Tape 18, Side 1, 1094 to end
Side 2, 1 to 1500

COMMITTEE ON JUDICIARY

Subcommittee on Adjudication

June 25, 1974

Members Present: Rep. George F. Cole, Chairman
Sen. Elizabeth W. Browne
Rep. Norma Paulus

Excused: Sen. John D. Burns
Sen. George Eivers
Rep. Lewis B. Hampton

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

Others Present: Hon. Frank Alderson, District Court Judge, Lane County
Mr. Jack Frost, Linn County District Attorney, Oregon District Attorneys' Association
Sen. C. R. Hoyt
Miss Vinita Howard, Motor Vehicles Division
Capt. John Williams, Oregon State Police

Agenda: (1) Approval of Minutes of meeting of June 4, 1974

(2) CLASSES OF OFFENSES; DISPOSITION OF OFFENDERS; Preliminary Draft No. 3; June 1974

(3) RECKLESS DRIVING AND CRIMINAL LIABILITY; Reference Paper; June 1974

(4) SERIOUS TRAFFIC OFFENSES; Preliminary Draft No. 1, June 1974

Rep. George F. Cole, Chairman, called the meeting to order at 10:00 a.m. in Room 14, State Capitol.

Minutes of meeting of June 4, 1974

Chairman Cole moved the adoption of the minutes dated June 4, 1974, after a correction was made on page 14, paragraph 5, line 5. The word "year" was changed to "month". There being no objections, the minutes were approved as corrected.

The Chairman announced that the subcommittee would hear testimony of witnesses before going into work session.

Judge Frank Alderson introduced himself and explained that he was appearing to express his own opinions, that he had not discussed the draft with other individuals and that his views did not necessarily reflect those of anyone else. His main purpose in appearing, he said, was to urge practicality, along with theory, in the considerations being adopted by the subcommittee. Too often, he continued, practical considerations are left to the full committee or the legislature, and it was his opinion that they should be discussed and worked out in subcommittee.

The question to consider, said Judge Alderson, is how the changes will be handled by the courts and whether they will accomplish what the subcommittee intends. He stressed again that he was not advancing any particular process or arguing for or against any particular consideration.

Judge Alderson raised the question whether decriminalizing a first DUIL would necessarily decrease the backlog in district courts. Since it would still be possible to have a license suspended on a first DUIL and the reason many cases are contested is because of the possible suspension, the docketing problem would still exist. Another question to consider, he said, is whether the right to a jury trial can be constitutionally eliminated and whether the subcommittee is certain this can be done.

In answer to a question by Chairman Cole as to what effect the decriminalization of the first DUIL, with the resulting civil procedure rather than criminal, would have on his court, Judge Alderson answered that it would have some effect but that he wasn't certain just how much. He explained that Lane County has a high percentage of criminal cases aside from DUIL and that this would be a factor in the overall docketing problem. In answer to a question, he stated that he favored appeals being directed to the Court of Appeals but didn't believe it would have much of an effect on decreasing district court backlogs. Because a case would be appealed directly to the Court of Appeals, it would be more important for a lawyer to present a case well in district court, which would take more time.

Judge Alderson explained that he opposed subsection (4) of section 4 on page 4 of the draft on Classes of Offenses; Dispositon of Offenders because if a prosecutor has a weak case or if a material witness is no longer available he would probably lose the case because of the barring of "plea discussions". It was his opinion that it would be preferable to show a conviction even though on a lesser charge.

Mr. Paillette explained that it was the intent of the subcommittee to make a first DUIL a traffic infraction and that a subsequent offense would be a crime. The reason for subsection (4), continued Mr. Paillette, was to make certain that a second DUIL would be treated as a crime and not allow a loophole where the defendant could plead guilty to another infraction.

Judge Alderson made reference to the intent of section 8 of the draft on Classification of Offenses; Disposition of Offenders, and Mr.

Paillette explained that in the draft on Serious Traffic Offenses the double conviction with respect to the .15 and DUIL was still an open question.

A decriminalization of minor traffic offenses would have no effect on the overcrowded dockets of the Lane County courts, reported Judge Alderson. Chairman Cole commented that reports have been received from other courts that would substantiate Judge Alderson's statement, and, for this reason, the subcommittee has been considering the decriminalization of first offense DUILs and .15 charges.

He would object, said Judge Alderson, to the culpability language of the criminal code being used in the traffic code and would question the fact that there would need to be that much of a change and whether it would be advisable. It was his opinion that the statutes pertaining to reckless driving are probably all right and that perhaps the statutes relating to careless driving might be considered.

Chairman Cole commented that the subcommittee believed that reckless driving should not be treated as a lesser alternative to the DUIL charge, and that it actually is a more serious violation. The subcommittee wanted to increase the effect of reckless driving not only on the basis of penalty but on the basis of the seriousness of the charge. Judge Alderson stated that he agreed but that he objected to the language of the commentary on page 2, paragraph 3,of the reference paper on Reckless Driving and Criminal Liability.

The subcommittee, said Chairman Cole, was concerned with a person being charged with both a DUIL and .15. Also of concern to the subcommittee is the fact that a double charge is being used for plea bargaining, that a defendant will plead to a DUIL so that the .15 will be dropped because of the possible jail sentence. The subcommittee believed that if they were both traffic infractions there would be no reason for plea bargaining. Judge Alderson answered that a .15 or .10 should remain a crime.

