PROPOSED

OREGON CRIMINAL PROCEDURE CODE

FINAL DRAFT AND REPORT - NOVEMBER 1972

CRIMINAL LAW REVISION COMMISSION

311 State Capitol – Salem

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* Subcommittee Chairman

FOREWORD

In 1967 the Oregon Legislature created the Criminal Law Revision Commission and assigned it the task of revising the state's law of crime and criminal procedure. The Oregon Criminal Code of 1971, prepared by the Commission and approved, with amendments, by the 56th Legislative Assembly, replaced a century-old substantive criminal code and completed Phase I of the criminal law revision project.

Phase II of the project, the proposed Criminal Procedure Code, representing the first general modernization of our procedural laws since 1864, finishes the major work of the Commission. The structure of the revised procedure code—a logically integrated and planned format—meshes the many new provisions with those statutes we have retained and rearranged to provide a systematic sequence of sections from Arrest to Work Release.

Included among the numerous procedural changes recommended are the first overall reforms ever attempted in this state in the complex and controversial areas of: (1) Pre-Trial Discovery; (2) Plea Discussions and Agreements; (3) Release of Defendants (bail); and (4) Search and Seizure. In addition, significant revisions are suggested in the statutes dealing with grand jury and indictments, plus a proposed constitutional amendment to permit, after a probable cause preliminary hearing, charges to be filed in circuit court by a district attorney's information. Statutes to govern the stopping of persons by peace officers are spelled out in detail. Rules relating to former jeopardy are defined and clarified. And, new statutes controlling the use and disclosure of presentence reports have been drafted.

The proposed Criminal Procedure Code embodies many other procedural innovations intended to simplify and improve the complicated mechanisms to which society looks for the delicate balancing of its collective interests and those of the individual defendant charged with crime. The great common denominator that underlies any criminal procedure rule, and against which that rule must ultimately be tested, is the U. S. Constitution. Judge Henry Friendly once said that we may look upon "the Bill of Rights as a code of criminal procedure." Without question, the most difficult problem areas in the field of criminal procedure are constitutional in nature; moreover, any of this state's rules must pass muster of the Oregon Constitution.

Certainly, no single area of the law has undergone more upheaval during the last decade than criminal procedure; and this has resulted chiefly from United States Supreme Court decisions. Undoubtedly, more major changes lie ahead. Judicial interpretation of the Bill of Rights and its application through the Fourteenth Amendment to state criminal matters will continue to make the drafting of criminal procedure statutes a chancy business at best.

The Commission believes its proposals measure up to the stringent constitutional requirements, while protecting the law-abiding community and meeting the legimate needs of law enforcement. However, the hard process of drafting and debate that preceded this report makes us fully aware that some of our findings may be disputed and our proposals criticized in certain particulars. Nevertheless, we think that, on balance, the new code will make the administration of criminal justice faster, fairer and more efficient.

Some preliminary planning and research on criminal procedure began in the Fall of 1970; however, the bulk of the work on this phase of the project was done between June 1971 and October 1972. During this period we held 28 subcommittee meetings and 14 meetings of the full Commission, five of which were two-day meetings. Our methodology was the same as was employed in writing the new substantive code: Research and drafting, planned and supervised by the project director, consisted of an examination and analysis of existing Oregon laws, a comparison of them with the laws of other states and model codes, and preparation by the staff and other reporters of preliminary drafts.

The preliminary drafts of the separate Articles with explanatory commentary and research papers were submitted to one of our three subcommittees for the initial discussion. The first drafts

reflected the new law or changes in the old law that appeared necessary or desirable, with the background information laying the groundwork for discussion of the policy questions raised thereby. Each preliminary draft was revised or amended as determined by the respective subcommittee, and once a draft was approved for adoption it was then further examined, discussed and refined during meetings of the full Commission. Upon receiving tentative approval, the draft was distributed to the various legal, judicial and other interested groups throughout the state for their evaluation.

The Commission is indebted to the many persons who met with us and assisted immeasurably with their constructive comments and advice. Professor George M. Platt, University of Oregon Law School, was reporter for the Search and Seizure Article, a mammoth and contentious subject, which includes among its new features the first attempt by any state to codify the rules on warrantless searches. The article on Pre-Trial Discovery, largely the work of John Osburn, Solicitor General, Department of Justice, tries to deal rationally and realistically with a difficult and sensitive issue. Members of the Oregon State Bar Committee on Criminal Law and Procedure and the Oregon District Attorneys' Association were particularly helpful in bringing a wide range of knowledge and experience to this project. Also, we wish to thank the Oregon Sheriffs' and Police Chiefs' Associations whose representatives assisted us, especially in our work on arrests and related procedures. Many other members of the Bench and the Bar of this state also helped with this important undertaking and we warmly thank them all.

This final draft and report, as did the 1970 publication, sets forth the text of the sections, with most of the new or amended sections followed by commentary describing the purpose of the particular section discussed and, where appropriate, outlining the derivation of the proposal and its relationship to existing law. In statutes that are amended the deleted material is [bracketed] in *italics* and the new material is set out in **bold face.** To assist the reader in locating and identifying new sections and existing statutes, unit and section captions are also set out in **bold face.** Sections that show an ORS number in parentheses are existing statutes whose substance is not changed but which would be relocated to fit the structure of the new Code. These statutes will not appear in the legislative bill to be introduced, but are set out in this report to clearly show the Commission's recommendations for arrangement of the Code.

The publications most frequently cited in the commentaries (and their abbreviated citations) are the American Bar Association Standards for Criminal Justice, Approved Drafts, (ABA Standards); the American Law Institute's Model Code of Pre-Arraignment Procedure, Tentative Drafts (MCPP); the Model Penal Code, Proposed Official Draft, 1962 (MPC); the Federal Rules of Criminal Procedure (Fed. Rules); and the New York Criminal Procedure Law of 1971 (NYCPL). State criminal procedure statutes or rules of New Jersey, Illinois, Michigan, California and Florida are also cited from time to time.

The 13 members of the Commission recommend the adoption of the proposed Criminal Procedure Code; however, some parts of it were not approved unanimously, but reflect a majority vote of the membership and, obviously, not every member agrees with everything found in it. We submit this final draft and report with the firm belief that its approval by the Legislature will improve the administration of criminal procedures for the People of the State of Oregon, and with the expectation that this, in turn, will help to identify and insure that elusive but essential commodity known as "criminal justice."

CRIMINAL LAW REVISION COMMISSION
Senator Anthony Yturri, Chairman

Salem, Oregon
November 1972

EDITORIAL NOTE

Two important matters came before the Criminal Law Revision Commission after this draft and report went to press. One, a proposal submitted by the Board of Parole, would further amend ORS chapter 144 to codify new standards relating to parole and parole revocation proceedings. The Commission will prepare a separate bill dealing with these additional recommendations regarding parole procedures. The second matter, a proposed set of jail standards and guidelines for detention facility operation developed by the Corrections Division Jail Standards Committee, was also examined by the Commission. Their proposal would make certain amendments to ORS chapter 169 and, in addition, would create mandatory standards relating to jails. Because this proposal had not been reduced to bill form, the Commission, consequently, was unable to take any definitive action upon it; however, the Commission supports the efforts of the Jail Standards Committee to bring about badly needed reform in this area.

TABLE SHOWING DISPOSITION OF EXISTING STATUTES

Column (1) lists each section of *Oregon Revised Statutes* that is either amended or repealed by the proposed Criminal Procedure Code. Column (2) shows whether the section is amended (A) or repealed (R). Column (3) shows, if the ORS section is amended, the draft section that accomplishes the amendment; and if the ORS section is repealed, the section of the draft that contains comparable matter. The sections of the draft that contain unaffected existing law are not shown in this table.

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10.300	A	571
17.115	A	572
22.020	A	573
22.030	A	574
22.040	A	575
22.050	A	576
30.550	A	577
33.070	A	578
33.080	A	579
33.090	A	580
34.410	A	581
34.720	A	582
44.230	A	583
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131.340	R	15
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131.360	R	15
131.365	R	......
131.370	R	15
131.380	R	15
131.390	R	15
131.400	R	17
131.410	R	19
131.420	R	18
131.430	R	21
131.440	R	22
131.450	R	23
131.460	R	24
131.470	R	25
132.030	A	56
132.040	R	56
132.050	A	57
132.060	A	58
132.090	A	61
132.100	A	62
132.110	A	63
132.120	A	64
132.130	R	......
132.210	A	65
132.220	A	66
132.310	A	67
132.320	A	68
132.330	A	69
132.350	A	71
132.360	A	72
132.380	A	74
132.390	A	75
132.410	A	77
132.420	A	78
132.430	A	79
132.440	A	80
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132.590	A	291
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132.680	A	298
132.690	A	299
132.710	A	300
132.720	A	301
133.010	R	1
133.037	A	33
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(1)	(2)	(3)
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133.300	R	106
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133.350	R	114
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133.610	A	216
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133.820	A	231
133.830	A	232
133.840	A	233
133.860	A	235
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134.020	A	287
134.110	A	302
134.120	A	303
134.130	A	304
134.140	A	305
134.150	A	306
134.160	A	307
134.510	A	308
134.520	A	309
134.540	A	311
134.550	A	312
134.560	A	313
134.605	A	314
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135.020	A	207
135.110	A	208
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135.560	A	276
135.610	A	277
135.620	R	277
135.630	A	278
135.640	A	279
135.670	A	282
135.680	A	283
135.690	A	284
135.700	A	285
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135.830	A	254
135.840	A	255
135.850	A	256
135.860	A	257
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135.880	A	270
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135.900	R	27
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136.020	R	......
136.030	A	332
136.040	A	333
136.070	A	336
136.110	A	340
136.120	A	341
136.130	A	342
136.140	A	343
136.210	A	344
136.220	A	345
136.230	A	346
136.250	A	348
136.290	A	353
136.295	A	354
136.340	R	......
136.350	R	......
136.510	A	362
136.545	A	363
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136.610	A	366
136.620	A	367
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136.640	R	......
136.650	A	368
136.660	A	369
136.670	A	370
136.680	A	371
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136.720	A	375

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137.250	A	432
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144.025	A	510
144.040	A	511
144.050	A	512

(1)	(2)	(3)
144.060	A	513
144.075	A	514
144.210	A	515
144.220	A	516
144.226	A	517
144.228	A	518
144.250	A	520
144.260	A	521
144.270	A	522
144.310	A	523
144.330	A	524
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144.374	A	529
144.400	A	533
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PART I. GENERAL PROVISIONS

ARTICLE 1. PRELIMINARY

Section 1. General definitions. As used in sections 1 to 568 of this Act, except as otherwise specifically provided or unless the context requires otherwise:

(1) "Accusatory instrument" means a grand jury indictment, an information or a complaint.

(2) "Bench warrant" means a process of a court in which a criminal action is pending, directing a peace officer to take into custody a defendant in the action who has previously appeared before the court upon the accusatory instrument by which the action was commenced, and to bring him before the court. The function of a bench warrant is to achieve the court appearance of a defendant in a criminal action for some purpose other than his initial arraignment in the action.

(3) "Complaint" means a written accusation, verified by the oath of a person, filed with a magistrate, and charging another person with the commission of an offense, other than an offense punishable as a felony. A complaint serves both to commence an action and as a basis for prosecution thereof.

(4) "Complainant's information" means a written accusation, verified by the oath of a person, filed with a magistrate, and charging another person with the commission of an offense punishable as a felony. A complainant's information serves to commence an action, but not as a basis for prosecution thereof.

(5) "Correctional facility" has the meaning provided for that term in ORS 162.135.

(6) "Criminal action" means an action at law by means of which a person is accused and tried for the commission of an offense.

(7) "Criminal proceeding" means any proceeding which constitutes a part of a criminal action or occurs in court in connection with a prospective, pending or completed criminal action.

(8) "District attorney," in addition to its ordinary meaning, includes a city attorney as prosecuting officer in the case of municipal ordinance offenses, and the Attorney General in those criminal actions or proceedings within his jurisdiction.

(9) "District attorney's information" means a written accusation by a district attorney and:

(a) If filed with a magistrate to charge a person with the commission of an offense, other than an offense punishable as a felony,

serves both to commence an action and as a basis for prosecution thereof; or

(b) If filed with a magistrate to charge a person with the commission of an offense punishable as a felony, serves to commence an action, but not as a basis for prosecution thereof; or

(c) If, as is otherwise authorized by law, filed in circuit court to charge a person with the commission of an offense, serves as a basis for prosecution thereof.

(10) "Information" means a district attorney's information or a complainant's information.

(11) "Reasonable cause" means that there is a substantial objective basis for believing that a person to be arrested has committed an offense.

(12) "Trial court" means a court which by law has jurisdiction over an offense charged in an accusatory instrument and has authority to accept a plea thereto, or try, hear or otherwise dispose of a criminal action based on the accusatory instrument.

(13) "Ultimate trial jurisdiction" means the jurisdiction of a court over a criminal action or proceeding at the highest trial level.

(14) "Warrant of arrest" means a process of a court, directing a peace officer to arrest a defendant and to bring him before the court for the purpose of arraignment upon an accusatory instrument filed therewith by which a criminal action against the defendant has been commenced.

COMMENTARY

The section proposes a set of terms that have general application in the proposed criminal procedure code.

(1) "Accusatory instrument" is a new term that includes the three kinds of formal documents that are used to charge a person with the commission of an offense.

(2) "Bench warrant" is defined for the first time to distinguish it from a "warrant of arrest," defined in subsection (14). Each type of warrant is meant to accomplish the same thing, i.e., the arrest of a person, but for different purposes.

(3) "Complaint," a type of accusatory instrument, is a new definition and is distinguishable from an "information" that is fully defined in subsections (4), (9) and (10). This type of accusatory instrument is limited in its use to non-felony offenses and would be the basis not only for the commencement of the action but also for its prosecution in district or justice court. ORS 156.020 provides that in a justice's court a criminal action is commenced by the filing of the "complaint," but does not define the term. ORS 156.030 provides that for purposes of determining the sufficiency of the pleading, a complaint is deemed an indictment. These sections are applicable to district court through ORS 156.610. ORS 484.170 sets out the minimum requirements of a traffic complaint.

(4) "Complainant's information" would be the instrument used to commence a felony action in an inferior court, but would not serve as a basis for prosecution. The basis for prosecution of such a crime in circuit court would be either a grand jury indictment or a district attorney's information. The existing definition of information is as follows:

> ORS 133.010. An information is a written statement of the essential facts charging a person with the commission of a crime, made upon oath and filed with a magistrate in a preliminary proceeding.

The present term is frequently used interchangeably with the term, "complaint," and its precise meaning is unclear. Moreover, this doesn't appear to be a satisfactory definition for an information that a district attorney would file in circuit court in lieu of an indictment.

(5) "Correctional facility" incorporates the same definition used in the Criminal Code.

(6) "Criminal action" and (7) "criminal proceeding" are self-explanatory and are important in the application of the general provisions of the proposed code.

(8) "District attorney" is broadly defined to include not only county prosecutors, but, where appropriate, city attorneys and the Attorney General.

(9) "District attorney's information" is defined to distinguish between this type of accusatory instrument and a complaint when used to charge a misdemeanor or violation, and also to indicate that it can be used either to commence a felony action, or, if filed in circuit court, as a basis for prosecution.

(10) "Information" includes a "district attorney's information" and a "complainant's information." The use of this kind of accusatory instrument would be limited to crimes punishable as felonies.

(11) "Reasonable cause," the standard to be applied to test the validity of an arrest or the issuance of a warrant of arrest, is taken from the MCPP § 3.01 (2) (Tent. Draft No. 2, 1969). The ALI comments:

> "That reasonable cause exists where there is some substantial objective basis for believing a person guilty of crime seems . . . to state the essence of a large body of case law. This standard expresses the demand of the courts that it be possible to explain and justify the arrest to an objective third party, without requiring that at the time of the arrest the guilt of the person arrested be more probable than not." (At 15). See, also *State v. Williams*, 253 Or 613, 456 P2d 497 (1969).

(12) "Trial court" and (13) "Ultimate trial jurisdiction" are new definitions of particular significance because it is at this stage in the criminal procedure system that most of the provisions will be applied.

(14) "Warrant of arrest" is defined herein to distinguish this process from the "bench warrant." The term has especial application in Article 4.

Section 2. Applicability of provisions to actions occurring before and after effective date. (1) The provisions of this Act apply to:

(a) All criminal actions and proceedings commenced upon or after the effective date of this Act and all appeals and other post-judgment proceedings relating or attaching thereto; and

(b) All matters of criminal procedure prescribed in this Act which do not constitute a part of any particular action or case, occurring upon or after the effective date of this Act.

(2) The provisions of this Act do not impair or render ineffectual any proceedings or procedural matters which occurred before the effective date of this Act.

COMMENTARY

This section sets forth the rules under which the Criminal Procedure Code will be applied to particular actions and proceedings.

The Code covers the procedural aspects of any action commenced upon or after the effective date of the Act even though the offense charged was committed prior thereto. The provisions of paragraph (a) differ from the applicability of the Oregon Criminal Code of 1971 which deals with substantive matters and applies only to offenses committed after its effective date.

Paragraph (b), dealing with general procedural matters not attached to any specific or existing criminal action or case, refers to rules and procedures such as those covering the formation of grand juries or the issuance of search warrants.

Subsection (2) makes clear that the new Code is not intended to have any effect upon procedural matters that occurred before the effective date of the Act.

Section 3. Parties in criminal action. (1) Except for offenses based on municipal or county ordinances, in a criminal action the State of Oregon is the plaintiff and the person prosecuted is the defendant.

COMMENTARY

This section is similar to ORS 131.020, which would be repealed, but specifically takes into account prosecutions based on municipal or county ordinances. In those cases the city or county, instead of the state, would be the plaintiff.

Section 4. When departures, errors or mistakes in pleadings or proceedings are material. No departure from the form or mode prescribed by law, error or mistake in any criminal pleading, action or proceeding renders it invalid, unless it has prejudiced the defendant in respect to a substantial right.

COMMENTARY

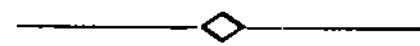
This section restates ORS 131.030, which would be repealed.

Time Limitations

Section 5. Timeliness of criminal actions. A criminal action must be commenced within the period of limitation prescribed in sections 6 to 9 of this Act.

