they were and to get acquainted with them. Ten years ago this was no problem but today individuals were exercising their rights and saying that they did not have to talk to the police under those circumstances. On occasion they found that those who refused to talk to the officers were wanted.

Senator Burns asked if the Stopping of Persons Article imposed a sanction for refusing to talk to a police officer and was told by Mr. Paillette that it did not. The only sanction that might follow such conduct was that it could serve as a basis for the officer to reasonably suspect the individual of criminal conduct, and he could then pat him down and take whatever action was appropriate under the circumstances.

Mr. Paillette advised that at the time the Commission acted on the stop and frisk provisions, the Supreme Court had not yet decided the case on Portland's suspicious loitering statute. The stop and frisk provisions were an adjunct to the suspicious loitering statute and while the state statute had not yet been tested, loitering statutes generally were being held unconstitutional.

After some of the law enforcement personnel present at the meeting discussed problems they had encountered where individuals had refused to answer police questions, Senator Burns expressed the view that there should be some sanction of a minimal nature added to the draft to require a person to respond to a reasonable inquiry by a police officer.

Mr. Paillette stated that his recollection of a recent case involving a Portland ordinance was that one of the things the court found somewhat onerous was the fact that it was grounds for an arrest when someone refused to respond to police questioning.

Mr. Osburn said that basically the problem was that no one had ever said, as a matter of policy, that if a police officer asked a question as to identity, the person had to answer. Terry recognized that a person, in order to live in society, must recognize some obligation as a citizen to stop when a police officer talked to him and to submit to a search if an officer had reason to believe he was

armed. The difficulty was finding exactly what the statute should prohibit; whether to say as a matter of policy that the person must produce identification and let that be the offense if he refused to do so. In the past the enforcement effort had been aimed continuously at having other kinds of statutes such as the loitering statute or the "after hours" kind of statute where there was an independent basis for arrest not really related to a requirement to answer a policeman's questions. In almost every instance the courts were striking down the notion that a person had no right to be on a street unless he could satisfy a jury that he had a lawful business to perform there.

Mr. Paillette suggested that the subcommittee might want to take another look at the desirability of having a specific statute on the questioning of witnesses. He said he was not sure that even that type of statute would get to the problem of requiring a witness to identify himself. Chairman Chandler advised that it would take two statutes to accomplish the purpose -- one to state the crime and another for the penalty.

Mr. Osburn said a better approach would be to permit a police officer to detain a person for a reasonable period of time, as was permitted under Terry and Cloman. He was of the opinion that to charge a person with a crime for failing to answer was a project that would consume the subcommittee. He said he would be content if the statute said that the stopping of a person under Terry and Cloman circumstances did not constitute an arrest and that stopping of a person did not constitute an arrest for the purposes of these sections unless the person was being held to answer for violation of law. Senator Burns remarked that Mr. Osburn's proposal was the practical effect of the action already taken by the Commission in connection with the Stopping of Persons Article. Mr. Paillette pointed out under that Article the officer was required to have a reasonable suspicion that the individual he was stopping for the purpose of questioning was involved in some kind of criminal activity and he was not just stopping him to find out his identity.

Senator Burns suggested that the subcommittee go on to the following subsections in section 2 and come back to this question later if they chose to do so.

Subsections (3), (4), (5) and (6). Mr. Paillette explained that subsections (3), (4), (5) and (6) dealt with the formal charging instruments and attempted to distinguish between what district attorneys called an information and what the layman referred to as a complaint. With respect to a charging document filed by a district attorney, case law held in the early 1900's that it was unnecessary to have a verified complaint by a district attorney; his oath of office was sufficient. That same law, however, did not apply to a private citizen filing a complaint; his complaint must be verified by oath. Further, an information under present law had two different meanings: (1) a

document filed by a district attorney in district court to charge a misdemeanor which would initiate the action and lay the foundation for the prosecution or (2) a document initiating a felony prosecution which began the action where the defendant did not end up being prosecuted on that instrument. It seemed to Mr. Paillette that it was desirable to try to distinguish between those two. The draft defined a "complaint" as a document filed by a private citizen which would serve both to commence an action and as a basis for the prosecution.