Judge Alderson commented that the present statutory penalties for "hit and run" are grossly inadequate and that he would want to see a change in the penalty. Any "hit and run", said Judge Alderson, should be a crime. The comment was made by Rep. Paulus that complaints had been made by other judges about the low penalties.

Judge Alderson presented a letter from Judge Winfrid K. Liepe, District Judge, Lane County. The letter is attached as Appendix A.

Mr. Jack Frost explained that he is the chairman of the Criminal Law Procedure Committee of the Oregon District Attorneys' Association. He would like, said Mr. Frost, to make available to the Oregon State Bar copies of the draft, Classes of Offenses; Disposition of Offenders, and a copy of his report. He explained that the Bar publication won't be out until the middle of the summer. The Bar Committee, he continued, after studying preliminary draft No. 2, was in agreement with most of the aspects of the draft. The committee agreed that a first DUIL should

be an infraction. Also, he continued, the committee proposes that the Bar support a bill that would repeal the over .15 provision because there is no reason for a separate offense of a DUIL and .15. A recommendation of the Bar Committee, he said, was to re-examine what is meant by "under the influence". Perhaps a determination could be made that if an individual had a certain percent alcohol in the blood he would be guilty of a certain degree of its effects regardless of how he conducted himself, said Mr. Frost.

In order to get the suspended drivers off the highways, said Mr. Frost, accurate and readily available records are needed and a system to stop vehicles for license checks.

The implied consent law should apply to drivers in connection with testing for alcohol count in the blood, said Mr. Frost, and there should be no argument. If an individual is driving and is stopped and asked to take a test, he would have to take it, continued Mr. Frost. The person who drinks occasionally and has a low alcohol count may be driving much more recklessly than the alcoholic with an over .15 who has a tolerance to alcohol, said Mr. Frost. He would agree with the Bar Committee that there should be a re-evaluation of the meaning of "under the influence". Drugs are becoming more of a problem, he said, and there is no way to test for some of them. The Bar Committee did not make a recommendation as to whether .15 should be lowered to .10, but that it was his own opinion that .10 would be a better guage.

The District Attorneys' Association, at a meeting last week, reported Mr. Frost, adopted a resolution approving of the decriminalization of certain traffic offenses and the first DUIL. He stated that he would send the subcommittee a copy of the resolution.

In reference to section 7 of the draft on Classes of Offenses; Disposition of Offenders, there was some concern with the language and the opinion was that whether the district attorney would appear at a trial should not be left strictly to the discretion of the judge, explained Mr. Frost. He suggested that perhaps the language could be changed to "shall not be required to appear". It was his own personal opinion, said Mr. Frost, that on a Class A infraction most district attorneys would just as soon not appear. However, he continued, on a second offense, the district attorney should be given the option.

In his opinion, said Mr. Frost, reckless driving as now defined can be interpreted in so many ways that he would welcome the criminal code culpability language being used in the traffic code.

Mr. Frost related that an objection to the Reckless Driving and Criminal Liability paper would be that it does not incorporate any circumstances, only the act of driving in a particular condition. Mr. Paillette agreed and stated that the subcommittee would probably want to consider adding to the language of the draft.

In regard to plea bargaining, said Mr. Frost, a judge will use discretion in sentencing no matter how many mandatory requirements are adopted and prosecutors will negotiate in order to see justice done. Plea bargaining, in his opinion, serves better justice in many instances.

A defendant may be willing to admit a lesser offense where he won't to a more serious charge, and in a case that would be difficult to prove, the prosecutor would lose the case without plea bargaining.

Mr. Frost explained that he would prefer to see a distinction made in the types of "driving while suspended offenses". Mr. Paillette explained that future responsibility suspended driving under ORS 486.021, page 3 of the draft, would be an infraction.

According to Mr. Frost, an easier, less complicated way to handle suspended sentences is needed. There are difficulties in handling the paper work and doing the followup work on a suspension order that is needed for a good case in court.

Judge Alderson commented that he would prefer to see an absolute maximum speed imposed with no exceptions or a basic rule law.

Mandatory jail sentences, explained Judge Alderson, would be difficult for a judge to work with as is required by the present statutes and the over .15 charge.

A great problem exists for the courts, stated Judge Alderson, in that more policemen are hired and more arrests made but no money is provided for judges and prosecutors.

Appendix A, Minutes of June 4, 1974, letter from Hon. Sam Hall, District Judge, Curry County

Mr. Paillette referred to paragraph (2) of Judge Hall's letter and explained that the word "restriction", as used in P.D. No. 2 had been modified in P.D. No. 3.

Paragraph (3) of the letter from Judge Hall dealing with section 5 of the draft raises a question regarding the civil trial provision.

Paragraph (4) refers to the commentary of section 7, said Mr. Paillette, and the commentary can be rewritten. It wasn't contemplated that the officer would argue the case. Chairman Cole suggested that the judge could be given the discretion to decide. Rep. Paulus stated that the commentary should be changed to indicate that the officer could be a witness only.