COMMENTARY

See commentary under § 9.



Section 6. Time limitations. (1) A prosecution for murder or manslaughter may be commenced at any time after the death of the person killed.

(2) Except as provided in subsection (3) of this section or as otherwise expressly provided by law, prosecutions for other offenses must be commenced within the following periods of limitations after their commission:

(a) For any other felony, three years;

(b) For any misdemeanor, two years;

(c) For a violation, six months.

(3) If the period prescribed in subsection (2) of this section

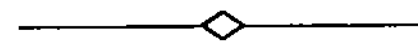
has expired, a prosecution nevertheless may be commenced as follows:

(a) If the offense has as a material element either fraud or the breach of a fiduciary obligation, prosecution may be commenced within one year after discovery of the offense by an aggrieved party or by a person who has a legal duty to represent an aggrieved party and who is himself not a party to the offense, but in no case shall the period of limitation otherwise applicable be extended by more than three years; or

(b) If the offense is based upon misconduct in office by a public officer or employe, prosecution may be commenced at any time while the defendant is in public office or employment or within two years thereafter, but in no case shall the period of limitation otherwise applicable be extended by more than three years.

COMMENTARY

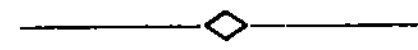
See commentary under § 9.



Section 7. Prosecution; when commenced. A prosecution is commenced when a warrant or other process is issued, provided that the warrant or other process is executed without unreasonable delay.

COMMENTARY

See commentary under § 9.



Section 8. Time limitations; when time starts to run; tolling of statute. (1) For the purposes of section 6 of this Act, time starts to run on the day after the offense is committed.

(2) Except as provided in section 9 of this Act, the period of limitation does not run during:

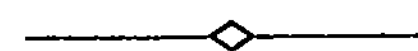
(a) Any time when the accused is not an inhabitant of or usually resident within this state; or

(b) Any time when the accused secrets himself within the state so as to prevent process being served upon him.

(3) If, when the offense is committed, the accused is out of the state, the action may be commenced within the time provided in section 6 of this Act after his coming into the state.

COMMENTARY

See commentary under § 9.



Section 9. Tolling of statute; three year maximum. Notwithstanding section 8 of this Act, in no case shall the period of limitation otherwise applicable be extended by more than three years.

COMMENTARY TO SECTIONS 5 TO 9

A. Summary

These sections deal with the substance and application of the statute of limitations for criminal offenses. They are made part of the procedural code in accordance with an earlier decision of the Commission.

Section 6 (1) sets no limitation at all for prosecutions for murder or manslaughter. Section 6 (2) establishes the periods of limitation for all other offenses. Section 6 (3) provides for two extended periods of time, one in which fraud or breach of fiduciary responsibility is not discovered until after the basic period has expired, and the other in which the offender has been guilty of misconduct in office. The first clause in paragraph (b), while employing the language, "if the offense is based upon misconduct in office by a public officer or employe," would include, but not be limited to the offenses of "official misconduct" set forth in the new Criminal Code. Examples of other crimes that would fall within this area would be bribe receiving, misuse of confidential information and other similar conduct.

Section 7 provides that a prosecution is considered to be commenced when a warrant or any other process is issued, provided that the process is executed without "unreasonable delay." In determining whether the delay is reasonable, factors such as the effort made to find the accused, inability to find him, the fact that the accused was in prison and other circumstances too numerous to detail in a statute may be taken into account.

Section 8 details the circumstances in which the statute of limitations does not run, e.g., the defendant is absent from the state or cannot be found within the state.

Section 9 provides for a maximum of three years that can be added to the basic period because of circumstances set forth in section 8.

As the Model Penal Code commentary observes:

"Objectives of limitation provisions are varied:

"(1) Foremost is the desirability of requiring that prosecutions be based upon reasonably fresh evidence . . . .

"(2) If the person refrains from further criminal activity, the likelihood increases with the passage of time that he has reformed, diminishing pro tanto the necessity for imposition of this criminal sanction . . . .

"(3) As time goes by the retributive impulse which may have existed in the community is likely to yield place to a sense of compassion for the person prosecuted for an offense long forgotten.

"(4) Finally, it is desirable to lessen the possibility of blackmail based on a threat to prosecute or to disclose evidence to enforcement. After a period of time, a person ought to be allowed to live without fear of prosecution." (Tent. Draft No. 5 at 16 (1956)).

The Model Penal Code, supra at 17-22, also suggests that in determining the proper lengths of periods of limitation, five basic problems must be resolved:

(1) Should there be a period of limitations for all offenses? The draft continues the exceptions for murder and manslaughter now contained in ORS 131.110 (1).

(2) How many graduations in periods of limitations should there be? The draft provides for four, ranging from offenses without any limitation to the very minor offense of violation with a six month limitation.

(3) How long should each separate period of limitation be? Again, except for murder and manslaughter, the proposed draft provides for periods of three years, two years, and six months. These periods are largely arbitrary because, as the Model Penal Code points out, there is an absence of empirical data upon which to base a determination of appropriate amounts of time. To the extent that length of periods of limitation can be rationalized at all they, like penalty provisions, must be viewed as compromises reflecting the multiple and sometimes conflicting aims of the criminal law. For example, it might be said that (a) the more serious the offense, the greater the need for deterrence and the more undesirable it is to offer the possibility of escape from punishment after a short period of limitation, or (b) the more serious the offense, the greater the likelihood that the perpetrator is a continuing danger to society and the greater the need to incapacitate him whenever he is caught or (c) the more serious the offense, the less likely the offender is to reform of his own accord, and thus the need for compulsory treatment whenever he is apprehended. Yet it is also true that the more serious

the charge, the more there is at stake for the defendant and the greater the procedural need for the protection afforded by a limitation period.

(4) Should there be special provision for offenses which by their nature are particularly difficult to detect? The draft is based upon the same premise as the Model Penal Code approach, i.e., that it is ordinarily desirable to start the running of the period of limitation at the time a crime is committed rather than at the time the offense is detected or the offender discovered.

The assumption is that most offenses are known at least to the victim at the time of or soon after commission, or that the offense can be discovered by adequate investigation by enforcement officials. This is not likely to be true of certain offenses where the opportunity for prolonged concealment is great. These are dealt with separately by the draft in two categories:

Paragraph (a), subsection (3), of section 6 deals with cases involving fraud or a breach of fiduciary obligation and provides that a prosecution may be brought within one year after discovery of the offense. (See Note, 102 U of Pa L Rev 630, 639-640).

Paragraph (b) of subsection (3) deals with misconduct by a public officer or employe. Some states deal specifically with offenses by public officials either by providing a longer period of limitations, by providing that the time does not run while the person is holding public office, or by providing that prosecution may be within a specified period after the person leaves office. The draft provides that prosecution may be within two years after discovery of the offense.

Under both of the foregoing exceptions the period of limitations otherwise applicable is not extended more than three years.

(5) Finally, should special short periods of limitation be prescribed for offenses which by their nature are more likely to be the subject of fraudulent prosecutions? The A.L.I. believed some provision of this sort was needed, but decided it was preferable to deal with each situation specifically in the section defining the offense. The only crime in the Oregon Code in which the requirement of a prompt complaint was considered (and rejected by the Commission) was that of rape.

B. Derivation

Section 6 (1) and (2) is essentially the same as ORS 131.110 with a new provision to cover violations.

Section 6 (3) is derived from Michigan Revised Criminal Code § 130 and Model Penal Code § 1.06.

Sections 7 and 9 are from the same source. Section 8 is a restatement of ORS 131.120.

C. Relationship to Existing Law

ORS contains three basic statutes dealing with time limitations, 131.110, 131.120 and 131.130.

The draft continues the present legislative policy of having no limitation on prosecutions for murder or manslaughter. The provisions for extending the period of limitation in fraud, fiduciary breaches and public official misconduct have no counterpart in existing statutory law.

The provisions of section 7 relating to the question of when a prosecution is commenced would change existing law now found in ORS 131.130 which states that an action is "commenced . . . when the indictment is found and filed with the clerk of the court or . . . when the indictment or complaint is filed or lodged in the court or with the officer having jurisdiction . . . ."

The draft takes the Model Penal Code view that a warrant of arrest is sufficient. In so doing, it proceeds on the assumption that the basic purpose of a statute of limitation is to insure that the accused will be informed of the decision to prosecute and the general nature of the charge with sufficient promptness to allow him to prepare his defense before evidence of his innocence becomes weakened with age. His further right to have the matter promptly disposed of by trial is not dealt with here.

Both the finding of an indictment and the issuance of a warrant of arrest require a formal decision by the prosecution as to the general nature of the charge and the identity of the accused. Both will ordinarily come to the attention of the accused.

The A.L.I. commentary notes that there is a danger that a warrant may be issued and allowed to lie around without diligent effort to execute it. The draft requires that the warrant be executed within a reasonable time. (Model Penal Code, supra at 25).

The requirement that an information be filed is rejected. Some states require that the accused be apprehended and given a preliminary examination bfore the period would cease to run. This view also is rejected.

Section 8 states when the time starts to run and specifies those situations in which time is not counted against the period of limitations. Except for the three year maximum limitation, the draft reflects current legislation and decisions. An extensive compilation of cases is contained in Notes, 90 ALR 452 (1934); 124 ALR 1049 (1940).

Subsection (2) deals with the situation where the defendant is outside the state or secretes himself within the state. Some courts have held that mere absence from the jurisdiction is enough. There are

other cases that have held that the jury must find a purpose to avoid detection or prosecution. (See Model Penal Code, Tent. Draft No. 5 at 27).

Section 9 would change existing law which does not now put any limit on the number of years that the statute of limitations can be tolled.

Oregon cases:

In case in which an indictment was returned within the time permitted by statute but was later dismissed and a new indictment returned after the allowable time had elapsed, the court held that the new indictment was barred by the statute of limitations because the statute had not been tolled by the first indictment. *State v. Silver*, 239 Or 459, 398 P2d 178 (1965).

See also, *State v. Terry*, 160 Or 308, 85 P2d 354 (1938); *State v. Mannix*, 133 Or 329, 288 P 507, 290 P 745 (1930); *Union County v. Hyde*, 26 Or 24, 37 P 76 (1894).

State Criminal Jurisdiction

Section 10. Jurisdiction; generally. Except as otherwise provided in sections 10 to 13 of this Act, a person is subject to prosecution under the laws of this state for an offense that he commits by his own conduct or the conduct of another for which he is criminally liable if:

(1) Either the conduct that is an element of the offense or the result that is an element occurs within this state; or

(2) Conduct occurring outside this state is sufficient under the law of this state to constitute an attempt to commit an offense within this state; or

(3) Conduct occurring outside this state is sufficient under the law of this state to constitute a conspiracy to commit an offense within this state and an overt act in furtherance of the conspiracy occurs within this state; or

(4) Conduct occurring within this state establishes complicity in the commission of, or an attempt, solicitation or conspiracy to commit an offense in another jurisdiction which also is an offense under the law of this state; or

(5) The offense consists of the omission to perform a legal duty imposed by the law of this state with respect to domicile, residence or a relationship to a person, thing or transaction in this state; or

(6) The offense violates a statute of this state that expressly prohibits conduct outside this state affecting a legislatively protected interest of or within this state and the actor has reason to know that his conduct is likely to affect that interest.

COMMENTARY

See commentary under § 13.

Section 11. Jurisdiction; exceptions. (1) Unless in the statute defining the offense a legislative intent clearly appears to declare the conduct criminal, regardless of the place of the result, subsection (1) of section 10 of this Act does not apply if:

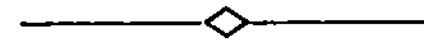
(a) Either causing a specified result or an intent to cause or danger of causing that result is an element of an offense; and

(b) The result occurs or is designed or likely to occur only in another jurisdiction where the conduct charged would not constitute an offense.

(2) Subsection (1) of section 10 of this Act does not apply if causing a particular result is an element of an offense and the result is caused by conduct occurring outside this state that would not constitute an offense if the result had occurred there, unless the actor intentionally or knowingly caused the result within this state.

COMMENTARY

See commentary under § 13.



Section 12. Jurisdiction; criminal homicide. (1) If the offense committed is criminal homicide, either the death of the victim or the conduct causing death constitutes a "result" within the meaning of subsection (1) of section 10 of this Act.

(2) If the body, or a part thereof, of a criminal homicide victim is found within this state, it shall be prima facie evidence that the result occurred within this state.

COMMENTARY

See commentary under § 13.

Section 13. Jurisdiction; definition. As used in sections 10 to 13 of this Act, "this state" means the land and water and the air space above the land and water with respect to which the State of Oregon has legislative jurisdiction.

COMMENTARY TO SECTIONS 10 TO 13

A. Summary

The above sections establish a broad jurisdictional basis for the prosecution in Oregon of offenses involving persons, property or public interests of this state.

The purpose of these sections is to make it clear that (1) the Oregon Criminal Code covers conduct occurring outside the state that produces results that are prohibited inside the state, (2) the Code applies to criminal conduct intended to produce crim-

inal results in some other jurisdiction, and (3) activity that is lawful where engaged in shall not be penalized in this state unless that activity is so adverse to a legislatively protected interest in this state that it must be made punishable here, or such activity is specifically meant by the actor to take effect here.

B. Derivation

The sections are based on Model Penal Code § 1.03, Michigan Revised Criminal Code § 140 and Illinois Criminal Code § 1-5, except for subsection (2) of section 12 which is taken from New York Criminal Procedure Law § 20.20 (1971).

C. Relationship to Existing Law

Three existing statutes deal with state criminal jurisdiction, i.e., the "territorial applicability" of the laws of this state. Those are ORS 131.210, punishability of offenders under state law; ORS 131.220, where crime commenced outside state is consummated within state; and ORS 131.230, where death results within state from act done outside state. A fourth statute, ORS 131.240, relates to acts punishable in two jurisdictions and is dealt with in the draft on double jeopardy.

The proposed sections spell out the circumstances under which Oregon legislation can be applied, and are concerned not only with the obvious situations wherein the conduct takes place inside the state, but also with the more complicated instances in which the conduct occurs in whole or in part outside the state.

Subsection (1) of section 10 would not change the effect obtainable under present law, that if one of the elements of the offense or if the result that is an element of the offense occurs within the state, a criminal prosecution may be maintained here, with venue to be determined by the draft sections on that subject.

Subsection (2) of section 10 covers the situation in which the actor engages in conduct outside the state, for the purpose of bringing about a certain result in Oregon, but fails to complete the substantive offense in this state.

Subsection (3) of section 10 sets out the universal rule that all conspirators may be tried in the forum state if an overt act by one of them occurs there, although the others may have been elsewhere at the time of the overt act.

Subsection (4) of section 10 is the "other side of the coin" in comparison with subsection (3) and covers inchoate crimes that are meant to culminate in an offense in another jurisdiction. However, it requires that the crime intended would also have to be a crime in this state.

Subsection (5) is designed to cover omissions outside the borders of this state that affect persons or interests within the state.

Subsection (6) is a further extension of the "protected interest" principle and is aimed at statutes expressly prohibiting conduct outside the State of Oregon that affects a legislatively protected interest in this state. A *mens rea* limitation is included so that the actor would need to have "reason to know" that his conduct is likely to affect the Oregon interest.

Section 11 contains two exceptions to help resolve any conflict of laws problems that might arise when an Oregon statute attempts to penalize activity occurring outside this state that is lawful where done but criminal here.

Section 12 would allow a criminal prosecution in Oregon if the death blow were struck in another state and the victim died in Oregon, or if the death blow were struck in Oregon and the victim died elsewhere. Of course, the usual case would be of the first variety, although the proposed section would add a flexibility that ORS 131.230 does not now contain.

The section also is meant to permit prosecution in Oregon in the following kind of situation. D, in the State of Washington, mails a box of poisoned chocolates to V, living in Portland. V eats the candy in Oregon, then drives to Vancouver, Washington, where he dies. Preliminary drafts used the words "bodily impact" in this section, but the Commission substituted the term "conduct" because it considered the former language too restrictive and difficult to apply to situations such as homicide by poisoning.

The Commission believes that in the type of case illustrated above, because V ingested the poison while he was in Oregon, the interest of the state in prosecuting D is just as great as it would be had the victim actually died within this state. The "conduct causing death" includes not only D's sending the chocolates, but V's consuming them as well.

Subsection (2) of section 12 incorporates, for jurisdictional purposes only, a prima facie evidence provision to take care of the case in which the dead body, or any part thereof, is first found in this state but there is no proof as to where the actual death took place.

Section 13 proposes a definition of "this state" which is consistent with the concept of territory used in applying the territorial principle to matters of criminal jurisdiction.

Oregon cases:

In *State v. Barnett*, 15 Or 77, 14 P 737 (1887), the Oregon Court held that property stolen outside the state, brought into and converted to the defendant's use within the state, constituted larceny. The state

will inquire into the ownership of property within the state, regardless of whether the owner is a foreigner or citizen, present or absent. If a person, either personally or by the hand of another, does acts which amount to larceny within the state, he may be indicted and punished if found within the state. The Court also stated that when a person employs innocent agents to commit a crime, that person is guilty of the crime where it was committed.

The case of *State v. Owen*, 119 Or 15, 224 P 516 (1926), held that under the statute (now ORS 131.-220) it was a crime for one outside the state to aid and abet another person in the state in the commission of an offense. The defendant drew a check in California on an Oregon bank in which he had no funds. The check was unlawfully paid by a bank officer and the defendant was charged with aiding and abetting him in committing the crime of embezzlement.

Venue

Section 14. Place of trial. (1) Except as otherwise provided in sections 14 to 25 of this Act, criminal actions shall be commenced and tried in the county in which the conduct that constitutes the offense or a result that is an element of the offense occurred.

(2) All objections of improper place of trial are waived by a defendant unless he objects in the manner set forth in sections 17 to 20 of this Act.

COMMENTARY

See commentary under § 25.

Section 15. Place of trial; special provisions. (1) If conduct constituting elements of an offense or results constituting elements of an offense occur in two or more counties, trial of the offense may be held in any of the counties concerned.

(2) If a cause of death is inflicted on a person in one county and the person dies therefrom in another county, trial of the offense may be held in either county.