Subsection (5) defined a "complainant's information" as an accusation charging a person with an offense punishable as a felony. It would initiate the action in the lower court but the person charged under that information would ultimately end up in circuit court and would not be prosecuted on the initial complainant's information but would be prosecuted either under an indictment or a district attorney's information filed in circuit court.

Mr. Paillette further explained that he had distinguished between a complainant's information and a district attorney's information for two reasons: (1) the district attorney's information did not require verification on oath because oath was implicit in the office; and (2) it was important to distinguish with respect to subsection (6) (c) which said "as is otherwise authorized by law." That phrase would involve, under existing law, an information filed in circuit court upon a waiver of indictment or it could refer to the proposed revision to the Constitution allowing a district attorney to proceed in circuit court directly on an information under the optional indictment/information system. It would also cover the problem discussed in connection with ORS chapter 132 as to the advisability of including a specific provision dealing with misdemeanors charged in circuit court by the district attorney.

Mr. Paillette was of the opinion that the existing definition of an information contained in ORS 133.010 was inadequate. The definitions in the draft attempted to point out that in some cases the charging instrument served only to initiate the action filed in the lower court. If filed in circuit court, it initiated the action and also served as a basis for prosecution of the action. This kind of approach, he said, would be helpful not only because of the changes the Commission was recommending in the grand jury provisions but also with respect to clearing up ambiguities in existing law as to what was meant by an information.

Mr. Milbank asked if a police officer was included within the concept of a private person and received an affirmative reply from Mr. Paillette.

Mr. Milbank said that a very real problem existing in some counties in connection with initiating a criminal prosecution was the time lag

between the time the law enforcement officer made the arrest and the time the defendant and his attorney were given the name of the charge resulting from the arrest. Mr. Paillette replied that this draft did not deal with this problem.

Subsection (7). Mr. Paillette advised that existing law did not contain a definition of "reasonable cause." The definition in the draft was based on section 3.01 of the Model Penal Code of Pre-Arraignment Procedure and on an Oregon case, State v. Williams.

Section 3. Information and complaint; form and content. Mr. Paillette outlined that section 3 was a definitional section setting out the form and content of informations and complaints. It did not deal with ORS 133.060, "Cited person to appear before magistrate; effect of failure to appear." Mr. Paillette said he intended at a later time to propose some changes with respect to joinder of defendants, but section 3 would still be viable even if the rules with respect to jointly indicted defendants were changed.

Mr. Cole noted that the last sentence of subsection (3) was redundant because the same statement was made in subsection (1). Mr. Paillette explained that subsection (1) defined a complaint whereas subsection (3) defined the factual part of an information or complaint.

Mr. Cole moved to delete the last sentence of subsection (3) and the motion carried unanimously.

Mr. Osburn expressed concern about the allegations of fact of an evidentiary character referred to in subsection (3) and asked whether the provision would alter the pleading rules in the filing of misdemeanor complaints by requiring a pleading of evidence not now required. Mr. Paillette replied that he did not intend that result. The attempt was to distinguish between the name of the crime as opposed to the act of which the defendant was accused that led to the conclusion that he had committed a certain crime.

Mr. Osburn said the provision appeared to require that the charge be more specific than merely charging, for example, "theft." Mr. Paillette stated that if that was his impression, the wording should be changed. Chairman Chandler suggested that "of an evidentiary character" be deleted from subsection (3).

Mr. Osburn said he understood the present law to be that the language of a complaint must comply with ORS 132.540. Mr. Paillette pointed out that the draft dealt specifically with informations or complaints whereas ORS chapter 132, except indirectly, did not deal with informations or complaints but with indictments.

Senator Burns noted that the objective of this revision was to simplify and to render more precise the criminal code and suggested that ~~the charging elements or requirements of one accusatory instrument~~ should be the same as another. His suggestion was to consolidate the requirements for indictments, informations and complaints. Mr.

Paillette replied that all three were not the same in practice even though they were the same from the standpoint of pleading. A complaint filed by a private citizen could be vastly different from one filed by a district attorney. Senator Burns inquired if there were situations in the state where a private citizen filed complaints with a magistrate that were not typed up on forms provided by the district attorney's office. No one could answer the question, but Mr. Paillette pointed out that there were provisions in existing law allowing a private citizen to file a complaint without its being approved by the district attorney's office.