In paragraph (5) of his letter, which relates to section 8 of the draft, Judge Hall raises the question that if a defendant were charged with a civil DUIL or .15 and as a result of the same episode also charged with reckless driving and in order to prove the charge of reckless it would be necessary to prove the fact of DUIL or .15, would the defendant not be allowed to plead innocent to the civil charge when the DUIL or .15 had already been proven. Also, Judge Hall asked if an officer is allowed to include the fact element of DUIL or .15 in his assessment of driving to warrant a reckless charge, which would not

otherwise be reckless, whether it would encourage an increase in the number of reckless charges in which the manner of driving alone would not result in a verdict of guilty. After considerable discussion, Mr. Paillette agreed to do further research on the subject.

At 12:00 noon the subcommittee recessed for lunch, reconvening at 1:30

In paragraph (6) of the letter from Judge Hall relating to sections 3 and 9, the members agreed that a judge should have the authority to suspend part as well as all of a fine. Mr. Paillette agreed to add further commentary to the section.

Paragraph (7), dealing with section 10 of the draft, of Judge Hall's letter referred to the commentary on the possibility of each municipality having the option to adopt Senate Bill 403 and be subject to the same appellate procedure. Judge Hall referred to an old Oregon case which would make it necessary to change the statute for a city to impose jurisdiction on a state court. Mr. Paillette advised that he had been unable to find the old case mentioned. He did find other pertinent cases, he said, and had a memo prepared by Gene Hallman on the constitutionality of allowing cities the option, and it was his belief that there is a serious equal protection question. There would probably be a problem, said Mr. Paillette, in allowing a city to allow de novo appeals to circuit court and another city to have the option to restrict its appeals to the Court of Appeals. Chairman Cole suggested changing de novo to district court instead of circuit court from justice of the peace and municipal courts and have it uniform.

Mr. Frost brought up the question of giving the defendant the choice as to where he would want his case heard. If he would choose to have it in either justice of the peace or municipal court, he would then waive his right to appeal, and if he chose district court, he could then appeal, said Mr. Frost. The decision would be with the defendant and not the court. This was suggested by Judge Hall in his letter. Chairman Cole asked whether the Consulting Committee had discussed this and particularly in reference to input from cities and counties. It was discussed, said Mr. Frost, from the standpoint of giving the defendant the option and if there was the possibility of appeal there would then be a record on which to appeal. Mr. Paillette commented that giving the defendant the option is an entirely different matter from giving the cities the choice.

Rep. Paulus pointed out that in some areas a defendant would have to travel a great distance to appear in district court as compared to someone living in a metropolitan area.

Mr. Paillette was asked to add to the language of the draft to include giving the defendant the option as to where a case would be heard.

Appendix B, Minutes of June 4, 1974, letter from Hon. P. M. Bagley, District Judge, Multnomah County

The second paragraph of Judge Bagley's letter supports the concept of administrative procedure for minor offenses and the handling of

major offenses through the court. Mr. Paillette referred to paragraphs 3 and 4 of the letter and pointed out that they are contrary to the direction the subcommittee has taken so far.

Regarding paragraph 5 of Judge Hall's letter, Mr. Paillette explained that in the draft on Serious Offenses there is a section dealing somewhat with the question but only with the aspect of traffic crimes and Class A infractions from the standpoint of probable cause arrest. His main concern, said Mr. Paillette, was that with respect to the implied consent statute an arrest will be needed if DUIL is made a traffic infraction. With respect to other infractions, he would recommend going along with Judge Bagley's suggestion to cite only on probable cause and not to arrest. Mr. Paillette remarked that the question was raised at the conference of district attorneys as to what can be done to make certain that an individual, who is from out of town or state and is arrested, posts bail so that he will later appear. One of the answers would be, except for probable cause Class A infractions, that it wouldn't make any difference whether the defendant shows up or not, but there should be a way to make certain that bail is posted.

Miss Howard explained that communities along the state border have a problem if an out of state driver is cited because nothing can be done to make him post bail. If an Oregon driver doesn't show, a court can send a recommendation for suspension until an appearance is made.

Mr. Paillette explained that the Serious Offenses draft specifically gives arrest authority on Class A infractions. If there is an arrest for DUIL and a later charge of .15 there is probable cause arrest authority for DUIL, but there is the question regarding the .15 arrest, and it is this question that he attempted to clear in the draft. Chairman Cole suggested leaving the language as it is now written.

Mr. Paillette asked whether the subcommittee wishes to make any changes with respect to procedures for charging Class B, C and D infractions since there is no stipulation that a citation will be issued for these other infractions, although the implication is there. Chairman Cole suggested leaving the draft as it is until a determination is made as to what infractions will be included in the various categories.

Letter from James M. Mattis, Legal Consultant, University of Oregon

The letter from Mr. Mattis is attached as Appendix B.

Chairman Cole pointed out that the second paragraph in the letter suggests defining reckless driving and that the subcommittee had already done this. Mr. Paillette, in answer to a question by Rep. Paulus, explained that the definition is incorporated in the reference paper on Reckless Driving. Rep. Paulus stated that the paragraph raises a point in that as long as reference is made to reckless driving and decriminalization there will continue to be confusion. To eliminate confusion that will be created she suggested substituting "dangerous driving" as the crime.