(3) If the commission of an offense commenced outside this state is consummated within this state, trial of the offense shall be held in the county in which the offense is consummated or the interest protected by the criminal statute in question is impaired.

(4) If an offense is committed on any body of water located in, or adjacent to, two or more counties or forming the boundary between two or more counties, trial of the offense may be held in any nearby county bordering on the body of water.

(5) If an offense is committed in or upon any railroad car, vehicle, aircraft, boat or other conveyance in transit and it cannot readily be determined in which county the offense was committed, trial of the offense may be held in any county through or over which the conveyance passed.

(6) If an offense is committed on the boundary of two or more counties or within one mile thereof, trial of the offense may be held in any of the counties concerned.

(7) A person who commits theft, burglary or robbery may be tried in any county in which he exerts control over the property that is the subject of the crime.

(8) If the offense is an attempt or solicitation to commit a crime, trial of the offense may be held in any county in which any act that is an element of the offense is committed.

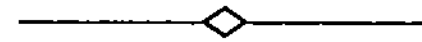
(9) If the offense is criminal conspiracy, trial of the offense may be held in any county in which any act or agreement that is an element of the offense occurs.

(10) A person who in one county commits an inchoate offense that results in the commission of an offense by another person in another county, or who commits the crime of hindering prosecution of the principal offense, may be tried in either county.

(11) A criminal nonsupport action may be tried in any county in which the dependent child is found, irrespective of the domicile of the parent, guardian or other person lawfully charged with support of the child.

COMMENTARY

See commentary under § 25.



Section 16. Place of trial; doubt as to place of crime; conduct outside of state. If an offense is committed within the state and it cannot readily be determined within which county the commission took place, or a statute that governs conduct outside the state is violated, trial may be held in the county in which the defendant resides, or if he has no fixed residence in this state, in the county in which he is apprehended or to which he is extradited.

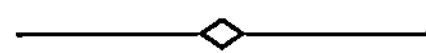
COMMENTARY

See commentary under § 25.

Section 17. Change of venue. In accordance with sections 18 to 25 of this Act, the defendant in a criminal action may have the place of trial changed only once, except for causes arising after the first change was allowed.

COMMENTARY

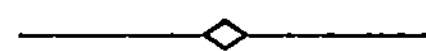
See commentary under § 25.



Section 18. Motion for change of venue; when made. A motion for change of venue may be made in any criminal action in a circuit or district court when the case is at issue upon a question of fact.

COMMENTARY

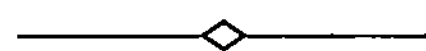
See commentary under § 25.



Section 19. Change of venue for prejudice. The court, upon motion of the defendant, shall order the place of trial to be changed to another county if the court is satisfied that there exists in the county where the action is commenced so great a prejudice against the defendant that he cannot obtain a fair and impartial trial.

COMMENTARY

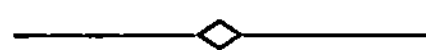
See commentary under § 25.



Section 20. Change of venue in other cases. For the convenience of parties and witnesses, and in the interest of justice, the court, upon motion of the defendant, may order the place of trial to be changed to another county.

COMMENTARY

See commentary under § 25.



Section 21. Transmission of transcript on change of venue. When the court has ordered a change of venue, the clerk shall forthwith make and retain authenticated copies of the original papers filed in the case and transmit to the clerk of the proper court a transcript of the proceedings and the original papers.

COMMENTARY

See commentary under § 25.

serves both to commence an action and as a basis for prosecution thereof; or

(b) If filed with a magistrate to charge a person with the commission of an offense punishable as a felony, serves to commence an action, but not as a basis for prosecution thereof; or

(c) If, as is otherwise authorized by law, filed in circuit court to charge a person with the commission of an offense, serves as a basis for prosecution thereof.

(10) "Information" means a district attorney's information or a complainant's information.

(11) "Reasonable cause" means that there is a substantial objective basis for believing that a person to be arrested has committed an offense.

(12) "Trial court" means a court which by law has jurisdiction over an offense charged in an accusatory instrument and has authority to accept a plea thereto, or try, hear or otherwise dispose of a criminal action based on the accusatory instrument.

(13) "Ultimate trial jurisdiction" means the jurisdiction of a court over a criminal action or proceeding at the highest trial level.

(14) "Warrant of arrest" means a process of a court, directing a peace officer to arrest a defendant and to bring him before the court for the purpose of arraignment upon an accusatory instrument filed therewith by which a criminal action against the defendant has been commenced.

COMMENTARY

The section proposes a set of terms that have general application in the proposed criminal procedure code.

(1) "Accusatory instrument" is a new term that includes the three kinds of formal documents that are used to charge a person with the commission of an offense.

(2) "Bench warrant" is defined for the first time to distinguish it from a "warrant of arrest," defined in subsection (14). Each type of warrant is meant to accomplish the same thing, i.e., the arrest of a person, but for different purposes.

(3) "Complaint," a type of accusatory instrument, is a new definition and is distinguishable from an "information" that is fully defined in subsections (4), (9) and (10). This type of accusatory instrument is limited in its use to non-felony offenses and would be the basis not only for the commencement of the action but also for its prosecution in district or justice court. ORS 156.020 provides that in a justice's court a criminal action is commenced by the filing of the "complaint," but does not define the term. ORS 156.030 provides that for purposes of determining the sufficiency of the pleading, a complaint is deemed an indictment. These sections are applicable to district court through ORS 156.610. ORS 484.170 sets out the minimum requirements of a traffic complaint.

(4) "Complainant's information" would be the instrument used to commence a felony action in an inferior court, but would not serve as a basis for prosecution. The basis for prosecution of such a crime in circuit court would be either a grand jury indictment or a district attorney's information. The existing definition of information is as follows:

> ORS 133.010. An information is a written statement of the essential facts charging a person with the commission of a crime, made upon oath and filed with a magistrate in a preliminary proceeding.

The present term is frequently used interchangeably with the term, "complaint," and its precise meaning is unclear. Moreover, this doesn't appear to be a satisfactory definition for an information that a district attorney would file in circuit court in lieu of an indictment.

Section 3. Parties in criminal action. (1) Except for offenses based on municipal or county ordinances, in a criminal action the State of Oregon is the plaintiff and the person prosecuted is the defendant.

COMMENTARY

This section is similar to ORS 131.020, which would be repealed, but specifically takes into account prosecutions based on municipal or county ordinances. In those cases the city or county, instead of the state, would be the plaintiff.

Section 4. When departures, errors or mistakes in pleadings or proceedings are material. No departure from the form or mode prescribed by law, error or mistake in any criminal pleading, action or proceeding renders it invalid, unless it has prejudiced the defendant in respect to a substantial right.

COMMENTARY

This section restates ORS 131.030, which would be repealed.

Time Limitations

Section 5. Timeliness of criminal actions. A criminal action must be commenced within the period of limitation prescribed in sections 6 to 9 of this Act.

COMMENTARY

See commentary under § 9.

Section 6. Time limitations. (1) A prosecution for murder or manslaughter may be commenced at any time after the death of the person killed.

(2) Except as provided in subsection (3) of this section or as otherwise expressly provided by law, prosecutions for other offenses must be commenced within the following periods of limitations after their commission:

(a) For any other felony, three years;

(b) For any misdemeanor, two years;

(c) For a violation, six months.

(3) If the period prescribed in subsection (2) of this section

Section 9. Tolling of statute; three year maximum. Notwithstanding section 8 of this Act, in no case shall the period of limitation otherwise applicable be extended by more than three years.

COMMENTARY TO SECTIONS 5 TO 9

A. Summary

These sections deal with the substance and application of the statute of limitations for criminal offenses. They are made part of the procedural code in accordance with an earlier decision of the Commission.

Section 6 (1) sets no limitation at all for prosecutions for murder or manslaughter. Section 6 (2) establishes the periods of limitation for all other offenses. Section 6 (3) provides for two extended periods of time, one in which fraud or breach of fiduciary responsibility is not discovered until after the basic period has expired, and the other in which the offender has been guilty of misconduct in office. The first clause in paragraph (b), while employing the language, "if the offense is based upon misconduct in office by a public officer or employe," would include, but not be limited to the offenses of "official misconduct" set forth in the new Criminal Code. Examples of other crimes that would fall within this area would be bribe receiving, misuse of confidential information and other similar conduct.

Section 7 provides that a prosecution is considered to be commenced when a warrant or any other process is issued, provided that the process is executed without "unreasonable delay." In determining whether the delay is reasonable, factors such as the effort made to find the accused, inability to find him, the fact that the accused was in prison and other circumstances too numerous to detail in a statute may be taken into account.

Section 8 details the circumstances in which the statute of limitations does not run, e.g., the defendant is absent from the state or cannot be found within the state.

Section 9 provides for a maximum of three years that can be added to the basic period because of circumstances set forth in section 8.

As the Model Penal Code commentary observes:

"Objectives of limitation provisions are varied:

"(1) Foremost is the desirability of requiring that prosecutions be based upon reasonably fresh evidence . . . .

"(2) If the person refrains from further criminal activity, the likelihood increases with the passage of time that he has reformed, diminishing pro tanto the necessity for imposition of this criminal sanction . . . .

"(3) As time goes by the retributive impulse which may have existed in the community is likely to yield place to a sense of compassion for the person prosecuted for an offense long forgotten.

"(4) Finally, it is desirable to lessen the possibility of blackmail based on a threat to prosecute or to disclose evidence to enforcement. After a period of time, a person ought to be allowed to live without fear of prosecution." (Tent. Draft No. 5 at 16 (1956)).

The Model Penal Code, supra at 17-22, also suggests that in determining the proper lengths of periods of limitation, five basic problems must be resolved:

(1) Should there be a period of limitations for all offenses? The draft continues the exceptions for murder and manslaughter now contained in ORS 131.110 (1).

(2) How many graduations in periods of limitations should there be? The draft provides for four, ranging from offenses without any limitation to the very minor offense of violation with a six month limitation.

(3) How long should each separate period of limitation be? Again, except for murder and manslaughter, the proposed draft provides for periods of three years, two years, and six months. These periods are largely arbitrary because, as the Model Penal Code points out, there is an absence of empirical data upon which to base a determination of appropriate amounts of time. To the extent that length of periods of limitation can be rationalized at all they, like penalty provisions, must be viewed as compromises reflecting the multiple and sometimes conflicting aims of the criminal law. For example, it might be said that (a) the more serious the offense, the greater the need for deterrence and the more undesirable it is to offer the possibility of escape from punishment after a short period of limitation, or (b) the more serious the offense, the greater the likelihood that the perpetrator is a continuing danger to society and the greater the need to incapacitate him whenever he is caught or (c) the more serious the offense, the less likely the offender is to reform of his own accord, and thus the need for compulsory treatment whenever he is apprehended. Yet it is also true that the more serious

other cases that have held that the jury must find a purpose to avoid detection or prosecution. (See Model Penal Code, Tent. Draft No. 5 at 27).

Section 9 would change existing law which does not now put any limit on the number of years that the statute of limitations can be tolled.

Oregon cases:

In case in which an indictment was returned within the time permitted by statute but was later dismissed and a new indictment returned after the allowable time had elapsed, the court held that the new indictment was barred by the statute of limitations because the statute had not been tolled by the first indictment. *State v. Silver*, 239 Or 459, 398 P2d 178 (1965).

See also, *State v. Terry*, 160 Or 308, 85 P2d 354 (1938); *State v. Mannix*, 133 Or 329, 288 P 507, 290 P 745 (1930); *Union County v. Hyde*, 26 Or 24, 37 P 76 (1894).

State Criminal Jurisdiction

Section 10. Jurisdiction; generally. Except as otherwise provided in sections 10 to 13 of this Act, a person is subject to prosecution under the laws of this state for an offense that he commits by his own conduct or the conduct of another for which he is criminally liable if:

(1) Either the conduct that is an element of the offense or the result that is an element occurs within this state; or

(2) Conduct occurring outside this state is sufficient under the law of this state to constitute an attempt to commit an offense within this state; or

(3) Conduct occurring outside this state is sufficient under the law of this state to constitute a conspiracy to commit an offense within this state and an overt act in furtherance of the conspiracy occurs within this state; or

(4) Conduct occurring within this state establishes complicity in the commission of, or an attempt, solicitation or conspiracy to commit an offense in another jurisdiction which also is an offense under the law of this state; or

(5) The offense consists of the omission to perform a legal duty imposed by the law of this state with respect to domicile, residence or a relationship to a person, thing or transaction in this state; or

(6) The offense violates a statute of this state that expressly prohibits conduct outside this state affecting a legislatively protected interest of or within this state and the actor has reason to know that his conduct is likely to affect that interest.

COMMENTARY

See commentary under § 13.

inal results in some other jurisdiction, and (3) activity that is lawful where engaged in shall not be penalized in this state unless that activity is so adverse to a legislatively protected interest in this state that it must be made punishable here, or such activity is specifically meant by the actor to take effect here.

B. Derivation

The sections are based on Model Penal Code § 1.03, Michigan Revised Criminal Code § 140 and Illinois Criminal Code § 1-5, except for subsection (2) of section 12 which is taken from New York Criminal Procedure Law § 20.20 (1971).

C. Relationship to Existing Law

Three existing statutes deal with state criminal jurisdiction, i.e., the "territorial applicability" of the laws of this state. Those are ORS 131.210, punishability of offenders under state law; ORS 131.220, where crime commenced outside state is consummated within state; and ORS 131.230, where death results within state from act done outside state. A fourth statute, ORS 131.240, relates to acts punishable in two jurisdictions and is dealt with in the draft on double jeopardy.

The proposed sections spell out the circumstances under which Oregon legislation can be applied, and are concerned not only with the obvious situations wherein the conduct takes place inside the state, but also with the more complicated instances in which the conduct occurs in whole or in part outside the state.

Subsection (1) of section 10 would not change the effect obtainable under present law, that if one of the elements of the offense or if the result that is an element of the offense occurs within the state, a criminal prosecution may be maintained here, with venue to be determined by the draft sections on that subject.

Subsection (2) of section 10 covers the situation in which the actor engages in conduct outside the state, for the purpose of bringing about a certain result in Oregon, but fails to complete the substantive offense in this state.

Subsection (3) of section 10 sets out the universal rule that all conspirators may be tried in the forum state if an overt act by one of them occurs there, although the others may have been elsewhere at the time of the overt act.

Subsection (4) of section 10 is the "other side of the coin" in comparison with subsection (3) and covers inchoate crimes that are meant to culminate in an offense in another jurisdiction. However, it requires that the crime intended would also have to be a crime in this state.

Subsection (5) is designed to cover omissions outside the borders of this state that affect persons or interests within the state.

Subsection (6) is a further extension of the "protected interest" principle and is aimed at statutes expressly prohibiting conduct outside the State of Oregon that affects a legislatively protected interest in this state. A *mens rea* limitation is included so that the actor would need to have "reason to know" that his conduct is likely to affect the Oregon interest.

Section 11 contains two exceptions to help resolve any conflict of laws problems that might arise when an Oregon statute attempts to penalize activity occurring outside this state that is lawful where done but criminal here.

Section 12 would allow a criminal prosecution in Oregon if the death blow were struck in another state and the victim died in Oregon, or if the death blow were struck in Oregon and the victim died elsewhere. Of course, the usual case would be of the first variety, although the proposed section would add a flexibility that ORS 131.230 does not now contain.

The section also is meant to permit prosecution in Oregon in the following kind of situation. D, in the State of Washington, mails a box of poisoned chocolates to V, living in Portland. V eats the candy in Oregon, then drives to Vancouver, Washington, where he dies. Preliminary drafts used the words "bodily impact" in this section, but the Commission substituted the term "conduct" because it considered the former language too restrictive and difficult to apply to situations such as homicide by poisoning.

The Commission believes that in the type of case illustrated above, because V ingested the poison while he was in Oregon, the interest of the state in prosecuting D is just as great as it would be had the victim actually died within this state. The "conduct causing death" includes not only D's sending the chocolates, but V's consuming them as well.

Subsection (2) of section 12 incorporates, for jurisdictional purposes only, a prima facie evidence provision to take care of the case in which the dead body, or any part thereof, is first found in this state but there is no proof as to where the actual death took place.

Section 13 proposes a definition of "this state" which is consistent with the concept of territory used in applying the territorial principle to matters of criminal jurisdiction.

Oregon cases:

In *State v. Barnett*, 15 Or 77, 14 P 737 (1887), the Oregon Court held that property stolen outside the state, brought into and converted to the defendant's use within the state, constituted larceny. The state

(6) If an offense is committed on the boundary of two or more counties or within one mile thereof, trial of the offense may be held in any of the counties concerned.

(7) A person who commits theft, burglary or robbery may be tried in any county in which he exerts control over the property that is the subject of the crime.

(8) If the offense is an attempt or solicitation to commit a crime, trial of the offense may be held in any county in which any act that is an element of the offense is committed.

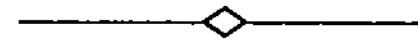
(9) If the offense is criminal conspiracy, trial of the offense may be held in any county in which any act or agreement that is an element of the offense occurs.

(10) A person who in one county commits an inchoate offense that results in the commission of an offense by another person in another county, or who commits the crime of hindering prosecution of the principal offense, may be tried in either county.

(11) A criminal nonsupport action may be tried in any county in which the dependent child is found, irrespective of the domicile of the parent, guardian or other person lawfully charged with support of the child.

COMMENTARY

See commentary under § 25.



Section 16. Place of trial; doubt as to place of crime; conduct outside of state. If an offense is committed within the state and it cannot readily be determined within which county the commission took place, or a statute that governs conduct outside the state is violated, trial may be held in the county in which the defendant resides, or if he has no fixed residence in this state, in the county in which he is apprehended or to which he is extradited.

COMMENTARY

See commentary under § 25.

Section 17. Change of venue. In accordance with sections 18 to 25 of this Act, the defendant in a criminal action may have the place of trial changed only once, except for causes arising after the first change was allowed.

Section 22. Filing of transmitted transcript and papers. The change of the place of trial is complete when the transcript and papers are filed with the clerk of the court to which the trial is transferred, and thereafter the action shall proceed in the same manner as if it has been commenced in that court.

COMMENTARY

See commentary under § 25.