Sheriff Truett indicated that there were justice of the peace courts where citizens requested complaints, the complaints were drawn up, the warrant issued and the sheriff went out and picked up the individual. In those situations the district attorney had not seen the complaint even though it was typed up on one of his forms.

Mr. Paillette contended that an information or complaint was not the same as an indictment in all respects whereas Senator Burns maintained that it was unnecessary to define the charging requirements for informations or complaints and then redefine the same thing for an indictment. Representative Cole expressed agreement with Senator Burns.

Chairman Chandler suggested that the problem might be resolved by inserting after "complainant" in subsection (3), "substantially in the form and substance as outlined in ORS 132.510 through 132.550." Mr. Osburn noted that the last two sentences of subsection (1) and the last two sentences of subsection (3) proposed requirements different from those for indictments.

Mr. Paillette asked Mr. Osburn if he believed the verification part of a complaint presently applied to the accusatory part also and received an affirmative reply. Mr. Osburn added that he would certainly take that position if he were suing someone for false arrest.

Mr. Paillette stated that when a complaint was verified, the accused was being charged with committing certain conduct proscribed by law. The facts supporting a false arrest charge would be based on the underlying conduct of which he was accused rather than the specific label placed upon that conduct. So long as the underlying facts were as the complainant believed them to be, he said he could not see why the complainant would be subject to a false arrest charge simply because the accusatory part was mislabeled.

Senator Burns contended that it was not unreasonable to require a private party who had a complaint to go through the proper channels, i.e., the district attorney. Representative Cole stated that if a private citizen went directly to a district judge or a justice of the peace with a complaint and the complaint was accepted, he should have to stand behind his accusation, and Senator Burns concurred.

Mr. Paillette reiterated that when the complainant verified the factual part of a complaint by his oath, he thereby alleged certain acts committed by the accused. He was not swearing that the accused committed, for example, criminal mischief in the third degree but was swearing that the individual had done certain things.

After further discussion Senator Burns moved to strike "of an evidentiary character" in subsection (3) of section 3, and the motion carried unanimously.

Representative Cole moved to approve section 3 as amended. Motion carried. Voting for the motion: Cole, Mr. Chairman. Voting no: Burns.

ORS 133.020. Magistrate defined. ORS 133.030. Who are magistrates. Mr. Paillette commented that ORS 133.020 and 133.030 could be combined into one section, but it would not accomplish a great deal.

Representative Cole asked why subsection (6) of ORS 133.030 was set out in its present form rather than stating "Judges of the municipal court." Chairman Chandler replied that the reason was probably that in some places the city recorder or another city official acted as a part-time municipal judge and this language would cover that situation.

Sheriff Truett stated that as he understood subsection (6), municipal officers would include police officers. Chairman Chandler replied that police officers did not have the power to issue a warrant and would therefore not fall within the provision. Senator Burns commented that if the police officers were authorized to exercise the powers and functions of a justice of the peace, and in some cities this was true, subsection (6) would then include police officers. In that sense, he said, there was a redundancy in the section.

Mr. Osburn asked if county judges were magistrates and was told by Chairman Chandler that in some counties they were. He added that the legislature had enacted a statute that removed judicial functions from county judges in certain counties only, and for that reason there was no conflict in the language of ORS 133.030.

With respect to ORS 133.020 Senator Burns questioned whether that definition was a true definition of magistrate inasmuch as a magistrate also had authority to render disposition of certain crimes. Chairman Chandler replied that the definition set out the only power that was common to all magistrates and, outside of the authority to perform a marriage ceremony, the power to issue a warrant was the only function common to all.

Mr. Paillette commented that somewhere in ORS there might be another definition of magistrate but he was not aware of it. Senator Burns asked that the staff check to see if magistrate was defined

elsewhere and perhaps a better definition could be found. Mr. Osburn noted that ORS 141.040 provided that "a magistrate authorized to issue a warrant of arrest may issue a search warrant" which in effect adopted the definition in ORS 133.020.