The suggestion was made in the third paragraph of the letter to change section 4, subsection (3) on proof of any previous conviction to Class A traffic infraction only. Mr. Paillette made the suggestion of changing the language to read"of the Class A traffic infraction or the traffic crime". Chairman Cole agreed.

Mr. Frost explained that the Consulting Committee had discussed, as was stated in the first draft, proving the previous Class A infraction conviction as an element of the traffic crime on that offense. One of the elements of the traffic crime on a second DUIL would be to prove that there was a previous conviction of the same offense, he said. The problem is solved as the draft is presently written in that the prior conviction would be known to the court but not to the jury. He stated that he was concerned that if the prior conviction is in fact an element of the traffic crime of DUIL if there would be a constitutional or due process problem in the fact that it isn't proven. Chairman Cole agreed that there could be a question since it didn't involve just a determination in sentencing but a determination of whether the defendant would be guilty of the crime. Mr. Paillette agreed that it was a good point but that it wasn't being directly dealt with in the draft. Mr. Frost added that from the standpoint of selling the procedure it might be difficult because the consequences for the first offense are light and extremely strong for the second. In answer to a question by Chairman Cole, Mr. Frost said that he favored the way the draft was written, and, Mr. Paillette remarked, the Consulting Committee agreed to leave the decision to the Judiciary Committee.

Mr. Paillette stated that his personal opinion would be that a previous conviction should be pleaded and proven and that the jury should know about it. Mr. Frost said that it appears hypocritical, but that defense lawyers would object to making a conviction known to the jury. Mr. Paillette suggested that one way to solve the question would be to write in the requirement that the state or the prosecutor plead and prove either a Class A infraction or a crime without specifying what the offense was.

Mr. Paillette explained that the draft provision came from the Consulting Committee and that nothing had been done to it by the subcommittee. Rep. Paulus stated that she would favor leaving the provision in the draft.

In his paragraph dealing with section 6, Mr. Mattis suggested changing the word "shall" to "need". Rep. Paulus stated that doing this would bring up the equal protection question where one city might have the finances to provide counsel and another wouldn't. The members agreed to make no changes in section 6.

Section 5(1). Mr. Paillette stated that the paragraph in Mr. Mattis' letter refers to trial by jury in criminal cases. It was agreed that the commentary would be written to clarify the section.

Section 7. Mr. Paillette explained that Mr. Mattis suggests using the term "state's attorney" rather than "district attorney". Mr. Paillette stated that in the draft "district attorney" was defined to

include "city attorney", and Chairman Cole pointed out that the word "state" isn't used. Rep. Paulus indicated that the word "state" does not appear in subsection (1) as mentioned by Mr. Mattis. It was agreed to eliminate (a) and (b) would be incorporated in subsection (2).

CLASSIFICATION OF OFFENSES; DISPOSITION OF OFFENDERS; P.D. No. 3

Mr. Paillette announced that the changes made in the draft are based on the decisions of the full committee at the meeting of June 12. The exceptions, continued Mr. Paillette, were amendments presented by Miss Howard after the meeting on the 12th, and he called on Miss Howard to comment.

Miss Howard called attention to the proposed language in subsection (1)(d) which, she stated, was inadvertently typed as "subsections (1), (2) and (4) and should read "subsections (1), (4) and (5)".

Section 4.

Miss Howard called attention to the proposed language in subsection (1)(d) which, she stated, was inadvertently typed as "subsections (1), (2) and (4) and should read "subsections (1), (4) and (5)". She said that 486.211(1) is the failure to file reports that are required by the division in case of an accident, (4) is the financial responsibility suspension that is imposed for a conviction on a serious offense such as DUIL, and a suspension of that type becomes indefinite until proof of future responsibility is filed, and 486.211(5) is if there is a court ordered judgment as a result of an accident --in other words, a judgment provision with which a defendant shall comply, said Miss Howard.

In answer to a question by Chairman Cole, Miss Howard answered that she wasn't absolutely certain that "accumulated traffic infractions" was needed as long as the chapter 482 reference is included. Chairman Cole stated that it is included in chapter 482. Motor Vehicles Division accumulated suspensions, continued Miss Howard, would be under chapter 482. It was agreed that "resulting from accumulated traffic infraction" should be deleted. Miss Howard suggested substituting "...any driver's license suspension from failure to comply with a court ordered suspension or revocation from any order...".

Chairman Cole referred to subsection (5) of 486.211, and Miss Howard stated that the section relates to judgments filed when one party claims damages sustained in an accident and the guilty party has no insurance. Chairman Cole replied that if the damages are for less than $200, no accident report needs to be filed and Motor Vehicles would not be aware of the claim. If damages are for over $200, then MVD would be aware and would issue a suspension for reason of financial responsibility, continued Chairman Cole, and therefore this would involve only those accidents where no accident report would be filed. In answer to a question by Chairman Cole, Miss Howard answered that there were 921 unsatisfied judgments in 1973 and that before they are forwarded to MVD a defendant has several days to comply. Chairman Cole

raised the question whether this form of suspension should be subject to traffic crime. After some discussion, the decision was reached to not make changes in 486.211(5).

Chairman Cole referred to the question raised by Mr. Frost as to how a traffic crime should be charged against an individual--whether it should be done with a citation, whether the district attorney should be given the authority to amend a citation if in fact an infraction should be a crime, or whether it should be limited to the district attorney filing a complaint in case of a traffic crime.