Section 23. Expenses of change; taxation as costs. (1) The expenses of the change of place of trial under section 20 of this Act shall be taxed, as allowed by law, as expenses of the action, and the costs and expenses of the action shall be taxed in the court and paid by the county wherein the trial is held. If the costs and expenses are not recovered from the defendant, the county in which the action was commenced shall repay the county in which the trial is held.

(2) The expenses of a change of place of trial under section 19 of this Act shall not be taxed against the defendant.

COMMENTARY

See commentary under § 25.

Section 24. Attendance of defendant at new place of trial. (1) When the court has ordered a change of place of trial, if the defendant has been released on security release, conditional release or recognizance, he must, without further notice, appear at the time and place appointed for trial and not depart therefrom without permission of the court.

(2) A security deposit is sufficient therefor in all respects as if the action had proceeded to final determination in the court where it was commenced.

COMMENTARY

See commentary under § 25.

Section 25. Conveyance of defendant in custody after change of venue. When the court has ordered a change of place of trial, if

inal results in some other jurisdiction, and (3) activity that is lawful where engaged in shall not be penalized in this state unless that activity is so adverse to a legislatively protected interest in this state that it must be made punishable here, or such activity is specifically meant by the actor to take effect here.

B. Derivation

The sections are based on Model Penal Code § 1.03, Michigan Revised Criminal Code § 140 and Illinois Criminal Code § 1-5, except for subsection (2) of section 12 which is taken from New York Criminal Procedure Law § 20.20 (1971).

C. Relationship to Existing Law

Three existing statutes deal with state criminal jurisdiction, i.e., the "territorial applicability" of the laws of this state. Those are ORS 131.210, punishability of offenders under state law; ORS 131.220, where crime commenced outside state is consummated within state; and ORS 131.230, where death results within state from act done outside state. A fourth statute, ORS 131.240, relates to acts punishable in two jurisdictions and is dealt with in the draft on double jeopardy.

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Subsection (6) is a further extension of the "protected interest" principle and is aimed at statutes expressly prohibiting conduct outside the State of Oregon that affects a legislatively protected interest in this state. A *mens rea* limitation is included so that the actor would need to have "reason to know" that his conduct is likely to affect the Oregon interest.

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The Commission believes that in the type of case illustrated above, because V ingested the poison while he was in Oregon, the interest of the state in prosecuting D is just as great as it would be had the victim actually died within this state. The "conduct causing death" includes not only D's sending the chocolates, but V's consuming them as well.

Subsection (2) of section 12 incorporates, for jurisdictional purposes only, a prima facie evidence provision to take care of the case in which the dead body, or any part thereof, is first found in this state but there is no proof as to where the actual death took place.

Section 13 proposes a definition of "this state" which is consistent with the concept of territory used in applying the territorial principle to matters of criminal jurisdiction.

Oregon cases:

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COMMENTARY

See commentary under § 25.

Section 23. Expenses of change; taxation as costs. (1) The expenses of the change of place of trial under section 20 of this Act shall be taxed, as allowed by law, as expenses of the action, and the costs and expenses of the action shall be taxed in the court and paid by the county wherein the trial is held. If the costs and expenses are not recovered from the defendant, the county in which the action was commenced shall repay the county in which the trial is held.

(2) The expenses of a change of place of trial under section 19 of this Act shall not be taxed against the defendant.

COMMENTARY

See commentary under § 25.

Section 24. Attendance of defendant at new place of trial. (1) When the court has ordered a change of place of trial, if the defendant has been released on security release, conditional release or recognizance, he must, without further notice, appear at the time and place appointed for trial and not depart therefrom without permission of the court.

(2) A security deposit is sufficient therefor in all respects as if the action had proceeded to final determination in the court where it was commenced.

COMMENTARY

See commentary under § 25.

Section 25. Conveyance of defendant in custody after change of venue. When the court has ordered a change of place of trial, if

Section 22. Filing of transmitted transcript and papers. The change of the place of trial is complete when the transcript and papers are filed with the clerk of the court to which the trial is transferred, and thereafter the action shall proceed in the same manner as if it has been commenced in that court.

COMMENTARY

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COMMENTARY

See commentary under § 25.

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COMMENTARY

See commentary under § 25.

Section 25. Conveyance of defendant in custody after change of venue. When the court has ordered a change of place of trial, if

Section 22. Filing of transmitted transcript and papers. The change of the place of trial is complete when the transcript and papers are filed with the clerk of the court to which the trial is transferred, and thereafter the action shall proceed in the same manner as if it has been commenced in that court.

COMMENTARY

See commentary under § 25.

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COMMENTARY

See commentary under § 25.

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(2) A security deposit is sufficient therefor in all respects as if the action had proceeded to final determination in the court where it was commenced.

COMMENTARY

See commentary under § 25.

Section 25. Conveyance of defendant in custody after change of venue. When the court has ordered a change of place of trial, if

the defendant is in custody, the clerk of the court shall issue an order to the sheriff of the county, directing him to safely convey the defendant and deliver him to the custody of the executive head of the correctional institution of the county where he is to be tried.

COMMENTARY TO SECTIONS 14 TO 25

A. Summary

These sections contain the bases for determining in which county in the state a criminal trial will be held.

Section 14 sets forth the general rule that the county in which the offense is committed is to be the place of trial.

Section 15 deals with special circumstances such as having two or more counties involved in a single offense or crimes committed on county boundaries, on moving conveyances or on bodies of water.

Section 16 provides for choice of a place of trial when a suitable location cannot be found under section 14 or 15.

Section 17 imposes a one-time limitation on a change of venue, except for extraordinary circumstances.

Sections 18 to 25 cover the procedural mechanics involved in filing the motion, the grounds for the motion, transmittal of court papers and conveyance of a defendant to the new location.

B. Derivation

Sections 14 to 16 are based on Michigan Revised Criminal Code § 145 and Illinois Criminal Code § 1-6, except for § 15 (10) which is similar to ORS 131.360.

Sections 17 to 25 are based on ORS 131.400, 131.410, 131.420, 131.430, 131.440, 131.450, 131.460 and 131.470. Sections 19 and 20 are based on Fed. Rules 21 (a), (b).

C. Relationship to Existing Law

Subsection (1) of section 14 is comparable to ORS 131.310. Subsection (2) restates existing case law.

Subsections (1) and (2) of section 15 are now covered by similar provisions in ORS 131.340.

Subsection (3) is similar to ORS 131.320 and 131.330. Subsection (4) is a modified version of ORS 131.380. Subsection (5) is new in so far as it deals specifically with crimes committed on moving conveyances; however, ORS 131.370 deals generally with situations such as this and those covered in subsection (6).

Subsection (7) of section 15 is similar to ORS 131.350, but stated in terms of "theft" as used in the Oregon Criminal Code of 1971. Subsections (8) and (9) are new. Subsection (10) is comparable to ORS 131.390. Subsection (11) is similar to ORS 131.360, but deletes the 60-day provision and is not limited to the "parent." The Commission was of the opinion that the 60-day limitation should be deleted, and that the state should be able to bring a prosecution for nonsupport regardless of the length of time during which the dependent child has resided in the county.

Section 16 is similar to ORS 131.320 with respect to acts committed outside the state, but new with respect to offenses committed within the state.

Section 17 is the counterpart of ORS 131.400. Section 18 restates part of ORS 131.420. Section 18 also is taken from ORS 131.420 and, like the existing statute, applies to actions in circuit and district court. Sections 19 and 20 are based on Fed. Rules 21 (a), (b).

Section 21 restates ORS 131.430. Section 22 restates ORS 131.440. Section 23 is similar to ORS 131.450 but would not allow costs to be taxed if a change of venue is necessary to ensure a fair trial for the defendant. Section 24 restates ORS 131.460 and section 25 restates ORS 131.470. Each of the above existing statutes would be repealed.

Oregon Constitution, Article I, § 11 provides, in part, that "In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed . . . ." However, this does not preclude the legislature from enacting statutes to provide for change of venue or for providing for a place of trial in those cases involving more than one county or where the county in which the crime occurred cannot reasonably be determined. The proposed sections are intended to establish comprehensive guidelines for handling such cases. On balance, they do not differ greatly from our existing rules although the language is new, and the sections are addressed more specifically to certain kinds of venue questions. Sections 17, 19 and 20, contrary to ORS 131.400 and 131.420, clearly would allow only the defendant to move for a change of venue.

Former Jeopardy

Section 26. Former jeopardy; definitions. As used in sections 26 to 29 of this Act, unless the context requires otherwise:

(1) "Conduct" and "offense" have the meaning provided for those terms in ORS 161.085 and 161.505.

(2) When the same conduct or criminal episode violates two or more statutory provisions, each such violation constitutes a separate and distinct offense.

(3) When the same conduct or criminal episode, though violating only one statutory provision, results in death, injury, loss or other consequences of two or more victims, and the result is an element of the offense defined, there are as many offenses as there are victims.

(4) "Criminal episode" means continuous and uninterrupted conduct that establishes at least one offense and is so joined in time, place and circumstances that such conduct is directed to the accomplishment of a single criminal objective.

(5) A person is "prosecuted for an offense" when he is charged therewith by an accusatory instrument filed in any court of this state or in any court of any political subdivision of this state, and when the action either:

(a) Terminates in a conviction upon a plea of guilty; or

(b) Proceeds to the trial stage and the jury is impaneled and sworn; or

(c) Proceeds to the trial stage when a judge is the trier of fact and the first witness is sworn.

(6) There is an "acquittal" if the prosecution results in a finding of not guilty by the trier of fact or in a determination that there is insufficient evidence to warrant a conviction.

COMMENTARY

A. Summary

This section defines five different terms involved with former jeopardy. The definitions make clear what constitutes a single and distinct offense and what constitutes a criminal episode.

Subsection (1) incorporates the Oregon Criminal Code of 1971 definition of "conduct" and "offense." The purpose of mentioning these terms in regard to former jeopardy is to give them the same meaning within the context of former jeopardy as for other criminal matters.

Subsection (2) makes conduct that violates two or more statutes a separate offense for each statute so violated.

Subsection (3) makes a separate offense, also, for each victim who is injured or killed as a result of a single course of criminal conduct.

Subsection (4) defines "criminal episode." The purpose of this definition is to identify the conduct (of a person) which may only be prosecuted once. Although this conduct may violate several statutes, each offense that relates to the same criminal conduct or "criminal episode" may be joined in one trial. Failure to join will prevent further prosecution for offenses stemming from the same criminal episode. This definition is further amplified by the provisions in section 28.

Subsection (5) defines "prosecuted for an of-

fense" which is another term for jeopardy. Jeopardy will attach when the first witness is sworn when the judge is the trier of fact. In jury trials jeopardy will attach when the jury is impaneled and sworn.

Subsection (6) defines an "acquittal." There must be either a finding of not guilty by the trier of fact or a determination that there is insufficient evidence to support a conviction.

B. Derivation

Subsection (1) is derived from the Oregon Criminal Code of 1971.

Subsections (2) and (3) are based on New York Criminal Procedure Law (NYCPL) § 40.10.

Subsection (4) is based in part on NYCPL § 40.10, language from *State v. Huennekens*, 245 Or 150, 420 P2d 384 (1966), and Proposed Texas Penal Code § 3.01.

Subsection (5) is based in part on NYCPL § 40.30 (1) and *United States v. Jorn*, 400 US 470 (1970).

Subsection (6) is based on Model Penal Code § 1.08 (1) (POD, 1962).

C. Relationship to Existing Law

The Oregon Constitution provides in Article I, § 12, that "no person shall be put in jeopardy twice for the same offense . . . ." The definitions in this section illuminate what is meant by "offense" and "jeopardy." See ORS 161.085 and 161.505.

The Oregon Criminal Code of 1971 defines the terms "conduct" and "offense."

There are no Oregon statutes that define the terms "criminal episode," "prosecuted for an offense" or "acquittal." ORS 132.560 (2) allows a joinder of counts and charges stemming from the same transaction but does not define "transaction."

The effect of this section will be to clarify an apparent conflict between cases that find only one offense when property belonging to several people is stolen versus the situation in which there is a crime against persons and each victim represents a separate offense.

The definition of "criminal episode" recognizes that a single course of criminal conduct can create different harms and violate different statutes but still be closely related in time, place and circumstances.

The criterion of "single criminal objective" is one part of the test incorporated into the draft to define the scope of the criminal episode. The determination of whether the conduct is "directed to the accomplishment of a single criminal objective" is an objective determination. In other words, the subjective intent of the person should not be considered in determining whether or not a certain offense was part of the criminal episode. Instead, the determination would depend upon what reasonably appeared under the circumstances to be within a single criminal objective.

If a person burglarizes a number of homes during an evening, each burglary would be a separate criminal episode because there is a difference of time and place. On the other hand, a close question would develop if several apartments in the same building were burglarized in succession in one evening. However, it is not the intent of this draft to suggest that a series of robberies or burglaries must be considered as one criminal episode simply because they are committed within a few hours or a few blocks of each other.

The simultaneous possession and sale of narcotics would constitute a criminal episode. Consequently, a person could not be tried for the sale and later tried for possession. Therefore, the present law, as stated in *State v. Molatore*, 91 Adv Sh 259, — Or App — (1970), which held that prosecution for possession of narcotics after acquittal for sale of narcotics was not double jeopardy, would be changed. However, sales of narcotics by one defendant to different people at different times on the same day would constitute separate criminal episodes because of a difference of time. For example, a prosecution for sale of narcotics to persons at 10:00 a.m. and 2:00 p.m. would not need to be joined with a prosecution for a sale at 4:00 p.m.

The following examples illustrate the application of the definition of "criminal episode" to specific fact situations. These examples do not try to distinguish among different degrees of the same crime or lesser included offenses, but are concerned only with testing the definition as applied to separate and distinct offenses.

FACTS: D enters bank, confronts teller and manager with a gun and demands money. After taking possession of the money, D ties up the manager and takes the teller with him as hostage. As D flees the bank, he fatally wounds the bank guard who attempts to prevent the escape.

ANALYSIS: One criminal episode consisting of crimes of robbery, kidnapping and felony murder.

FACTS: D enters 24-hour market late at night, points gun at lone female clerk and demands money. After getting money, D forces her to back room, rapes her and flees with money.

ANALYSIS: Crimes of robbery and rape. Whether D's conduct is a single episode is questionable. His conduct is "continuous and uninterrupted." The conduct is

serves both to commence an action and as a basis for prosecution thereof; or

(b) If filed with a magistrate to charge a person with the commission of an offense punishable as a felony, serves to commence an action, but not as a basis for prosecution thereof; or

(c) If, as is otherwise authorized by law, filed in circuit court to charge a person with the commission of an offense, serves as a basis for prosecution thereof.

(10) "Information" means a district attorney's information or a complainant's information.

(11) "Reasonable cause" means that there is a substantial objective basis for believing that a person to be arrested has committed an offense.

(12) "Trial court" means a court which by law has jurisdiction over an offense charged in an accusatory instrument and has authority to accept a plea thereto, or try, hear or otherwise dispose of a criminal action based on the accusatory instrument.

(13) "Ultimate trial jurisdiction" means the jurisdiction of a court over a criminal action or proceeding at the highest trial level.

(14) "Warrant of arrest" means a process of a court, directing a peace officer to arrest a defendant and to bring him before the court for the purpose of arraignment upon an accusatory instrument filed therewith by which a criminal action against the defendant has been commenced.

COMMENTARY

The section proposes a set of terms that have general application in the proposed criminal procedure code.

(1) "Accusatory instrument" is a new term that includes the three kinds of formal documents that are used to charge a person with the commission of an offense.

(2) "Bench warrant" is defined for the first time to distinguish it from a "warrant of arrest," defined in subsection (14). Each type of warrant is meant to accomplish the same thing, i.e., the arrest of a person, but for different purposes.

(3) "Complaint," a type of accusatory instrument, is a new definition and is distinguishable from an "information" that is fully defined in subsections (4), (9) and (10). This type of accusatory instrument is limited in its use to non-felony offenses and would be the basis not only for the commencement of the action but also for its prosecution in district or justice court. ORS 156.020 provides that in a justice's court a criminal action is commenced by the filing of the "complaint," but does not define the term. ORS 156.030 provides that for purposes of determining the sufficiency of the pleading, a complaint is deemed an indictment. These sections are applicable to district court through ORS 156.610. ORS 484.170 sets out the minimum requirements of a traffic complaint.

(4) "Complainant's information" would be the instrument used to commence a felony action in an inferior court, but would not serve as a basis for prosecution. The basis for prosecution of such a crime in circuit court would be either a grand jury indictment or a district attorney's information. The existing definition of information is as follows:

> ORS 133.010. An information is a written statement of the essential facts charging a person with the commission of a crime, made upon oath and filed with a magistrate in a preliminary proceeding.

The present term is frequently used interchangeably with the term, "complaint," and its precise meaning is unclear. Moreover, this doesn't appear to be a satisfactory definition for an information that a district attorney would file in circuit court in lieu of an indictment.

Section 3. Parties in criminal action. (1) Except for offenses based on municipal or county ordinances, in a criminal action the State of Oregon is the plaintiff and the person prosecuted is the defendant.

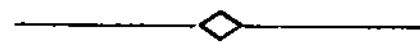
COMMENTARY

This section is similar to ORS 131.020, which would be repealed, but specifically takes into account prosecutions based on municipal or county ordinances. In those cases the city or county, instead of the state, would be the plaintiff.

Section 4. When departures, errors or mistakes in pleadings or proceedings are material. No departure from the form or mode prescribed by law, error or mistake in any criminal pleading, action or proceeding renders it invalid, unless it has prejudiced the defendant in respect to a substantial right.

COMMENTARY

This section restates ORS 131.030, which would be repealed.

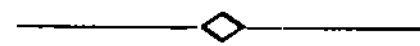


Time Limitations

Section 5. Timeliness of criminal actions. A criminal action must be commenced within the period of limitation prescribed in sections 6 to 9 of this Act.

COMMENTARY

See commentary under § 9.



Section 6. Time limitations. (1) A prosecution for murder or manslaughter may be commenced at any time after the death of the person killed.

(2) Except as provided in subsection (3) of this section or as otherwise expressly provided by law, prosecutions for other offenses must be commenced within the following periods of limitations after their commission:

(a) For any other felony, three years;

(b) For any misdemeanor, two years;

(c) For a violation, six months.