Section 4. ORS 133.037. Detention and interrogation of persons suspected of theft committed in a store; reasonable cause. Mr. Paillette explained that section 4 was the shoplifting detention statute. It had been amended to substitute the provisions of this Article for specific statutory references. It also added attempted theft inasmuch as several police officers had asked him whether subsection (2) covered attempted theft. His position was that under the definition of theft in the criminal code, the minute a shoplifter took any action to appropriate an article to himself, the theft was committed, but there was some question as to whether in that situation the theft had actually been committed or whether the shoplifter had merely taken a substantial step toward its commission. The addition of "or attempted theft" in subsection (1) would clarify any ambiguity that might exist.

Sgt. Inman asked if section 4 authorized a private citizen acting independently or at the direction of a police officer to detain a shoplifter, and he also wanted to know if it gave him immunity. Chairman Chandler replied that it gave immunity to a peace officer, merchant or merchant's employe but would probably not extend immunity to any other private citizen. Mr. Paillette advised that this language was the same as the old statute except that it had referred to shoplifting rather than theft of property of a store. In reply to Sgt. Inman's question he said that he did not read section 4 to cover a detention by a private citizen acting on his own account nor did the old statute contemplate such action.

Sgt. Inman then asked if the subcommittee believed that a private citizen should be given authority to question or detain a shoplifter. Senator Burns was of the opinion that he should not and added that he was somewhat concerned about the constitutionality of a detention statute such as this. Mr. Osburn said there was a Supreme Court case on the old shoplifting statute, but it did not go to its constitutionality. The problem was that the statute was awkwardly worded and suggested that if the merchant saw a person stealing something, it was not shoplifting but larceny. That was one of the reasons the shoplifting statute had fallen into disuse.

Mr. Milbank observed that the addition of "attempted theft" would cause a problem for the absent minded person who innocently picked up an item and put it in his pocket or purse while walking through the store, yet had every intention of paying for the item when he reached the cash register. Under the proposed amendment that person could be picked up by the store detective and detained on a charge of attempted theft and the merchant or his employe would be granted immunity.

Mr. Paillette reiterated his earlier contention that if a person caused a store employe to believe he had done some act that would constitute theft, whether he had left the store or had merely put an item in his pocket, for the purposes of this statute the addition of attempted theft would make no difference because the basis for the arrest was reasonable cause. Also, from the standpoint of protection of the suspect, he would not be damaged regardless of which way the statute was drawn.

Representative Cole moved that section 4 be approved as drafted and the motion carried unanimously.

ORS 133.045 through 133.080. Citation in lieu of arrest. Mr. Paillette noted that pages 7 and 8 of the draft set out the present statutes on citation in lieu of arrest, and this draft made no change in them. They were relatively new statutes, all passed by the legislature in 1969.

Sheriff Truett commented that most cities were not using these sections for the reason that the warrants could not be served outside their own jurisdiction, but the counties were using them. Senator Burns observed that more widespread use should be encouraged because they were enacted in the interest of the defendant.

Sheriff Truett concurred and pointed out that he was sure they would be more widely used if the warrants could be served by city police outside the city. Excepting warrants for certain minor violations, he believed the city police should be able to serve city warrants outside the city limits.

Mr. Paillette said this matter had been discussed during the course of the substantive revision. A preliminary draft had been prepared making it a state crime to fail to appear on a city citation to try to deal with that problem. The draft had been submitted to the League of Oregon Cities but no response was ever received. Also, during the last legislative session the matter was brought up in connection with another bill allowing service of a warrant outside the jurisdictional limits of the court.

Presuming the desirability of such a provision, Chairman Chandler commented that the real problem was defining the kind of warrant to be covered. Sheriff Truett said he would not want to see parking tickets and certain other minor violations placed in that category. Chairman Chandler asked if repeated offenses should be covered, an example being the person who had ignored a hundred parking tickets. Sheriff Truett suggested that problem could be solved by using a dollar amount; if the parking tickets exceeded, for instance, $100, the warrant could be included in the statute.

Senator Burns observed that certainly this subject should be considered at the next legislative session if it was inappropriate to consider it in connection with this draft.