Mr. Paillette commented that the statutes on the Uniform Traffic Citation are workable and wouldn't want to change them, but perhaps, he continued, a statute could be included to allow the district attorney to amend if the traffic citation would actually be for a crime.

Mr. Frost stated that if an arresting officer cites for an infraction and actually the offense is a crime, he can arrest or issue a Uniform Traffic Citation as for any misdemeanor. It still can, he continued, be directed through the district attorney for filing. Chairman Cole asked Mr. Frost if the district attorney had authority to amend and refile without changing the Uniform Traffic Citation if that would be a workable procedure, and Mr. Frost answered that it would. Mr. Paillette remarked that his only concern would be that the UTC provision not be changed.

Mr. Frost explained that from the prosecutor's standpoint one of the problems with the UTC is that it is necessary to prove that the offense occurred at a particular time and date while in the prosecution of any criminal charge proof has to be presented that the crime occurred during the period of the statute of limitations. Mr. Frost remarked that he wondered what would be reasonable grounds for amending a citation, and Chairman Cole stated that it would be done when an infraction would actually be a crime because of a prior conviction.

In answer to a question by Mr. Paillette on his opinion regarding specific provisions on probable cause arrest authority for either a Class A infraction or traffic crime and whether there would be an advantage from an officer's point of view in also issuing a citation, Captain Williams stated that there could be considerable objection from law enforcement officials if there were specific offenses for which an officer would not have the right to arrest. There would be occasions, continued Captain Williams, when an officer would want to arrest for any infraction.

Mr. Frost explained that if a UTC citation were issued for a DUIL, even for an infraction, it would be possible to prosecute on a crime if it was for a second offense. The problem, continued Mr. Frost, would be that the crime would be charged after discovering the citation was issued for a second offense and that it should be on a criminal basis rather than on the UTC. It was his suggestion that the traffic crime should be handled the same as other crimes. Chairman Cole explained

that an officer can now issue a citation for a traffic offense, and if he later discovers the driver has a suspended license he can then issue a new citation and have it served. If, he continued, an officer cited a driver for a DUIL and then later discovered the driver had a previous offense he could then issue a new citation on a criminal charge.

Mr. Paillette explained that if an officer is given the option of either taking a driver into custody or issuing a citation and he should decide to issue a citation, he could then use the UTC.

Captain Williams stated that the statutes require that all traffic violations be filed on the UTC. Mr. Frost explained that there could be a problem when a traffic infraction would become a crime because of a previous offense and the district attorney would issue the citation for the crime and would be required to use the UTC.

After considerable discussion the subcommittee members agreed that a police officer should have the option to either arrest or issue a citation. The district attorney would have the option of either having the defendant go to trial on the citation that was issued or to file a complaint against the defendant on a criminal charge. If, after a citation is issued by the police, it is discovered there was a previous offense, the police may either issue a complaint or go to the district attorney and have a complaint issued. ORS chapter 484 would be amended so that an individual other than a police officer could use the UTC forms and some of the case law interpreting the UTC would be repealed so that notice of an offense or crime would suffice that it in fact occurred rather than proof. Mr. Paillette stated that some of the rules applied in criminal cases about fair notice and material variance could be used, and as long as the defendant would receive fair notice and know of what he is accused, it would be adequate to charge the offense.

Subsection (1), paragraph (f). Senator Browne raised a question as to how a previous offense could be used as an element of a crime in a subsequent offense and whether it would be ex post facto. Mr. Paillette explained that the pragraph does not state that something that was legal before would now be criminal, but that it does state that something that was done before would have an effect on the sentence that would be imposed on a subsequent offense. Mr. Paillette agreed to research the question, which would affect only the new language.

Subsection (1), paragraph (e). Chairman Cole asked whether there were objections to changing .15 to .10 and to leaving the offense an infraction. It was his opinion, stated Chairman Cole, that it would eliminate plea bargaining. It was agreed that both offenses would remain Class A infractions.

Subsection (4). Mr. Paillette explained that the subsection was written into the draft so that a person could not plead "guilty" to an offense in exchange for a dismissal of the crime originally charged. In this way, a second Class A infraction, which would be a crime, would not be treated as another infraction. Miss Howard pointed out that if

DUIL and .10 are both traffic infractions that the public would need some assurance that a repeat offender would not be treated lightly. The members agreed to delete "to engage in plea discussions or" of the proposed language in subsection (4).

Section 9.

Subsection (1). Mr. Paillette pointed out that he deleted "restricted" from the section and substituted the word "limit" at the request of the Motor Vehicles Division. This was to get away from any implication that the word restricted was being used with respect to a restriction such as using corrective lenses. It still would, he continued, allow the judge to limit the defendant's driving during specified hours, to and from work, and etc.