(3) If the period prescribed in subsection (2) of this section

Section 9. Tolling of statute; three year maximum. Notwithstanding section 8 of this Act, in no case shall the period of limitation otherwise applicable be extended by more than three years.

COMMENTARY TO SECTIONS 5 TO 9

A. Summary

These sections deal with the substance and application of the statute of limitations for criminal offenses. They are made part of the procedural code in accordance with an earlier decision of the Commission.

Section 6 (1) sets no limitation at all for prosecutions for murder or manslaughter. Section 6 (2) establishes the periods of limitation for all other offenses. Section 6 (3) provides for two extended periods of time, one in which fraud or breach of fiduciary responsibility is not discovered until after the basic period has expired, and the other in which the offender has been guilty of misconduct in office. The first clause in paragraph (b), while employing the language, "if the offense is based upon misconduct in office by a public officer or employe," would include, but not be limited to the offenses of "official misconduct" set forth in the new Criminal Code. Examples of other crimes that would fall within this area would be bribe receiving, misuse of confidential information and other similar conduct.

Section 7 provides that a prosecution is considered to be commenced when a warrant or any other process is issued, provided that the process is executed without "unreasonable delay." In determining whether the delay is reasonable, factors such as the effort made to find the accused, inability to find him, the fact that the accused was in prison and other circumstances too numerous to detail in a statute may be taken into account.

Section 8 details the circumstances in which the statute of limitations does not run, e.g., the defendant is absent from the state or cannot be found within the state.

Section 9 provides for a maximum of three years that can be added to the basic period because of circumstances set forth in section 8.

As the Model Penal Code commentary observes:

"Objectives of limitation provisions are varied:

"(1) Foremost is the desirability of requiring that prosecutions be based upon reasonably fresh evidence . . . .

"(2) If the person refrains from further criminal activity, the likelihood increases with the passage of time that he has reformed, diminishing pro tanto the necessity for imposition of this criminal sanction . . . .

"(3) As time goes by the retributive impulse which may have existed in the community is likely to yield place to a sense of compassion for the person prosecuted for an offense long forgotten.

"(4) Finally, it is desirable to lessen the possibility of blackmail based on a threat to prosecute or to disclose evidence to enforcement. After a period of time, a person ought to be allowed to live without fear of prosecution." (Tent. Draft No. 5 at 16 (1956)).

The Model Penal Code, supra at 17-22, also suggests that in determining the proper lengths of periods of limitation, five basic problems must be resolved:

(1) Should there be a period of limitations for all offenses? The draft continues the exceptions for murder and manslaughter now contained in ORS 131.110 (1).

(2) How many graduations in periods of limitations should there be? The draft provides for four, ranging from offenses without any limitation to the very minor offense of violation with a six month limitation.

(3) How long should each separate period of limitation be? Again, except for murder and manslaughter, the proposed draft provides for periods of three years, two years, and six months. These periods are largely arbitrary because, as the Model Penal Code points out, there is an absence of empirical data upon which to base a determination of appropriate amounts of time. To the extent that length of periods of limitation can be rationalized at all they, like penalty provisions, must be viewed as compromises reflecting the multiple and sometimes conflicting aims of the criminal law. For example, it might be said that (a) the more serious the offense, the greater the need for deterrence and the more undesirable it is to offer the possibility of escape from punishment after a short period of limitation, or (b) the more serious the offense, the greater the likelihood that the perpetrator is a continuing danger to society and the greater the need to incapacitate him whenever he is caught or (c) the more serious the offense, the less likely the offender is to reform of his own accord, and thus the need for compulsory treatment whenever he is apprehended. Yet it is also true that the more serious

other cases that have held that the jury must find a purpose to avoid detection or prosecution. (See Model Penal Code, Tent. Draft No. 5 at 27).

Section 9 would change existing law which does not now put any limit on the number of years that the statute of limitations can be tolled.

Oregon cases:

In case in which an indictment was returned within the time permitted by statute but was later dismissed and a new indictment returned after the allowable time had elapsed, the court held that the new indictment was barred by the statute of limitations because the statute had not been tolled by the first indictment. *State v. Silver*, 239 Or 459, 398 P2d 178 (1965).

See also, *State v. Terry*, 160 Or 308, 85 P2d 354 (1938); *State v. Mannix*, 133 Or 329, 288 P 507, 290 P 745 (1930); *Union County v. Hyde*, 26 Or 24, 37 P 76 (1894).

State Criminal Jurisdiction

Section 10. Jurisdiction; generally. Except as otherwise provided in sections 10 to 13 of this Act, a person is subject to prosecution under the laws of this state for an offense that he commits by his own conduct or the conduct of another for which he is criminally liable if:

(1) Either the conduct that is an element of the offense or the result that is an element occurs within this state; or

(2) Conduct occurring outside this state is sufficient under the law of this state to constitute an attempt to commit an offense within this state; or

(3) Conduct occurring outside this state is sufficient under the law of this state to constitute a conspiracy to commit an offense within this state and an overt act in furtherance of the conspiracy occurs within this state; or

(4) Conduct occurring within this state establishes complicity in the commission of, or an attempt, solicitation or conspiracy to commit an offense in another jurisdiction which also is an offense under the law of this state; or

(5) The offense consists of the omission to perform a legal duty imposed by the law of this state with respect to domicile, residence or a relationship to a person, thing or transaction in this state; or

(6) The offense violates a statute of this state that expressly prohibits conduct outside this state affecting a legislatively protected interest of or within this state and the actor has reason to know that his conduct is likely to affect that interest.

COMMENTARY

See commentary under § 13.

inal results in some other jurisdiction, and (3) activity that is lawful where engaged in shall not be penalized in this state unless that activity is so adverse to a legislatively protected interest in this state that it must be made punishable here, or such activity is specifically meant by the actor to take effect here.

B. Derivation

The sections are based on Model Penal Code § 1.03, Michigan Revised Criminal Code § 140 and Illinois Criminal Code § 1-5, except for subsection (2) of section 12 which is taken from New York Criminal Procedure Law § 20.20 (1971).

C. Relationship to Existing Law

Three existing statutes deal with state criminal jurisdiction, i.e., the "territorial applicability" of the laws of this state. Those are ORS 131.210, punishability of offenders under state law; ORS 131.220, where crime commenced outside state is consummated within state; and ORS 131.230, where death results within state from act done outside state. A fourth statute, ORS 131.240, relates to acts punishable in two jurisdictions and is dealt with in the draft on double jeopardy.

The proposed sections spell out the circumstances under which Oregon legislation can be applied, and are concerned not only with the obvious situations wherein the conduct takes place inside the state, but also with the more complicated instances in which the conduct occurs in whole or in part outside the state.

Subsection (1) of section 10 would not change the effect obtainable under present law, that if one of the elements of the offense or if the result that is an element of the offense occurs within the state, a criminal prosecution may be maintained here, with venue to be determined by the draft sections on that subject.

Subsection (2) of section 10 covers the situation in which the actor engages in conduct outside the state, for the purpose of bringing about a certain result in Oregon, but fails to complete the substantive offense in this state.

Subsection (3) of section 10 sets out the universal rule that all conspirators may be tried in the forum state if an overt act by one of them occurs there, although the others may have been elsewhere at the time of the overt act.

Subsection (4) of section 10 is the "other side of the coin" in comparison with subsection (3) and covers inchoate crimes that are meant to culminate in an offense in another jurisdiction. However, it requires that the crime intended would also have to be a crime in this state.

Subsection (5) is designed to cover omissions outside the borders of this state that affect persons or interests within the state.

Subsection (6) is a further extension of the "protected interest" principle and is aimed at statutes expressly prohibiting conduct outside the State of Oregon that affects a legislatively protected interest in this state. A *mens rea* limitation is included so that the actor would need to have "reason to know" that his conduct is likely to affect the Oregon interest.

Section 11 contains two exceptions to help resolve any conflict of laws problems that might arise when an Oregon statute attempts to penalize activity occurring outside this state that is lawful where done but criminal here.

Section 12 would allow a criminal prosecution in Oregon if the death blow were struck in another state and the victim died in Oregon, or if the death blow were struck in Oregon and the victim died elsewhere. Of course, the usual case would be of the first variety, although the proposed section would add a flexibility that ORS 131.230 does not now contain.

The section also is meant to permit prosecution in Oregon in the following kind of situation. D, in the State of Washington, mails a box of poisoned chocolates to V, living in Portland. V eats the candy in Oregon, then drives to Vancouver, Washington, where he dies. Preliminary drafts used the words "bodily impact" in this section, but the Commission substituted the term "conduct" because it considered the former language too restrictive and difficult to apply to situations such as homicide by poisoning.

The Commission believes that in the type of case illustrated above, because V ingested the poison while he was in Oregon, the interest of the state in prosecuting D is just as great as it would be had the victim actually died within this state. The "conduct causing death" includes not only D's sending the chocolates, but V's consuming them as well.

Subsection (2) of section 12 incorporates, for jurisdictional purposes only, a prima facie evidence provision to take care of the case in which the dead body, or any part thereof, is first found in this state but there is no proof as to where the actual death took place.

Section 13 proposes a definition of "this state" which is consistent with the concept of territory used in applying the territorial principle to matters of criminal jurisdiction.

Oregon cases:

In *State v. Barnett*, 15 Or 77, 14 P 737 (1887), the Oregon Court held that property stolen outside the state, brought into and converted to the defendant's use within the state, constituted larceny. The state

(6) If an offense is committed on the boundary of two or more counties or within one mile thereof, trial of the offense may be held in any of the counties concerned.

(7) A person who commits theft, burglary or robbery may be tried in any county in which he exerts control over the property that is the subject of the crime.

(8) If the offense is an attempt or solicitation to commit a crime, trial of the offense may be held in any county in which any act that is an element of the offense is committed.

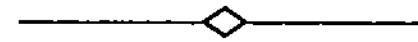
(9) If the offense is criminal conspiracy, trial of the offense may be held in any county in which any act or agreement that is an element of the offense occurs.

(10) A person who in one county commits an inchoate offense that results in the commission of an offense by another person in another county, or who commits the crime of hindering prosecution of the principal offense, may be tried in either county.

(11) A criminal nonsupport action may be tried in any county in which the dependent child is found, irrespective of the domicile of the parent, guardian or other person lawfully charged with support of the child.

COMMENTARY

See commentary under § 25.



Section 16. Place of trial; doubt as to place of crime; conduct outside of state. If an offense is committed within the state and it cannot readily be determined within which county the commission took place, or a statute that governs conduct outside the state is violated, trial may be held in the county in which the defendant resides, or if he has no fixed residence in this state, in the county in which he is apprehended or to which he is extradited.

COMMENTARY

See commentary under § 25.

Section 17. Change of venue. In accordance with sections 18 to 25 of this Act, the defendant in a criminal action may have the place of trial changed only once, except for causes arising after the first change was allowed.

Section 22. Filing of transmitted transcript and papers. The change of the place of trial is complete when the transcript and papers are filed with the clerk of the court to which the trial is transferred, and thereafter the action shall proceed in the same manner as if it has been commenced in that court.

COMMENTARY

See commentary under § 25.

Section 23. Expenses of change; taxation as costs. (1) The expenses of the change of place of trial under section 20 of this Act shall be taxed, as allowed by law, as expenses of the action, and the costs and expenses of the action shall be taxed in the court and paid by the county wherein the trial is held. If the costs and expenses are not recovered from the defendant, the county in which the action was commenced shall repay the county in which the trial is held.

(2) The expenses of a change of place of trial under section 19 of this Act shall not be taxed against the defendant.

COMMENTARY

See commentary under § 25.

Section 24. Attendance of defendant at new place of trial. (1) When the court has ordered a change of place of trial, if the defendant has been released on security release, conditional release or recognizance, he must, without further notice, appear at the time and place appointed for trial and not depart therefrom without permission of the court.

(2) A security deposit is sufficient therefor in all respects as if the action had proceeded to final determination in the court where it was commenced.

COMMENTARY

See commentary under § 25.

Section 25. Conveyance of defendant in custody after change of venue. When the court has ordered a change of place of trial, if

Former Jeopardy

Section 26. Former jeopardy; definitions. As used in sections 26 to 29 of this Act, unless the context requires otherwise:

(1) "Conduct" and "offense" have the meaning provided for those terms in ORS 161.085 and 161.505.

(2) When the same conduct or criminal episode violates two or more statutory provisions, each such violation constitutes a separate and distinct offense.

(3) When the same conduct or criminal episode, though violating only one statutory provision, results in death, injury, loss or other consequences of two or more victims, and the result is an element of the offense defined, there are as many offenses as there are victims.

(4) "Criminal episode" means continuous and uninterrupted conduct that establishes at least one offense and is so joined in time, place and circumstances that such conduct is directed to the accomplishment of a single criminal objective.

(5) A person is "prosecuted for an offense" when he is charged therewith by an accusatory instrument filed in any court of this state or in any court of any political subdivision of this state, and when the action either:

(a) Terminates in a conviction upon a plea of guilty; or

(b) Proceeds to the trial stage and the jury is impaneled and sworn; or

(c) Proceeds to the trial stage when a judge is the trier of fact and the first witness is sworn.

(6) There is an "acquittal" if the prosecution results in a finding of not guilty by the trier of fact or in a determination that there is insufficient evidence to warrant a conviction.

COMMENTARY

A. Summary

This section defines five different terms involved with former jeopardy. The definitions make clear what constitutes a single and distinct offense and what constitutes a criminal episode.

Subsection (1) incorporates the Oregon Criminal Code of 1971 definition of "conduct" and "offense." The purpose of mentioning these terms in regard to former jeopardy is to give them the same meaning within the context of former jeopardy as for other criminal matters.

Subsection (2) makes conduct that violates two or more statutes a separate offense for each statute so violated.

Subsection (3) makes a separate offense, also, for each victim who is injured or killed as a result of a single course of criminal conduct.

Subsection (4) defines "criminal episode." The purpose of this definition is to identify the conduct (of a person) which may only be prosecuted once. Although this conduct may violate several statutes, each offense that relates to the same criminal conduct or "criminal episode" may be joined in one trial. Failure to join will prevent further prosecution for offenses stemming from the same criminal episode. This definition is further amplified by the provisions in section 28.

Subsection (5) defines "prosecuted for an of-

closely joined in "time, place and circumstances." However, it is difficult to determine whether such conduct is "directed to the accomplishment of a single criminal objective." Because the robbery was already completed before the rape took place, it would appear that D's objective was robbery. The rape would not seem to be directed to the accomplishment of the robbery. However, it could be argued that D's objective was rape and that the robbery was preliminary to the commission of the rape. Or, D's objective could be both robbery and rape.

FACTS: D enters 24-hour market late at night, points gun at lone female clerk and demands money. After getting money, D forces the clerk to go with him when he flees the store. He takes her to remote area where, two hours after the robbery, he rapes her and leaves her on deserted road.

ANALYSIS: Two criminal episodes. Episode I consisting of crimes of robbery and kidnapping. Episode II consisting of crime of rape. It would seem much clearer that the rape was not directed to the accomplishment of the first objective, the robbery.

FACTS: D steals a car at 9:00 p.m., robs market at 9:30 p.m. and flees in stolen car.

ANALYSIS: One criminal episode consisting of crimes of theft and robbery.

FACTS: D steals a car at 9:00 p.m., robs market at 9:30 p.m. and flees in stolen car. D is seen entering a tavern at 11:00 p.m. by a police officer. The officer attempts to arrest D and is wounded by D in an exchange of gunfire.

ANALYSIS: Two criminal episodes. Episode I consisting of crimes of theft and robbery. Episode II consisting of crimes of resisting arrest and assault.

Jeopardy has traditionally attached when the jury was impaneled and sworn or when the court is the trier of fact, when the prosecution begins its case. This rule has been followed by the United States Supreme Court in the following cases: *United States v. Jorn*, 400 US 470 (1970); *Downun v. United States*, 372 US 734 (1963); *Green v. United States*, 355 US 184 (1957); *Wade v. Hunter*, 336 US 684 (1949); *Kepner v. United States*, 195 US 100 (1904).

Until recently the federal standards of double jeopardy were not applicable to the states. However, in *Benton v. Maryland*, 395 US 784 (1969), the Supreme Court applied the federal double jeopardy standard to state proceedings by asserting that the due process clause of the Fourteenth Amendment incorporated the Fifth Amendment protection against double jeopardy. Therefore, the guidelines announced in *Jorn, Downun, Green, Wade* and *Kepner* are now constitutionally required in all state criminal proceedings.

Subsection (5) also sets out a guideline in respect to prosecutions by different sovereignties. Under the present draft if a person commits an offense against the federal government and an offense against the state government, both offenses need not be joined if they are within the same criminal episode. For instance, if a person unlawfully takes money from a federally protected bank and kills the municipal policeman during his escape, these two offenses are within the same criminal episode but need not be joined in one prosecution. In other words, conviction for bank robbery in Federal District Court will not bar a subsequent murder prosecution in a state court.

Subsection (5) and section 27 prohibit the dual prosecution by the municipal court and the state court for offenses arising from the same criminal episode. In that regard, the rule in *State v. Miller*, 92 Adv Sh 963, — Or App —, 484 P2d 1132 (1971), is modified. Where a defendant convicted of possession of a concealed weapon in municipal court was subsequently charged in state court with being a felon in possession of a weapon, the state prosecution was not double jeopardy.

Under this draft, the state prosecution would be double jeopardy because the act of possession of a concealable weapon and the act of being a felon in possession of a weapon are part of one criminal episode. The two acts are joined in time, place and circumstances and are continuous in nature. The only distinction is the status of being a felon.

Cases:

United States v. Jorn, 400 US 470 (1970), held that when the first jury was dismissed, so that the first witness could consult with an attorney regarding self-incrimination, a subsequent trial would constitute double jeopardy. ". . . A defendant is placed in jeopardy in a criminal proceeding once the defendant is put to trial before the trier of the facts, whether the trier be a jury or a judge."

Downun v. United States, 372 US 734 (1963), held that jeopardy attaches when the jury is impaneled and sworn. The original trial judge dismissed the jury before any evidence was presented because the prosecution failed to locate the principal witness. The second trial was barred because jeopardy was not properly annulled in the first trial.