Senator Burns then called attention to ORS 133.075 and pointed out that under the new criminal code if the class of misdemeanor was not otherwise specified in a particular statute, it was considered to be a Class A misdemeanor. In the interest of clarity he suggested inserting "Class A" before "misdemeanor" in ORS 133.075 although he was hesitant to make a person guilty of a Class A misdemeanor for failure to appear on a citation for a violation. He said he was inclined to think that as a matter of equity the punishment in this section should somehow be related to the offense charged.

Mr. Paillette's view was that failure to appear on a citation was comparable to bail jumping. Bail jumping in the second degree was a Class A misdemeanor and was applicable to one who jumped bail having been charged with a violation. Chairman Chandler observed that the integrity of the system demanded that a defendant show up to answer the charge, and he saw no reason why a person who failed to answer should receive a lesser penalty because he happened to be charged with a minor violation. He was of the opinion that if people were to be encouraged to show up in court when they were turned loose on their own recognizance and if the police were to be encouraged to follow that practice, there was nothing wrong with imposing a Class A misdemeanor penalty on them when they failed to appear.

Senator Burns then moved to insert "Class A" before "misdemeanor" in ORS 133.075. The motion carried unanimously.

Section 5. ORS 133.100. Citations for certain littering violations. Mr. Paillette explained that the last session of the legislature had enacted ORS 133.100 which contained reference to the old littering statute, ORS 164.440. The amendment in section 5 merely cured the obsolete statutory reference.

Representative Cole moved to approve section 5 and the motion carried without opposition.

Section 6. ORS 133.110. Issuance; citation. Mr. Paillette advised that section 6 applied a reasonable cause standard for the magistrate to use in issuing a warrant of arrest. The language of the present statute was somewhat awkward because the sentence was split so that an argument could be made that probable cause did not apply to the degree of satisfaction the magistrate had to find for the issuance of the warrant. The amendatory language was intended to make clear that reasonable cause was to be used as the standard for determining that the person charged had committed the crime. It would conform to the same standard of probable cause required to make the arrest.

The second amendment in section 6, Mr. Paillette said, added a violation to the provision authorizing an officer to use a citation rather than a warrant in lieu of an arrest.

Representative Cole called attention to the language, " . . . or on a felony charge which may be deemed a misdemeanor charge after sentence is imposed . . . . " He noted that when imposition of sentence was suspended and the defendant was placed on probation, he was not actually sentenced. The language he referred to would impose a misdemeanor sentence in that situation, he said, even though the defendant had not actually been sentenced.

Mr. Paillette agreed that Representative Cole was technically correct because in most cases the offense would be more likely to be a misdemeanor before sentence was imposed. Under the criminal code the court was given authority to declare an offense to be a misdemeanor and then suspend sentence and also place the person on probation. In effect, it would then be a misdemeanor even though he had not been sentenced. He suggested the question could be resolved by amending the language to read, " . . . or on a felony charge which in the discretion of the court may be considered a misdemeanor . . . . " Another way to amend the section would be to include a specific statutory reference to ORS 161.705, "Reduction of Class C felony or criminal activity in drugs to misdemeanor." However, that would not cover the statutes scattered throughout ORS that still used the old form for penalties. They defined an offense outside the criminal code and carried a misdemeanor option but were not always Class C felonies.

After further discussion as to appropriate language, Senator Burns moved to amend section 6 to read:

> " . . . or on a felony charge which in the discretion of the court may be considered a misdemeanor charge he may authorize a peace officer to issue and serve a citation as provided in ORS 133.055."

Motion carried.

Senator Burns moved to approve section 6 as amended and the motion carried without opposition.

ORS 133.120 Authority to issue. Mr. Paillette advised that ORS 133.120 was not amended by this draft.

Section 7. ORS 133.140. Form. Section 7, Mr. Paillette explained, amended ORS 133.140 to delete the old statutory form and replaced it with a delineation of the specific information to be contained in a warrant. ORS 133.130 would be repealed because it set out the contents of a warrant and would no longer be necessary with enactment of section 7. Subsection (6) was the same as existing law whereas subsection (7) imposed a new requirement.

Senator Burns moved approval of section 7 and the motion carried unanimously.