Subsection (2)(b). The suspension period of 90 days was changed to one year, reported Mr. Paillette. In answer to a question by Chairman Cole regarding correlation with the automatic suspension now in the vehicle code, Mr. Paillette explained that he didn't amend any other statutes in the draft dealing with Motor Vehicles Division and had intended to raise the question with the committee. Miss Howard stated that MVD would favor a revision on automatic suspensions so they could be imposed at the time of conviction by the judge. Chairman Cole commented that revision of automatic suspensions could be added to subsection (5). ORS chapter 482.430 and 482.450 would need to be changed, commented Miss Howard. Mr. Paillette suggested that "any Motor Vehicles Division mandatory suspension that the judge would impose at the time of sentence" be added to section 9. Chairman Cole asked Mr. Paillette to revise the language so that any suspension a judge might impose would be concurrent with any mandatory suspension so there wouldn't be the possibility of a double penalty. Miss Howard explained that chapter 482.580 dealing with court ordered mandatory suspensions should also be revised.

The Chairman explained that after the necessary changes are made by Mr. Paillette, Preliminary Draft No. 3, Classes of Offenses; Disposition of Offenders would be sent to the full committee along with a research paper on quasi ex post facto and collateral estoppel.

SERIOUS TRAFFIC OFFENSES; P.D. No. 1

Section 1. Mr. Paillette explained that at the time the draft was written, the committee's wishes were that .10 would be a crime and that this would now need to be changed. As the statutes read now and as the draft is now worded reference is made to being under the influence of intoxicating liquor, dangerous drugs or narcotic drugs, and a question that was brought up by the district attorneys related to "other drugs" such as aspirin or prescription drugs that might affect a person's ability to operate a motor vehicle. Captain Williams indicated that there are some tests to determine whether a person might be under the influence of drugs. Miss Howard added that there were 29 convictions in 1973 as a result of being under the influence of drugs.

Section 2. Mr. Paillette reported that .15 is changed to .10 and that the section would be combined with section 1 to make .10 on a first offense an infraction. Subsection (5) was deleted and added to section 3, continued Mr. Paillette.

Section 3. The section deals with mandatory suspensions, said Mr. Paillette, and referred to paragraph (c) to point out that .10 had been included. Miss Howard stated that the section would have to be amended to allow a judge to impose a suspension.

Section 4. Under subsection (1), reported Mr. Paillette, chapter 482.540 is amended to increase the suspension for refusal to take a breath test from 90 to 180 days.

Section 5. Mr. Paillette explained the section deals with hearing on a suspension and that it is a housekeeping amendment with a reference to 483.992, which would be repealed since DUIL will be restated by section 1.

In answer to a question by Sen. Hoyt, Captain Williams explained that a police officer can stop an automobile simply to check the driver's license but that it isn't usually done unless the vehicle is stopped for another reason. A driver is required to show his license on demand, continued Captain Williams, and if a driver were required to take a breath test, it would be extremely helpful to the officer.

Section 6. The proposed new language "to the person's address as shown by division records" was included to tie in with section 7, said Mr. Paillette.

Section 7. The specific language wasn't adopted by the committee, but the problem of driving while suspended or revoked was discussed with respect to notices, said Mr. Paillette. It is proposed that the existing statute would be repealed and section 7 would be substituted, he said. The section would delete the necessity of a personal notification of suspension. Also, continued Mr. Paillette, if a person fails to notify MVD of a change of address and does not receive a notice or if he refuses to sign a receipt for certified mail containing the notice, he cannot use the fact that the suspension was not received as a defense.

Chairman Cole raised the question whether suspensions ordered by a judge would apply to sections 6 and 7 and whether they would be MVD suspensions. The consensus was that a suspension order should indicate whether it was ordered by the court or MVD. Mr. Paillette stated that a court should not be involved with mailing out suspension notices. An offense under section 7 would be a traffic crime.

Section 8. Chairman Cole explained that the section would do away with the provision that makes it possible for a defendant to be charged with both a .10 and DUIL offense. After some discussion on consolidating the two offenses, it was agreed to allow a defendant to be charged with both a .10 and DUIL but be convicted on only one charge. Mr. Paillette was directed to delete section 8. Mr. Paillette called attention to a

"Memo", attached as Appendix C, dealing with legislative history relevant to DUIL and .15 crimes.

Section 9. No changes were made in the section, which deals with the implied consent law.

Section 10. Mr. Paillette pointed out that in subsection (1)(b) .10 has been changed to .08 and that it would be necessary for an individual to have more than .05 percent but less than .08 percent by weight of alcohol in his blood before it would be indirect evidence that may be used to determine whether or not he was under the influence of intoxicating liquor.

Subsection (1)(c) has also been changed, reported Mr. Paillette so that there would be a disputable presumption of being under the influence if a person has a .08 rather than a .10.

Mr. Frost referred to subsection (3) of section 9 and wondered if there was a specific reason for not allowing the refusal to take a breath test to be admissible in any civil or criminal action. He questioned whether there was a legal basis but didn't believe there was a constitutional problem. Mr. Paillette replied that the legislature was perhaps concerned with the civil aspect and the possibility of subsequent lawsuits and that it could be used against an individual in a later lawsuit to collect damages.

Chairman Cole suggested the subcommittee make no changes in section 9 and specifically subsection (3) and let the full committee consider it.

Rep. Paulus stated that she would be in favor of lowering the blood alcohol percentage to .05 and on a second offense it would be a crime. She also favored strengthening the provisions pertaining to taking a breath test. It was his opinion, said Mr. Paillette, that it would be difficult to pass such a proposal and that by classifying DUIL and .10 as infractions the jury trial and other protections are already being eliminated.