Green v. United States, 355 US 184, 188 (1957).

closely joined in "time, place and circumstances." However, it is difficult to determine whether such conduct is "directed to the accomplishment of a single criminal objective." Because the robbery was already completed before the rape took place, it would appear that D's objective was robbery. The rape would not seem to be directed to the accomplishment of the robbery. However, it could be argued that D's objective was rape and that the robbery was preliminary to the commission of the rape. Or, D's objective could be both robbery and rape.

FACTS: D enters 24-hour market late at night, points gun at lone female clerk and demands money. After getting money, D forces the clerk to go with him when he flees the store. He takes her to remote area where, two hours after the robbery, he rapes her and leaves her on deserted road.

ANALYSIS: Two criminal episodes. Episode I consisting of crimes of robbery and kidnapping. Episode II consisting of crime of rape. It would seem much clearer that the rape was not directed to the accomplishment of the first objective, the robbery.

FACTS: D steals a car at 9:00 p.m., robs market at 9:30 p.m. and flees in stolen car.

ANALYSIS: One criminal episode consisting of crimes of theft and robbery.

FACTS: D steals a car at 9:00 p.m., robs market at 9:30 p.m. and flees in stolen car. D is seen entering a tavern at 11:00 p.m. by a police officer. The officer attempts to arrest D and is wounded by D in an exchange of gunfire.

ANALYSIS: Two criminal episodes. Episode I consisting of crimes of theft and robbery. Episode II consisting of crimes of resisting arrest and assault.

Jeopardy has traditionally attached when the jury was impaneled and sworn or when the court is the trier of fact, when the prosecution begins its case. This rule has been followed by the United States Supreme Court in the following cases: *United States v. Jorn*, 400 US 470 (1970); *Downun v. United States*, 372 US 734 (1963); *Green v. United States*, 355 US 184 (1957); *Wade v. Hunter*, 336 US 684 (1949); *Kepner v. United States*, 195 US 100 (1904).

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United States v. Jorn, 400 US 470 (1970), held that when the first jury was dismissed, so that the first witness could consult with an attorney regarding self-incrimination, a subsequent trial would constitute double jeopardy. ". . . A defendant is placed in jeopardy in a criminal proceeding once the defendant is put to trial before the trier of the facts, whether the trier be a jury or a judge."

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Green v. United States, 355 US 184, 188 (1957).

A defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent, he cannot be tried again.

State v. Weitzel, 157 Or 334, 69 P2d 958 (1937). Rape and sodomy are separate and distinct offenses even though they occur in close proximity, timewise, to each other.

State v. Gratz, 254 Or 474, 461 P2d 829 (1969). Generally in a crime against persons, each victim represents a separate crime, whereas only one crime is committed if the crime is only against the property of several persons.

State v. Huennekens, 245 Or 150, 420 P2d 384 (1966). For charges to be joined they must be concatenated in time, place and circumstances so that the evidence of one charge would be relevant and admissible with evidence of other charges. (This holding construed ORS 132.560 regarding permissive joinder of charges.)

State v. Buck, 239 Or 577, 398 P2d 176 (1965). Defendant not placed in jeopardy when proceeding extended only to commencement of juror number one on voir dire.

In Re Tice, 32 Or 179, 49 P 1038 (1897). Jeopardy attaches when jury is impaneled and sworn.

See also: *State v. McCormack*, 8 Or 236 (1880); *State v. Stewart*, 11 Or 52, 238, 4 P 128 (1883); *State v. Clark*, 46 Or 140, 80 P 101 (1905); *State v. Nodine*, 121 Or 567, 256 P 387 (1927); *State v. McDonald*, 231 Or 48, 365 P2d 494 (1962); *State v. George*, 253 Or 459, 455 P2d 609 (1969);*State v. Woolard*, 92 Adv Sh 789, — Or — (1971).

Section 27. Previous prosecution; when a bar to second prosecution. Except as provided in sections 28 and 29 of this Act:

(1) No person shall be prosecuted twice for the same offense.

(2) No person shall be separately prosecuted for two or more offenses based upon the same criminal episode, if the several offenses are reasonably known to the appropriate prosecutor at the time of commencement of the first prosecution and establish proper venue in a single court.

(3) If a person is prosecuted for an offense consisting of different degrees, the conviction or acquittal resulting therefrom is a bar to a later prosecution for the same offense, for any inferior degree of the offense, for an attempt to commit the offense or for an offense necessarily included therein. A finding of guilty of a lesser included offense is an acquittal of the greater inclusive offense, although the judgment of conviction is subsequently reversed or set aside.

COMMENTARY

A. Summary

Section 27 is the operative section that explains when a former prosecution will be a bar to another prosecution.

Subsection (1) reiterates the specific constitutional prohibition against double jeopardy.

Subsection (2) sets forth the policy that there should not be unnecessary separate trials stemming from conduct which constitutes more than one offense. The policy is further amplified by exceptions in section 28.

Subsection (3) restricts multiple prosecution for lesser included offenses and attempts of the offense charged. Protection is also afforded the defendant when his conviction is reversed because this acts as an acquittal of that specific offense.

B. Derivation

Subsection (1) is based upon Or Const Art I, § 12, and NYCPL § 40.20 (1).

Subsection (2) is based upon NYCPL § 40.20 (2), *Waller v. Florida*, 397 US 387 (1970), *Ashe v. Swenson*, 397 US 436 (1970), and MPC § 1.07 (2).

Subsection (3) is derived from ORS 135.900, MPC § 108 (1) (POD, 1962), *State v. Steeves*, 29 Or 85, 43 P 947 (1896), and *Benton v. Maryland*, 395 US 784 (1969).

C. Relationship to Existing Law

Section 27 sets forth the specific situations that act as a bar to subsequent prosecutions. However, these situations are affected subject to the exceptions in section 28. The exceptions in §§ 28 and 29 are intended to apply to all subsections in section 27.

In 1969 the United States Supreme Court held that the double jeopardy clause in the United States Constitution is "fundamental to the American scheme of justice" and the same constitutional standards apply against both the state and federal government. *Benton v. Maryland*, 395 US 784 (1969). Double jeopardy is now a federal constitutional issue which is being examined continually. As a general policy measure, any state codification of double jeopardy must, at minimum, conform to the United States Supreme Court's current interpretation. The Oregon draft proposal follows this policy.

Subsection (1) restates the double jeopardy provision of Article I, § 12, Oregon Constitution. This draft does not attempt to "torture" the words "same offense" into the meaning, "same transaction." To do so would overturn many Oregon cases. Instead, the draft follows the cases concerning "same offense" but expands compulsory joinder of related offenses in subsection (2).

Note that compulsory joinder, as used in this draft for jeopardy purposes, should not be confused with "permissive joinder" of counts and charges as allowed by ORS 132.560. Nor should the "criminal episode" test be construed as limiting the kind of evidence the state could present under a theory of a common scheme or design.

Subsection (2) states the general policy that a person shall not be unnecessarily subject to multiple trials. Generally this idea has been attached to the double jeopardy clause under the so-called "same transaction" test. Here, the consideration of fair trial and due process of law should be ample basis for restricting separate trials for the same criminal episode. The Oregon Supreme Court recently held that, under the Oregon Constitution, "a second prosecution is for the 'same offense' and prohibited if (1) the charges arise out of the same act or transaction, (2) the charges could have been tried in the same court, and (3) the prosecutor knew or reasonably should have known of the facts relevant to the second charge at the time of the original prosecution." *State v. Brown*, 94 Adv Sh 1591, 1606, — Or App — (1972). Although the opinion contains some obvious differences in language from that proposed here, the court does adopt the compulsory joinder concept.

In a recent case, *State v. Elliott*, 93 Adv Sh 447, — Or App — (1971), the Court of Appeals held that a prosecution for negligent homicide ten months after the death and accident, and subsequent to a prosecution and conviction for drunk driving, did not constitute double jeopardy. The court applied the "required evidence" approach and reasoned that conviction of negligent homicide would not necessitate a finding of driving while intoxicated. The "required evidence" approach to the "same evidence" test holds that offenses are "the same" if the elements of one are sufficiently similar to the elements of another.

When the defendant was prosecuted for drunk driving, the district attorney knew that a person had been killed as a result of the defendant's driving. Section 27, subsection (2), is aimed directly at this type of situation. In a case like *Elliott*, the prosecutor would be required to join both offenses, drunk driving and negligent homicide, in one prosecution because the offenses were joined in time, place and circumstances, and the conduct was continuous and uninterrupted. The single criminal objective would be the drunk driving.

Subsection (2) provides two protections for the prosecutor. The first is that the offenses must be known to the prosecutor. The purpose of this is to prevent the accused from concealing his total criminal activity within a criminal episode from the prosecutor and then asserting double jeopardy if the prosecutor should later discover and proceed against the remaining offenses.

The Commission discussed the problem of the amount of knowledge that would be necessary on the part of the prosecutor. This raises a difficult issue in that the prosecutor may not have sufficient evidence to prosecute but still have knowledge that the offense exists. This would place the prosecutor in the dilemma of waiting for more evidence before he proceeded against the accused or foregoing the offense that he lacks sufficient evidence on.

The modifying adverb, "reasonably," was purposely inserted before the word "known" to accomplish the above two objectives. Hopefully, this would give the courts the power to determine if under the circumstances the district attorney should have included the offense in the criminal episode and hence in the former prosecution.

The draft uses the concept of venue to delineate the extent of the knowledge required of the prosecutor. This is in line with the intent of the Commission that criminal episode should be limited to the area of one circuit court, or a county. If the criminal episode should cover more than one county, then the venue provisions of the Code will determine whether or not the prosecutor will be required to join the extra-county offenses.

Subsection (3) restates existing Oregon law, ORS 135.900, which would be repealed, and is supported by Oregon cases: *State v. Steeves*, 29 Or 85, 43 P 947 (1896); *State v. Unsworth*, 240 Or 453, 402 P2d 507 (1965); *Price v. Georgia*, 398 US 323 (1970).

Subsection (3) does not include solicitation or conspiracy. However, the provisions of ORS 161.485 prohibit conviction for more than one offense out of solicitation, attempt and conspiracy. Therefore, the inclusion of solicitation and conspiracy is unnecessary.

Cases:

State v. Miller, 92 Adv Sh 963, — Or App —, 484 P2d 1132, Sup Ct review denied (1971).

Where defendant was convicted of violation of municipal ordinance making it a violation to carry a concealable weapon, subsequent state prosecution for being a felon in possession of a weapon is not double jeopardy. The two convictions required proof of different facts and were aimed at preventing two different evils.

See also: *State v. Howe*, 27 Or 138, 44 P 648 (1899); *State v. Steeves*, 29 Or 85, 43 P 947 (1896); *State v. Magone*, 33 Or 570, 56 P 648 (1899); *State v. Smith*, 101 Or 127, 199 P 194 (1921); *Miller v. Hansen*, 126 Or 297, 269 P 864 (1928); *Claypool v. McCauley*, 131 Or 371, 283 P 751 (1929); *State v. McDonald*, 231 Or 48, 365 P2d 494 (1962); *State v. Mayes*, 245 Or 179, 421 P2d 385 (1966).

Section 28. Previous prosecution; when not a bar to subsequent prosecution. A previous prosecution is not a bar to a subsequent prosecution when the previous prosecution was properly terminated under any of the following circumstances:

(1) The defendant consents to the termination or waives, by motion, by an appeal upon judgment of conviction, or otherwise, his right to object to termination.

(2) The trial court finds that a termination, other than by judgment of acquittal, is necessary because:

(a) It is physically impossible to proceed with the trial in conformity with law; or

(b) There is a legal defect in the proceeding that would make any judgment entered upon a verdict reversible as a matter of law; or

(c) Prejudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without injustice to either the defendant or the state; or

(d) The jury is unable to agree upon a verdict; or

(e) False statements of a juror on voir dire prevent a fair trial.

(3) When the former prosecution occurred in a court which lacked jurisdiction over the defendant or the offense.

(4) When the subsequent prosecution was for an offense which was not consummated when the former prosecution began.

COMMENTARY

A. Summary

Section 28 lists four situations in which a previous prosecution will not bar another prosecution.

Subsection (1) states that a defendant may waive the bar of previous prosecution by consent or voluntary action.

Subsection (1) lists five instances where the termination of a previous prosecution is necessary in

order to maintain justice. Satisfaction of any of these will prevent a bar from arising.

Subsection (3) prevents the defendant from asserting a previous prosecution of a court that lacked jurisdiction as a bar.

Subsection (4) allows a separate trial when a more severe harm occurs after the prosecution commenced.

B. Derivation

Subsections (1) and (2) are derived from Model Penal Code § 1.08 (4). See also ORS 17.330, 17.345, 135.890 and 136.810 et seq.

Subsection (3) is based on NYCPL § 40.30 (2)(a) and Model Penal Code § 1.11 (1).

Subsection (4) is taken from Model Penal Code § 1.10 (1).

C. Relationship to Existing Law

Section 28 contains exceptions to section 27. In effect, section 28 allows certain situations to prevent jeopardy from attaching or if jeopardy has attached, to properly annul jeopardy.

Subsection (1) restates Oregon law that jeopardy may be annulled upon consent or motion of defendant. ORS 136.820 states the effect of granting a motion in arrest of judgment is to place defendant in the same situation in which he was before the indictment. *State v. Fowler*, 225 Or 201, 357 P2d 279 (1960), holds there was no former jeopardy where defendant's motion for arrest in judgment was granted with subsequent trial and conviction.

The words "by an appeal upon judgment of conviction" are added to subsection (1) to specify that if the defendant appeals from a conviction, a subsequent prosecution is allowed.

Subsection (2) in part follows the provisions in ORS 17.330 and ORS 17.345. ORS 17.330 allows for discharge of the jury after a failure to agree after an expiration of a proper period of time. ORS 17.345 allows discharge of a jury if one juror disappears after the verdict is decided but before it is announced in open court. These statutes are incorporated into the Criminal Procedure Code by ORS 136.330.

ORS 135.890 establishes three grounds for annulling jeopardy: first, a variance between indictment and proof; second, an indictment demurred to on form or substance; and third, discharge for want of prosecution. *State v. Jones*, 240 Or 546, 402 P2d 738 (1965), upheld the grounds for annulling jeopardy as contained in ORS 135.890. *Jones* went even further and stated that if jeopardy is properly annulled for any reason, the proceedings stand upon the same footing as if the defendant had never been in jeopardy.

In subsection (2)(b) the words "not attributable to the state" were deleted from Preliminary Draft No. 1. *Benton v. Maryland*, 395 US 784 (1969), appeared to prohibit an annulment of jeopardy based on a defect caused by the state. However, this point was not clearly articulated in *Benton*; therefore, the Commission thought the matter should be left for future judicial clarification.

Subsection (2) will have the effect of further defining "any reason" which was used in the *Jones* case. If "any reason" is not properly defined, the possibilities of injustice may arise. ORS 134.150 allows for dismissal by the court on its own motion or motion of the district attorney and in furtherance of justice.

Subsection (3) is a new statutory provision, but would not change the existing rule.

Subsection (4) is new to Oregon law. It is necessary to prevent injustice under the compulsory joinder aspects of section 27 and the definition of "criminal episode." The Commission amended out the portion allowing a severance of offenses if the statutes violated in a criminal episode were intended to prevent a substantially different harm or evil. The Commission thought this exception to the criminal episode theory was too broad, although the MPC and NYCPL permit this exception.

This recognizes the problem of when the harm occurs after a prosecution for the same criminal episode. When a defendant is prosecuted for reckless driving and later the victim of the accident dies, this subsection will allow the prosecution for negligent homicide.

Cases:

State v. Shaffer, 23 Or 555, 32 P 545 (1893). If a jury cannot agree on a verdict after a reasonable period for discussion and reflection and the judge is satisfied with the truth of the jury's declaration, then the jury can be discharged and the defendant tried anew. Also *State v. Richie*, 144 Or 430, 25 P2d 156 (1933). *State v. Paquin*, 229 Or 555, 368 P2d 85 (1962). *Ex Parte Tice*, 32 Or 179, 49 P 1038 (1897). Where a jury was dismissed on Sunday after failure to agree, this was improper because the court had no jurisdiction to act on Sunday. Therefore jeopardy was not properly annulled.

State v. Chandler, 128 Or 204, 274 P 303 (1929). It is improper to discharge a jury, that cannot agree on a verdict, outside the presence of the defendant. An improper or unwarranted discharge of a jury in a felony case has the legal effect of acquittal.

State v. Reinhart, 26 Or 466, 38 P 822 (1894).

Jeopardy does not attach if dismissal occurs before any trial and is done in the furtherance of justice.

See also: *State v. Fowler*, 225 Or 201, 357 P2d 279 (1960); *State v. Jones*, 240 Or 546, 402 P2d 738 (1965).

Section 29. Proceedings not constituting acquittal. The following proceedings will not constitute an acquittal of the same offense:

(1) If the defendant was formerly acquitted on the ground of a variance between the accusatory instrument and the proof; or

(2) If the accusatory instrument was:

(a) Dismissed upon a demurrer to its form or substance; or

(b) Dismissed upon any pre-trial motion; or

(c) Discharged for want of prosecution without a judgment of acquittal.

COMMENTARY

A. Summary

Section 29 sets forth three more situations where it is proper to annul jeopardy.

B. Derivation

The section is derived entirely from ORS 135.890.

C. Relationship to Existing Law

The new section is taken from ORS 135.890. Definition of what constitutes a bar of another prosecution is stated in section 27.

The reason the provisions of ORS 135.890 are included in this Article is to make clear that when a variance causes dismissal, this is not deemed an acquittal upon the merits. In that regard section 29 allows variance as a grounds for proper annulment of jeopardy. This section applies to all offenses including misdemeanors, felonies and violations.

State v. Jones, 240 Or 546, 402 P2d 738 (1965), upholds ORS 135.890 as being a proper basis for annulment of jeopardy. See also *Portland v. Stevens*, 180 Or 514, 178 P2d 175 (1947).

The section clarifies ORS 135.890, and conforms its language to the entire draft. It enlarges upon the apparent scope of the existing statute in that it covers informations and complaints, as well as indictments.