ORS 133.170. Directed to and executed by peace officer. ORS 133.220. Who may make. Mr. Paillette indicated he had left ORS 133.170 in the Article because it contained a limited definition of peace officer as opposed to the broader definition of the same term in the criminal code which contained the additional phrase, "such other persons as may be authorized by law." For arrest purposes the definition in ORS 133.170 should be retained so as not to include such persons as railroad detectives, campus police, etc. In reply to a question by Senator Burns as to the authority of a peace officer under the criminal code, Mr. Paillette explained that those included in that definition could arrest but they could not serve a warrant.

Chairman Chandler suggested that ORS 133.170 would be clarified by inserting at the beginning of the section, "For purposes of service of a warrant,". Mr. Paillette said the same purpose would be accomplished by inserting "As used in this chapter,".

Senator Burns was in favor of restricting the authority of a private policeman as much as possible, that is, campus police, liquor inspectors, etc. Mr. Paillette replied that if such persons were to be given authority to make an arrest, they should also be given the same protection and immunity as a regular police officer because it was unfair to say to them, "For purposes of enforcing the law, you are a policeman, but when you make an arrest, you are a private citizen." He advised that for purposes of serving a search warrant under the search and seizure draft a police officer was limited to three classes of police -- state police, city police and sheriffs.

After further discussion, Mr. Paillette suggested that the general definition of peace officer in the criminal code be incorporated in this section together with an exception applicable to peace officers serving a warrant of arrest.

The subcommittee directed Mr. Paillette to prepare an appropriate amendment in accordance with the above discussion.

Senator Burns left the meeting at this point. Although a quorum was no longer present, Chairman Chandler indicated that the balance of the draft would be considered to accommodate the law enforcement personnel who had traveled long distances to attend this meeting.

Section 8. Arrest by a peace officer; when and how made. Mr. Paillette explained that subsection (1) of section 8 applied to both warrantless arrests and arrests under a warrant and would repeal a number of statutes, one of which contained a prohibition against arresting under a warrant on Sunday unless such act was specifically authorized.

At the meeting of Subcommittee No. 1 on May 24, a question was raised as to whether an officer was acting as a peace officer or as a private citizen in a situation where he saw a crime being committed outside of the city or county where he worked and attempted to apprehend the individual or to prevent the crime. Subsection (2) attempted to answer that question by saying that if the peace officer made an arrest, he would have the same rights, privileges and immunities as were otherwise provided by law. In reply to an inquiry, Mr. Paillette advised that "peace officer" as used in this section would have the narrow definition applicable to ORS chapter 133.

Tape 10 - Side 2

Mr. Paillette called attention to two bills introduced at the 1971 session of the legislature -- Senate Bills 717 and 718 -- neither of which were enacted. Senate Bill 718 dealt with the problem under discussion but went into more detail with respect to mutual aid agreements between law enforcement agencies and also extended to liability insurance.

In connection with subsection (2) of section 8, Mr. Paillette said that at the last meeting there did not appear to be a particular problem involved with arrests under a warrant because the county, for example, could merely ask another county law enforcement agency in the proper jurisdiction to serve the warrant and make the arrest. The situations that needed to be dealt with were the probable cause arrests when the officer was outside his domain or where the officer was not technically on duty and was outside his own bailiwick when he witnessed a crime. He said it appeared to be sound legislative policy to let the peace officer act as a peace officer in those situations.

Subsection (3), Mr. Paillette said, made no change in present law. Subsection (4) dealt with a warrant and was incorporated by reference under subsection (3). Subsection (5) incorporated the justification sections under ORS chapter 161 with respect to the use of force and deadly force in making an arrest.

Subsections (6) and (7) were the knock and announce provisions and were a codification of case law not set forth in the existing statute. They used the same language as that appearing in the search and seizure draft with respect to search warrants. Subsection (8) gave authority to the officer to break into the premises after giving notice. Subsections (6), (7) and (8) were applicable with or without a warrant.

The subcommittee approved section 8 as drafted.

Section 9. ORS 133.310. Authority of officer to arrest without warrant. Mr. Paillette explained that section 9 deleted the greater portion of ORS 133.310, wrote in a reasonable cause standard and applied it two ways. First, the reasonable cause standard was applied to a "crime" which would include any felony or any misdemeanor, classified or unclassified, and next it was applied to a violation committed in the officer's presence. It eliminated the "in presence"