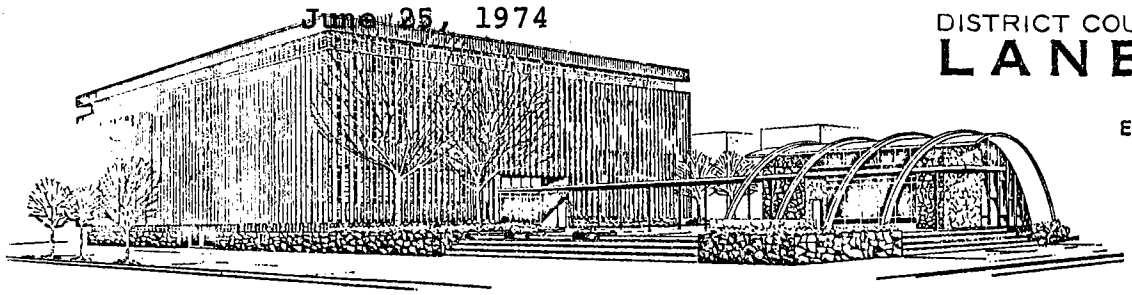
The meeting was adjourned at 4:50 p.m.

Respectfully submitted,

Anna McNeil, Clerk
Subcommittee on Adjudication

Subcommittee on Adjudication
June 25, 1974

APPENDIX A



DISTRICT COURT FOR
LANE COUNTY
COURTHOUSE
EUGENE, OREGON 97401

DISTRICT JUDGES
WILLIAM A. BECKETT
FRANK R. ALDERSON
WINFRID K. LIEPE

June 24, 1974

TO: COMMITTEE ON JUDICIARY SUBCOMMITTEE ON ADJUDICATION

I just received "Preliminary Draft #3." Please note the following suggestions. I forward them without comment, since there is not enough time before your meeting of June 25, 1974:

I. The following should stay traffic crimes

1. Driving under the influence of narcotics or dangerous drugs

2. Driving under the influence of intoxicating liquor

a. Causing property damage of any kind, whether property of defendant or another

or b. Causing physical injury to any person, whether to defendant or another

or c. Where defendant refuses to take a breathalizer test

3. Driving with a blood alcohol content of .10% by weight or greater

II. Conviction or plea on a traffic infraction should not be available in other criminal or civil proceedings for admission or collateral estoppel. Add to Section 1 (2):

"Any plea, finding or proceeding upon any traffic infraction shall not be used as evidence or for purpose of res adjudicata or collateral estoppel in any other civil or criminal proceeding."

Sincerely yours,

Winfrid K. Liepe

Winfrid K. Liepe
District Judge, Lane County

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June 24, 1974

Representative George Cole, Chairman
Adjudication Subcommittee
Joint Committee on Judiciary
Room 14, State Capitol
Salem, Oregon 97310

Dear Representative Cole:

As you probably know, the consulting committee of the Joint Judiciary Committee will be meeting in Salem at the end of this week. At that time, I will have an opportunity, along with other subcommittee members, to review in greater detail, preliminary draft No. 3 of the article concerning classes of offenses and disposition of offenders--particularly the suggested substantive changes. However, I should like to make a few comments for your committee's consideration as it reviews the draft on Tuesday.

Section 4(1)(c). I suggest that at whatever point in time the subcommittee addresses itself to defining the content of "reckless" driving, the committee title that offense different from its present title. In my conversations with various people around the state concerning the import and impact of the "decriminilization" of minor traffic offenses, many are confused to see the reference to "reckless" as a traffic crime but see the initial DUIIL as a traffic infraction. Some of this confusion results, I believe, because "reckless" in present practice often is the lesser offense. In order to further the legal fact that some forms of driving (including behavior which may involve or come about because of an alcoholic beverage usage) may result in being charged with some offense other than DUIIL or .15, I urge the committee to utilize the titles suggested in alternate sections 1 and 2 of the reference paper by Don Paillete drafted June 19, 1974 which refers to this type of crime as being "dangerous driving in the first or second degree" and that that terminology be substituted for paragraph (c) of Section 4.

Section 4(3). Although I still doubt the need or effectiveness of subsection (3) of Section 4, the internal logic of its sentence structure disturbs me also. Assuming the committee, like the consulting committee, is desirous of retaining the provision you might consider the following language as a substitute:

In any request for a jury trial of a traffic crime as described in paragraph (f) of subsection (1) of this section, proof of previous conviction of the Class A traffic infraction [shall be by a certified copy of the defendant's driving record which] shall be submitted only to the trial judge and the facts of the previous conviction shall not otherwise be made known to the jury. [Bracketed material optional.]

Section 6. Somewhat to my surprise, I have encountered a few administrators of cities who have felt somewhat offended that the statute would by law necessarily preclude appointment of counsel for indigents for "petty" offenses. The U.S. Supreme Court has made clear that under the Constitution, the state need not provide counsel for petty offenses. Stevenson v. Holsman, 254 Or. 94 (1969), is perfectly clear that in those instances where no loss of liberty is possible, no counsel need be provided. I believe that section 6 should be an affirmative statement that no counsel need be provided for a traffic infraction, however, this policy can be accomplished by substituting the word "need" for "shall" and yet not by statute preclude something of a local option.