PART II. PRE-ARRAIGNMENT PROVISIONS

ARTICLE 2. INVESTIGATION AND PREVENTION OF CRIME

Stopping of Persons

Section 30. Stopping of persons; definitions. As used in sections 30 to 32 of this Act, unless the context requires otherwise:

(1) "Crime" has the meaning provided for that term in ORS 161.515.

(2) A "frisk" is an external patting of a person's outer clothing.

(3) "Dangerous weapon," "deadly weapon" and "person" have the meaning provided for those terms in ORS 161.015.

(4) "Reasonably suspects" means that a peace officer holds a belief that is reasonable under the totality of the circumstances existing at the time and place he acts as authorized in sections 30 to 32 of this Act.

(5) A "stop" is a temporary restraint of a person's liberty by a peace officer lawfully present in any place.

COMMENTARY

A. Summary

Section 30 defines three terms that are peculiar to the stopping of persons and incorporates the new Criminal Code definition of five other terms. The terms also clarify what constitute a "frisk" and a "stop."

Subsection (1) incorporates the Criminal Code definition of "crime" and applies it to these provisions.

Subsection (2) defines a "frisk" so as to distinguish this procedure from a full search.

Subsection (3) incorporates the Criminal Code definition of "dangerous weapon," "deadly weapon" and "person" to give these terms the same meaning in the stopping of persons.

Subsection (4) defines "reasonably suspects" as a basis for allowing the stopping and frisking of persons by peace officers.

Subsection (5) defines the term "stop" as distinguished from other police actions such as arrest.

B. Derivation

Subsections (1) and (3) are derived from ORS 161.515 and 161.015.

Subsection (2) is derived from MCPP § 2.02 (4), Tentative Draft No. 2, 1969, and *Terry v. Ohio*, 392 US 1 (1968).

Subsection (4) is in part derived from ORS 161.239.

Subsection (5) is based on *Terry v. Ohio* and MCPP § 2.02 (1).

C. Relationship to Existing Law

ORS 161.015 defines "dangerous weapon," "deadly weapon" and "person" as follows:

> "'Dangerous weapon' means any instrument, article or substance which under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or serious physical injury."
>
> "'Deadly weapon' means any instrument, article or substance specifically designed for and presently capable of causing death or serious physical injury."
>
> "'Person' means a human being . . . ."

ORS 161.515 defines "crimes" as follows:

> "(1) A crime is an offense for which a sentence of imprisonment is authorized.
>
> "(2) A crime is either a felony or a misdemeanor."

"Peace officer" is not defined, but is meant to have the same meaning as for arrests in § 89.

The terms "frisk," "stop" and "reasonable suspicion" are not found in current Oregon statutes but have been mentioned in a few Oregon appellate cases. The Supreme Court of the United States sets out some guidelines for a "stop" and a "frisk" in *Terry v. Ohio*, 392 US 1 (1968), and *Sibron v. New York*, 392 US 40 (1968). However, there are no Oregon cases specifically concerning the manner of the "frisk."

Since the frisk is premised upon the safety of the officer, the manner and extent of the frisk has been limited to something less than a full blown search. In *Terry* the court stated:

> "The search must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a full search . . . ."

Since a full search is premised upon an arrest which in turn is premised upon probable cause, logic and fairness compel a search (or "frisk") when based upon less than probable cause, (or what is sometimes called reasonable suspicion) to be limited in scope and manner. The Supreme Court in *Terry* defines what limit they think is reasonable:

> "The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police." 392 US at 29.

Therefore, the extent of the "frisk" permitted by *Terry* is limited to weapons that can assault the police officer. Also, the manner of the "frisk" is limited to an external patting of clothing that would reveal the presence of a weapon:

> ". . . he is entitled for the protection of himself and others in the area to conduct a carefully limited search of outer clothing of such persons in an attempt to discover weapons which might be used to assault him."

A "stop" is defined for clarity and distinction from "arrest." The court in *Terry* termed the stop a seizure of that person:

> "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."

The "stop" is termed "temporary" because the underlying purpose of the stop is to allow the officer to investigate a suspicious circumstance. If the officer discovers his suspicions are baseless, the person is free to go. On the other hand, if there is a basis for suspicion, then this suspicion would ripen into a belief of criminal activity and hence constitute a probable cause for arrest. Either situation could result from a temporary stop.

"Reasonably suspects" is defined initially to show that the suspicious belief must be based on a totality of the circumstances. This requirement was stated in similar terms in *Terry*. There must be some facts or circumstances that distinguish the conduct of the individual stopped from that of other individuals who are not stopped:

> "In justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from these facts, reasonably warrant that intrusion . . . ." 392 US at 21.

ORS 161.239 deals with the use of deadly force in making an arrest or in preventing an escape. The officer has justification to use deadly force when he reasonably believes that:

> "The crime committed by the person was a felony or an attempt to commit a felony and under the totality of the circumstances existing at the time and place, the use of such force is necessary; . . . ."

The reasonable suspicion is similar in nature to the reasonable belief standard of ORS 161.239 but of different quantum. If the officer has such reasonable belief he would also have probable cause to arrest.

Section 31. Stopping of persons. (1) A peace officer who reasonably suspects that a person has committed or is about to commit a crime may stop the person and, after informing the person that he is a peace officer, make a reasonable inquiry.

(2) The detention and inquiry shall be conducted in the vicinity of the stop and for no longer than a reasonable time.

(3) The inquiry shall be considered reasonable only if limited to the immediate circumstances that aroused the officer's suspicion.

COMMENTARY

A. Summary

Section 31 provides the legal basis for the stopping of a person. If the officer cannot justify a stop under this situation, then he cannot restrain a person nor frisk his body. In other words, reasonable suspicion that a person has committed or is "about to commit a crime" is the condition precedent to any interference of a person's liberty by a peace officer.

B. Derivation

Subsection (1) is partly derived from MCPP § 2.02 (1)(a).

Subsections (2) and (3) are partially derived from 38 Ill Rev Stat § 107-14 and MCPP § 2.02 (1).

C. Relationship to Existing Law

In *Terry v. Ohio*, 392 US 1 (1968), the Supreme Court of the United States held that the stopping of a person was in fact a seizure of that person and within the Fourth Amendment protection from unreasonable searches and seizures. However, the court stated that the stopping of a person may be justified if reasonable. The determination of reasonableness will depend upon the circumstances of the stop and the ability of the officer to articulate specific facts explaining these circumstances.

The specific and articulable facts that the officer must point to to justify the stop should indicate to the officer that there is some type of criminal activity afoot and that this particular person is somehow involved:

> ". . . where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot . . . he identifies himself as a policeman and makes reasonable inquiries . . . ." 392 US at 30.

The Supreme Court does not use the term "reasonable suspicion" but as discussed above sets out a standard for inquiry and stopping on somewhat less than probable cause. The standard has the same effect whether or not it is called reasonable suspicion or reasonable inference or whatever.

In *State v. Cloman*, 254 Or 1, 456 P2d 67 (1969), the Oregon Supreme Court partially explained what reasonable suspicion was in relation to the stopping of a vehicle:

> "This 'reasonable suspicion' we deem to be of less quantum than probable cause to arrest." 254 Or at 6.
>
> "Our approval of an officer's right to stop to investigate should not be interpreted as drastically broadening an officer's power to restrain persons when the officer has no probable cause to arrest. The officer must have reasonable grounds to stop the person or car and the right to stop does not necessarily create a right to search." 254 Or at 9.

The court in *Terry* defines the guidelines to be followed but does not use the term "reasonable suspicion." The court in *Cloman* uses the term but does not clearly define what this means except that it is less than probable cause. Assuming that the guidelines in *Terry* are less than probable cause and that the reasonable suspicion in *Cloman* is less than probable cause, it would be reasonable to state that the guidelines in *Terry* are the guidelines for reasonable suspicion.

Therefore, when an officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity is afoot and when he is able to point to specific and articulable facts which give rise to the inference that criminal activity is afoot, the officer has "reasonable suspicion" and hence can stop the individual for investigation.

However, the court in *Terry* placed a caveat on the reasonable conclusions or inferences of the officer leading to a stop:

> ". . . would the facts available to the officer at the moment of the seizure or search warrant a man of reasonable caution in the belief that the action taken was appropriate . . . simple good faith on the part of the arresting officer is not enough . . . ." 392 US at 22.

This caveat apparently places an objective test in the forefront of the stop determination. In other words, the test should be what a reasonable officer would think in this situation and not what this particular arresting officer thought.

Subsection (1) proposes a codification of the peace officer's ability to stop a person as close to the *Terry* and *Cloman* rationale as possible while giving the courts leeway to interpret the protean situations that arise and giving the officer limited "stopping" powers.

The Commission amended subsection (1) of section 2 to allow a stop for all crimes. In the first draft a stop could only be made if an officer reasonably suspected a felony. The Commission thought the limitation of stopping authority to felonies alone was too restrictive. Further, the Commission believed that the division between felony and misdemeanor would lead to confusing and ambiguous field situations for a peace officer attempting to stop a person.

The New York statute allows a stop only for a suspected felony or Class A misdemeanor, while the

Illinois statute allows a stop for a suspected violation of any penal statute. The American Law Institute in its Model Code of Pre-Arraignment Procedure limits the stops only to a felony or a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property. (§ 2.02 (1)(a)(i)).

Subsections (2) and (3) codify the idea that a stop is a limited situation by its very nature. If a person is taken to the station for questioning he should be either under arrest or voluntarily cooperating with law enforcement officials.

This distinction is important because the person is not free to leave the presence of the officer who has reasonable suspicion; however, the officer is not free to forcibly take the person to the station upon mere suspicion.

The thrust of the *Terry* decision is to constitutionally recognize the "less than arrest situations" and incorporate them under the Fourth Amendment. As mentioned above, the stop will be constitutional if it is reasonable. The limitations as to the location of the stop and the content of the inquiry are designed as guidelines for reasonableness. Therefore, if the guidelines are adopted and followed, the stop would presumably be reasonable and hence constitutional.

Oregon cases:

State v. Huddleston, 91 Adv Sh 1815, — Or App — (1971), holds that the police can stop a vehicle upon reasonable suspicion that the car or its occupants have a connection with criminal activity. The facts in *Huddleston* show that there were several recent burglaries in the northwest area of the city. One of the items stolen was a power mower; a burglary had just occurred that resulted in theft of groceries, and officers had surmised that a covered pickup or van had been used in the previous burglaries. With this information in mind the arresting officer was proceeding to the scene of the most recent grocery larceny at 5:30 a.m. As the officer came near the area he noticed a pickup driving in the opposite direction from the area where the last burglary occurred. Following the pickup he observed what appeared to be the handle of a power mower and several items in the rear of the truck. The officer then decided to stop the truck and investigate further and found that, indeed, the truck and the occupants were involved in the latest larceny of groceries.

The Oregon Court of Appeals upheld this stop on reasonable suspicion as articulated in *Cloman*. This stop would appear to be within the *Terry* requirements because there are sufficient facts that the officer can specifically point to as raising a reasonable suspicion in his mind that the pickup truck was involved in criminal activity. The *Huddleston* case appears to be an example of good police work and well within proper police action in detecting crime.

In *State v. Fisher*, 92 Adv Sh 881, — Or App —, 484 P2d 865 (1971), the Court of Appeals did not reach the question of whether the stop was justifiable or not when defendants were stopped for a routine traffic matter. The matter was to advise defendant that his rear license plate was loose. It later developed that the officer became suspicious and searched the car, finding contraband. The court held that a routine traffic stop is of itself not sufficient cause for making a warrantless search and hence the contraband found was not admissible.

See also: *State v. Parks*, 92 Adv Sh 1497, — Or App — (1971); *State v. Murphy*, 2 Or App 251, 465 P2d 900 (1970), (*cert den* 400 US 944); *State v. Rater*, 253 Or 109, 453 P2d 680 (1969); *City of Portland v. James*, 251 Or 8, 444 P2d 554 (1968); *State v. Taylor*, 249 Or 268, 437 P2d 853 (1968).

Section 32. Frisk of stopped persons. (1) A peace officer may frisk a stopped person for dangerous or deadly weapons if the officer reasonably suspects that the person is armed and presently dangerous to the officer or other person present.

(2) If, in the course of the frisk, the peace officer feels an object which he reasonably suspects is a dangerous or deadly weapon, he may take such action as is reasonably necessary to take possession of the weapon.

COMMENTARY

A. Summary

Section 32 explains the basis, extent, and, incorporating the definition in section 30 of "frisk," the manner of the frisk. The provisions on "frisk" are separated from the provisions of "stop" so as to make it clear that a frisk does not always follow

a stop. A frisk is a distinct procedure from a stop and must be justified on completely separate grounds. However, as was the case in *Terry*, the stop and frisk can occur simultaneously.

B. Derivation

Section 32 is derived from MCPP § 2.02 (4).

C. Relationship to Existing Law

In *Terry v. Ohio*, 392 US 1 (1968), the court specified the basis for a frisk of a stopped person. The reason for a frisk was premised upon the safety of the officer and others in the immediate area who could suffer harm. Associate Justice Harlan succinctly stated the reason behind the frisk:

> "There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet." 392 US at 33.

Therefore, the reason the police officer may conduct a frisk is to protect himself and others from harm. However, the officer must have a reason for being in fear of his safety.

> ". . . where he has reason to believe that he is dealing with an armed and dangerous individual . . . whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.
>
> "And in determining whether the officer acted reasonably in such circumstances, due weight must be given . . . to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." 392 US at 27.

Terry allows a frisk of the individual that is stopped only if the officer fears for his safety or the safety of others and further if this fear is reasonable in light of the circumstances and inferences that can be drawn from the situation.

Preliminary Draft No. 1 limited the scope of the frisk to "deadly weapons." However, the Commission thought this limitation was too restrictive and included "dangerous weapons." Section 30 was amended to include the 1971 Criminal Code definition of "dangerous weapon."

In *State v. Hall*, 91 Adv Sh 823, — Or App —, 476 P2d 930 (1970), the Court of Appeals held that when an officer has reason to believe that he is dealing with an armed individual, he has a right to search for weapons. Here, the defendant was arrested for violation of the basic speed law. After stopping the vehicle and while the officers were walking up to the vehicle, the defendant got out holding his right hand in the pocket of his knee-length coat. The right pocket was baggy and sagged. The officers asked if he had a gun to which the defendant replied, "Yes." The officers removed the gun and arrested the defendant.

Here, the baggy pocket and the hand in the baggy pocket would be reason enough under *Terry* to justify the frisk. Although the stop was not a *Terry* stop in the traditional sense, because the officers stopped the vehicle for speeding, the search was a *Terry* type search because it was done out of fear for safety and not related to the speeding violation. (You don't expect a speeder to shoot.)

A recent decision by the Oregon Court of Appeals, *State v. Fisher*, 92 Adv Sh 881, — Or App —, 484 P2d 865 (1971), declined to disturb the trial court's finding of fact. The trial judge found that the reason for the officer's suspicions "appears to be more subjective on the part of the officer than based upon any objective observations made by him." At 883. The state had urged that the conduct of the defendant and his passenger was of a sufficiently suspicious character that the officer was justified in conducting a weapons search. The Court of Appeals, in refusing to upset the finding of fact of the trial court, cited *Sibron v. New York*, 392 US 40 (1968), as the basis for a search for weapons:

> "In the case of the self-protective search for weapons, he must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous . . . ." 392 US at 64.

The suspicious movements in question in *Fisher* were sudden hand movements by the passenger towards the glove compartment which were repeated two more times, coupled with placing the hand underneath a blanket on the front seat. The passenger, while acknowledging some hand movements, denied moving toward the glove compartment or placing his hand underneath the blanket. Therefore, this became a question of fact that was decided by the judge by granting a motion to suppress the evidence obtained through the search.

The Court of Appeals apparently approved the *Terry* and *Sibron* test for "frisking" a person or vehicle when the officer reasonably fears for his own safety.

In *Sibron* the Supreme Court held that the officer did not have a reasonable suspicion or fear for his safety when he thrust his hand into Sibron's pocket, finding contraband. The officer was not acquainted with Sibron and had no information concerning him. He merely saw Sibron talking to a number of known narcotics addicts over a period of eight hours. The officer was completely ignorant regarding the content of the conversations and saw nothing pass between the addicts and Sibron.

> "The suspect's mere act of talking with a number of known addicts over an eight-hour per-

iod no more gives rise to reasonable fear of life or limb on the part of the police officer than it justifies an arrest for committing a crime." 392 US at 64.

In *Sibron* the court reiterated the limited manner of the frisk because the officer that searched Sibron immediately stuck his hand into Sibron's pocket without any preliminary search:

"The search for weapons approved in *Terry* consisted solely of a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault.

"The search was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception—the protection of the officer by disarming a potentially dangerous man." 392 US at 65.

There are no Oregon cases commenting upon the scope and manner of the frisk. However, there is a Ninth Circuit Court of Appeals case that discusses the question. In *Tinney v. Wilson*, 408 F2d 912 (1969), the court held that the officer had no business squeezing soft objects that he comes across during the course of the frisk.

"Officer McGill specifically directed his attention to the pocket and 'could feel by gently squeezing' the object 'that it felt to be pills or capsules.' . . . While Officer McGill's 'frisk' of Tinney for weapons was constitutionally valid at its inception, the officer's 'squeezing' action transgressed the limits of a search which must be 'confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.' " 392 US at 29, 408 F2d at 916.

Related cases:

State v. Riley, 240 Or 521, 402 P2d 741 (1965).

Police officers, one of whom flashed a light in vehicle stopped for defective taillights and who noticed part of a gun protruding from under front seat of driver's side while driver was still near the vehicle, were justified in seizing the weapon on the ground that it was reasonably necessary to their safety.

"To justify the seizure of a weapon which could be used against the arresting officer we shall not draw a fine line measuring the possible risk to the officer's safety." 240 Or at 524.

State v. O'Neal, 251 Or 163, 444 P2d 951 (1968).

A search incident to an arrest is justified only for safety of arresting officer or because it has relevance to the crime for which the accused is arrested.

Where arresting officers had frisked defendant immediately after his arrest on traffic charges and inspection of a defendant's wallet did not reasonably relate to defendant's actions of driving without a license plate.

See also: *State v. Rater*, 253 Or 109, 453 P2d 680 (1969); *State v. Shaw*, 90 Adv Sh 2093, — Or App —, 473 P2d 159 (1970).