Section 5(1). Depending on whether or not the committee provides by statute for city attorney prosecution of state traffic offenses in municipal court, it may be necessary to amend ORS 221.349 relative to trial by jury in municipal court in order for sec. 5(1) to be fully implemented.

Section 7. The word "state" never appears in subsec. (1) of sec. 7 and therefore that term need not be defined in subsec. (2). However, I think the term "state's attorney" should be substituted for the term "district attorney" in order to avoid confusion with the term which is in wide use and has a wide understanding under our present system of government. Additionally, the committee should consider giving prosecuting attorneys a little more discretion in deciding whether or not to appear. Therefore, I suggest that this section read as follows:

Section 7. Counsel for State. (1) At any trial involving a traffic infraction only, the [district] state's attorney [shall] need not appear unless required by the trial judge.

(2) As used in subsection (1) of this section [; (a) "State" includes, where appropriate, political subdivisions and municipalities. (b) "District] "State's attorney" includes, where appropriate, a district attorney, city attorney and county counsel.

Sincerely yours,

James M. Mattis
Legal Consultant

JMM:is
cc:Don Paillette

MEMO

TO: Don Paillette

FROM: Gene Hallman

SUBJECT: Legislative history relevant to the question of whether DUIL and .15% are separate crimes.

House Bill 1216 (1971).

HB 1216, as originally introduced, had three basic provisions. First, it would authorize a pre-arrest breath test. Second, it would reduce the disputable presumption of under the influence from .15% to .10% and create a conclusive presumption at .15%. Third, it would create a separate crime of driving with more than .15% alcohol in the blood and provide that one could plead to or be found guilty of either .15% or DUIL if charged with one.

As finally enacted, the bill merely reduced the disputable presumption from .15% to .10%.

Senate Bill 54 (1971).

SB 54 was introduced after the separate crime provisons for .15% were deleted from HB 1216. SB 54 made it a crime to drive with more than .15% alcohol in the blood and provided for more severe penalties than were provided for DUIL.

Hearings on HB 1216 and SB 54.

Hearings were held on HB 1216 and SB 54 before the House Judiciary Committee, the Senate Criminal Law and Procedure Committee, and the Select Committee on Traffic

Safety (Senate).

At the April 2 meeting of the House Judiciary Committee the problem of conclusive presumptions was discussed. There were questions as to whether there could be a conclusive presumption in a criminal statute. The committee seemed to agree that it was more desirable to have two separate crimes than to have a conclusive presumption. (This is confusing as § 11(3) of original HB 1216 already made .15% a separate crime. The committee never appeared to discuss this.) It was suggested that the bill be amended to delete the conclusive presumption language and create a separate .15% crime.

The committee then discussed the matter of prosecution for DUIL and .15%. One representative said "Can't you get him for both crimes then?" Another replied "That's what we objected to wasn't it?" (apparently referring to the original bill. Later it was stated that the D.A. has a choice of going on .15% or going on DUIL. The consensus of the committee seemed to be that the bill would give the prosecutor discretion to go on one or the other. "What you are saying is that in any case of this kind the D.A. would have to chose which route he was going to go."

It should be noted that the committee was only discussing HB 1216 and possible amendments. SB 54 was not introduced at this time.

On April 26 the Traffic Safety Committee considered HB 1216. At this time the bill had been amended to delete

everything except the lowering of the disputable presumption. Rep. Crothers testified and outlines the original bill. He stated that it would have made .15% a separate crime. This was deleted.

Rep. Paulus testified. She first outlined the problems with the conclusive presumption in HB 1216. She then passed out copies of a proposed separate bill which would make driving with .15% illegal. This subsequently became SB 54. She stated that she wanted the wording back in HB 1216 but decided on a separate bill. She stated that the bill she passed out was in effect already in New York and Nebraska.

Rep. Paulus also stated that the new .15% bill would do exactly the same thing as a conclusive presumption. The only difference was that it would be a separate crime.

The Senate Criminal Law and procedure Committee discussed S.B. 54 and asked Al Laue of the Attorney General's office to testify on some of the legal problems of the bill. Some of the committee thought that DUIL would be a lesser included offense of .15%. Laue said this was incorrect. In response to another question Laue said he did not know if a person could be legally prosecuted for both DUIL and .15%.

Conclusion.

It appears that in both the House and the Senate the question of double prosecution was not explored in any detail.

In the House most committee members appear to have

been under the impression that there could be no double prosecution for the two separate crimes. This conclusion is based upon:

1) Several comments at the April 2 meeting to the effect that a prosecutor would have to elect which statute to prosecute under.

2) The separate crime was intended merely as a method of getting around the problems of a conclusive presumption. It was not intended to do more.

In the Senate there was substantially less talk about the double prosecution problem. Rep. Paulus stated that the separate crime was intended to do the same thing as the conclusive presumption. The committee took no action to clear up the question after Al Laue said he did not know if there could be double prosecution.

It should be noted that the double prosecution problem was originally brought to the attention of the legislature on Feburary 16 in a statement of the A.C.L.U. on HB 1216 (at page 4). There were no references to this statement in any of the hearings.so it is unclear whether it was ever considered.