Detention

Section 33. ORS 133.037 is amended to read:

133.037. **Detention and interrogation of persons suspected of theft committed in a store; reasonable cause.** (1) Notwithstanding [*ORS 133.310, 133.350, 133.550 and subsection (2) of 133.560*] **any other provision of law,** a peace officer, merchant or merchant's employee who has reasonable cause for believing that a person has committed theft **or attempted theft** of property of a store or other mercantile establishment may detain and interrogate the person in regard thereto in a reasonable manner and for a reasonable time.

(2) If a peace officer, merchant or merchant's employe, with reasonable cause for believing that a person has committed theft **or attempted theft** of property of a store or other mercantile establishment, detains and interrogates the person in regard thereto, and the person thereafter brings against the peace officer, merchant or merchant's employe any civil or criminal action based upon the detention and interrogation, such reasonable cause shall be a defense to the action, if the detention and interrogation were done in a reasonable manner and for a reasonable time.

COMMENTARY

The first amendment in this section is of a housekeeping nature. The other amendments are to allow the detention of suspected persons even though there may be a legal question in a given situation as to whether a completed crime of theft has occurred, or merely attempted theft.

Prevention by Public Officers

Section 34. General provisions. Crimes may be prevented by the action of public officers in accordance with sections 34 to 41 of this Act, and as otherwise authorized by law.

COMMENTARY

This section replaces the old boilerplate provisions of ORS 145.010.

Section 35. (ORS 145.020) Dispersal of unlawful or riotous assemblages. (1) When any five or more persons, whether armed or not, are unlawfully or riotously assembled in any county, city, town or village, the sheriff of the county and his deputies, the mayor of the city, town or village, or chief executive officer or officers thereof, and the justice of the peace of the district where the assemblage takes place, or such of them as can forthwith be collected, shall go among the persons assembled, or as near to them as they can with safety, and command them in the name of the State of Oregon to disperse. If, so commanded, they do not immediately disperse, the officer must arrest them or cause them to be arrested; and they may be punished according to law.

(2) For the purpose of arresting or causing the arrest of persons who fail to disperse when so commanded, the arresting officer or officers may command the aid of persons present or within the county, except members of the National Guard. No person, when so commanded, shall fail to give such aid and, if he does fail so to do, he shall be deemed one of the rioters and may be treated accordingly.

(3) No such officer, having notice of such unlawful or riotous assemblage, shall neglect to exercise the authority with which he is vested under this section.

Section 36. (ORS 145.060) Governor's power to enter into agreements with other states for crime prevention purposes. The Governor of Oregon may enter into agreements or compacts with

the Governor of any or all the states of Washington, Idaho, California and Nevada, each acting on behalf of his own state, in order to effectuate cooperative effort and mutual assistance in the prevention of crime in those states and in the enforcement of their respective criminal laws and policies.

Exclusion From Public Property

Section 37. (ORS 145.610) Definitions for ORS 145.610 to 145.640. As used in ORS 145.610 to 145.640, unless the context requires otherwise:

(1) "Police" means the municipal police and the county sheriff of the political subdivision in which the public property is located, and the Department of State Police.

(2) "Public official" means the officer or employe who is the administrative head of the board, commission, agency or division or department of this state or any political subdivision therein which has jurisdiction over any public property, or his designate.

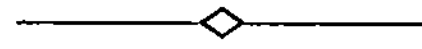
(3) "Public property" means public lands, premises and buildings, including but not limited to any building used in connection with the transaction of public business or any lands, premises or buildings owned or leased by this state or any political subdivision therein.

Section 38. (ORS 145.620) Proclamation of emergency period by Governor. After consultation with the public official, or his designate, and the police, the Governor may proclaim an emergency period if he finds that there exists on any public property a clear and present danger of injury to persons, damage to property or denial of or substantial interference with ingress or egress from public property. The proclamation shall describe the public property affected by the proclamation. He shall cause his proclamation to be publicized. When the Governor finds that the danger has ended, he shall proclaim the end of the emergency period.

Section 39. (ORS 145.630) Exclusion from public property. (1) During the emergency period proclaimed by the Governor under ORS 145.620, the public official shall order excluded from the public property described in the proclamation such persons who in the judgment of the public official are contributing to or aggravating the danger which the Governor has proclaimed to exist.

(2) After informing the person ordered removed or excluded from the public property of the proclamation and order, the police shall remove or exclude such person from such public property.

(3) Any person who, having been ordered excluded or removed from any public property, knowingly enters thereon or who remains on such property during an emergency period proclaimed by the Governor under ORS 145.620 and who refuses to leave such property upon request by the police, commits a Class A misdemeanor.



Section 40. (ORS 145.640) Review of exclusion order. Any person ordered removed or excluded from any public property under ORS 145.620 and 145.630 shall have immediate access to the circuit court for the county in which the property is located for review of the order of exclusion or removal. Such access shall be in the form of a writ of review and shall be given priority over all other cases on the docket of the circuit court.

COMMENTARY

The draft repeals ORS 145.040, 145.050 and 145.120 to 145.310, the so-called "peace bond" statutes. In the opinion of the Commission, these sections are outdated and cumbersome, and contribute nothing to the criminal justice system.

Section 41. (ORS 145.990) Penalties. (1) Violation of subsection (2) of ORS 145.020 is a Class C felony.

(2) Violation of subsection (3) of ORS 145.020 is a Class A misdemeanor.

Special Law Enforcement Officers

Section 42. ORS 148.010 is amended to read:

148.010. **Power of Governor to employ special agents.** The Governor may employ, at such salaries as he deems reasonable for the services rendered, special agents to effect the apprehension and conviction of criminals, the return of fugitives from justice, the investigation of cases in which he believes the laws of the state are being violated, the supervision of [*men*] **persons** paroled or conditionally pardoned from the Oregon [*State Penitentiary*] **Corrections Division** or the collection of evidence in any case, civil or criminal, in which the state is interested whenever in his judgment it is necessary from the conditions existing in any case, whenever he is convinced that criminals are likely to escape

punishment and justice cannot be done by the regularly constituted authorities of any county of the state or of the state or whenever any emergency has arisen which in his judgment would justify him so doing.

COMMENTARY

The amendments conform the section to the language used in the existing and proposed statutes relating to persons in the custody of the Oregon Corrections Division.

Section 43. (ORS 148.110) Presentment of facts to circuit court. Whenever in the opinion of the Governor the criminal laws of the state are not being faithfully executed and enforced and the circumstances justify the appointment of any sheriff, district attorney, constable or justice of the peace pro tem, he shall lay the facts of which he is advised before the circuit court, or any judge thereof, of the district of the office in question. The court or judge shall, without delay, in a summary manner consider the facts so presented and such further facts as can be gathered or may be presented by or on behalf of the Governor, the officer or any party interested.

Section 44. (ORS 148.120) Hearing. The court, or judge thereof, in conducting such hearing, shall have all the usual powers of the circuit court or judge, including the power to subpena and examine witnesses of its own motion. The Governor, the officer affected or any party interested may subpena witnesses and appear and participate in person or by counsel, and the officer shall be given reasonable opportunity to prepare and present this case. The Attorney General shall appear on behalf of the Governor if by him requested so to do.

Section 45. (ORS 148.130) Request that judge of another district conduct hearing; traveling expenses. When the Governor has made a request for an investigation before the court or judge of the district of the office affected, the court or judge may request that the hearing be held before the court or judge of any other district and call in such court or judge to conduct the same at the regular place of holding court in the district of the office affected. Such a request shall be made by the court or judge without delay and the court or judge called in shall proceed without delay to conduct the hearing. The actual necessary traveling expenses of any court or judge that is called in shall be paid out of the funds appropriated for

the purposes of ORS 148.110 to 148.180 upon properly verified vouchers being presented to the Secretary of State.

Section 46. (ORS 148.140) Findings. The court or judge shall make such findings as are justified by the facts adduced at the hearing and shall find as to whether or not the criminal laws of the state are being faithfully executed and enforced by the officers under investigation.

Section 47. (ORS 148.150) Appointment of special officers on finding that laws are not enforced. If it is found that the criminal laws of the state are not being faithfully executed and enforced by the officers under investigation, the Governor may appoint, for a period not longer than 90 days, such special officers as may be necessary to correct the failure to execute or enforce the criminal laws.

Section 48. (ORS 148.160) Qualifying of special officers; powers and duties. When appointed, special officers shall qualify in the same manner as provided by law for regularly elected officers, shall have all the power and authority of the regularly elected officers necessary to effectuate the purposes of the appointment and shall carry out the directions of the Governor, pursuant to the appointment, in the same manner and to the same extent as the duly elected officers could do or perform; and no greater power shall be conferred upon any special officer than is by law lodged with the regularly elected officers.

Section 49. (ORS 148.170) Compensation of special officers. The special officers provided for in ORS 148.150 shall receive a compensation for the time they are appointed equal to that provided for the regularly elected officers, the compensation to be paid in the same manner as the regular officers are paid.

Section 50. (ORS 148.180) Effect of appointment of special officers on salary of regular officers. The regularly elected, qualified and acting officers shall, during any appointment of a special officer, receive the salary provided by law, to the same extent as though no special officer had been appointed.

COMMENTARY

ORS 148.210 and 148.220 authorizing the appointment by the Governor of "railroad and steamboat police" are repealed.

Rewards

Section 51. (ORS 149.010) Offer of reward. If any person charged with or convicted of any felony within this state breaks prison, escapes, flees from justice, absconds or secretes himself, the county court of the county in which the crime was committed, if the court deems it necessary, may offer a reward not exceeding $1,000 for the apprehension and delivery of the body of such person to the custody of such officer as the county court directs.

Section 52. (ORS 149.020) Authority of county court to pay. Any person apprehending and delivering the body of such person to the proper officer and producing to the county court the receipt of such officer is entitled to and shall be paid the reward offered by the county court.

Section 53. (ORS 149.030) Procedure for payment. The county court, on the presentation of the duly certified claim of the applicant for reward accompanied by the proper orders and receipts, shall certify the amount offered in reward to the county clerk of the county under the seal of the county court, and the county clerk shall draw a warrant on the treasurer of the county for the amount so authorized.

COMMENTARY

ORS 149.040, allowing the sheriff of any county other than the one where a crime was committed to elect to receive a reward for apprehending the criminal, is repealed.

ARTICLE 3. GRAND JURY AND INDICTMENTS

Section 54. (ORS 132.010) Composition. A grand jury is a body of seven persons drawn by lot from the jurors in attendance upon the court at the particular term, having the qualifications prescribed by ORS 10.030 and sworn to inquire of crimes committed or triable within the county from which they are selected.

Section 55. (ORS 132.020) Selection of one or more juries; law applicable to additional jury; when inquiry void. (1) Under the direction of the court, the clerk shall write upon a separate ballot the name of each juror in attendance upon the court, place the ballots in the trial jury box and draw ballots therefrom one by one until the names of seven of such jurors are drawn and accepted by the court. The seven persons thus chosen shall constitute the grand jury.

(2) When the court, in its discretion, considers that one or more additional grand juries is needed for the administration of justice, one or more additional grand juries shall be selected in the manner provided in subsection (1) of this section.

(3) Any law applicable to the grand jury is equally applicable to any additional grand jury selected under subsection (2) of this section, except that whenever any duties or functions are imposed upon the grand jury, it shall be sufficient if such duties or functions are performed by one of the grand juries selected under this section.

(4) Any inquiry or investigation required by law to be made by a grand jury shall be void, unless such inquiry or investigation was made entirely by the same grand jury.

Section 56. ORS 132.030 is amended to read:

132.030. **Qualification; acceptance; excuse from service.** [*Before accepting a person drawn as a grand juror, the court must be satisfied that such person is qualified to act as a juror; but when drawn and found qualified, the person shall be accepted, unless the court, on the application of the juror and before he is sworn, excuses him*] **Neither the grand jury panel nor any individual juror may be challenged, but the court may at any time after a juror is drawn refuse to swear him upon a finding that the juror is disqualified** from service for any of the reasons prescribed in ORS 10.040 and 10.050.

COMMENTARY

A. Summary

Section 56 simplifies the language of ORS 132.030 and incorporates the provisions of ORS 132.040.

B. Derivation

The amendment is derived from New York Criminal Procedure Law § 190.20.

C. Relationship to Existing Law

The section does not change existing law. The court must examine the prospective jurors when they are chosen to be grand jurors to determine qualification or disqualification. During the court's examination of the panel any disqualifying factors will be brought to light in the colloquy enabling the court to excuse the juror from service before the oath is given.

ORS 132.040 would be repealed and made a part of ORS 132.030. ORS 132.040 merely modifies ORS 132.030 and therefore can easily be included therein without the necessity of a separate statute.

State v. Carlson, 39 Or 19, 62 P 1016 (1900), held that the legislature may prescribe who are eligible as grand jurors and the method of determining their qualifications. See also: *State v. Brown*, 28 Or 147, 41 P 1042 (1895).

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Section 55. (ORS 132.020) Selection of one or more juries; law applicable to additional jury; when inquiry void. (1) Under the direction of the court, the clerk shall write upon a separate ballot the name of each juror in attendance upon the court, place the ballots in the trial jury box and draw ballots therefrom one by one until the names of seven of such jurors are drawn and accepted by the court. The seven persons thus chosen shall constitute the grand jury.

(2) When the court, in its discretion, considers that one or more additional grand juries is needed for the administration of justice, one or more additional grand juries shall be selected in the manner provided in subsection (1) of this section.

(3) Any law applicable to the grand jury is equally applicable to any additional grand jury selected under subsection (2) of this section, except that whenever any duties or functions are imposed upon the grand jury, it shall be sufficient if such duties or functions are performed by one of the grand juries selected under this section.

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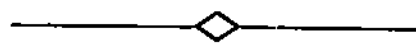

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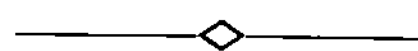
ORS 132.040 would be repealed and made a part of ORS 132.030. ORS 132.040 merely modifies ORS 132.030 and therefore can easily be included therein without the necessity of a separate statute.

State v. Carlson, 39 Or 19, 62 P 1016 (1900), held that the legislature may prescribe who are eligible as grand jurors and the method of determining their qualifications. See also: *State v. Brown*, 28 Or 147, 41 P 1042 (1895).



Section 57. ORS 132.050 is amended to read:

132.050. **Foreman.** The court shall appoint a foreman **and an alternate foreman** of the grand jury from the persons chosen to constitute that body. **The alternate foreman shall have the duties and powers of the foreman in his absence.**

COMMENTARY

The appointment of the alternate foreman will avoid the problem of the absent foreman when an indictment is returned or when the grand jury makes its report to the court. This is particularly important because of the statutory provisions allowing a grand jury of five or six members under exigent circumstances.

Section 58. ORS 132.060 is amended to read:

132.060. **Oath or affirmation of jurors.** (1) Before the members of the grand jury enter upon the discharge of their duties, the following oath must be administered to them **by or under the direction of the court**:

"You, as grand jurors for the County of ――――――, do solemly swear that you will diligently inquire into, and true presentment or indictment make of, all crimes against this state committed or triable within this county that shall come to your knowledge; that you will keep secret the proceedings before you, the counsel of the state, your own counsel and that of your fellows; that you will indict no person through envy, hatred or malice nor leave any person not indicted through fear, favor, affection or hope of reward; but that you will indict upon the evidence before you according to the truth and the laws of this state, so help you God."

---

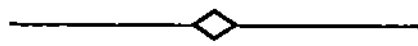
(2) In administering this oath, the blank therein must be filled with the name of the county in which the court is sitting; and if any juror prefers, he must be allowed to affirm thereto, in which case, instead of the final phrase thereof there must be added, "and this you promise under the pains and penalties of perjury."

COMMENTARY

Section 58 makes clear the requirement that the court swear in the grand jury. This amendment is consistent with the amendment in section 56 which allows the court to dismiss a prospective grand juror when he is not qualified.

Section 59. (ORS 132.070) Charge of court. When the grand jury is formed, the court shall charge it and give it such information as the court deems proper concerning the nature of its powers and duties, or charges for crime returned to the court or likely to come before the grand jury.

Section 60. (ORS 132.080) Clerk. The members of the grand jury shall appoint one of their number as clerk. The clerk shall keep minutes of their proceedings (except the votes of the individual jurors) and of the substance of the evidence given before them.



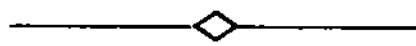
Section 61. ORS 132.090 is amended to read:

132.090. **Presence of persons at sittings or deliberations of jury.** (1) No person other than the district attorney or a witness actually under examination shall be present during the sittings of the grand jury; provided, however, that upon a motion filed by the district attorney in the circuit court, the circuit judge may appoint a reporter who shall attend the sittings of such grand jury and take and report the testimony in any matters pending before the grand jury; and provided further, that the circuit judge, upon the district attorney's showing to the court that it is necessary for the proper [*interrogation*] **examination** of a witness appearing before the grand jury, may appoint an interpreter, [*a woman,*] a medical **or other special** attendant or a nurse, who shall be present in the grand jury room and shall attend such sittings.

(2) No [*district attorney, witness, reporter, interpreter, woman, medical attendant or nurse*] **person other than members of the grand jury** shall be present when the grand jury is deliberating or voting upon a matter before it.

COMMENTARY

The proposed amendment to ORS 132.090 would delete obsolete and repetitious language. Apparently, the original purpose in providing for the appointment of a "woman" to assist in the "interrogation of a witness" before the grand jury was to aid children of tender years or to help in similar circumstances. The new language, "or other special" attendant, will accomplish the same purpose without restricting it to women. A literal reading of the existing subsection (2) would have the absurd effect of barring women during deliberations or voting of the grand jury.



Section 62. ORS 132.100 is amended to read:

132.100. **Oath to witness before grand jury.** The foreman of the grand jury or, in his absence, [*the clerk may*] **any other grand juror shall** administer an oath to any witness appearing before the grand jury.

COMMENTARY

This provision is similar to New York's Criminal Procedure Law § 190.25 (2) which allows any juror in the absence of the foreman to administer the oath to witnesses. The amendment also makes an oath mandatory.

Section 63. ORS 132.110 is amended to read:

132.110. **Absence, disqualification or inability of juror.** After the formation of the grand jury and before it is discharged, the court may :

(1) Discharge a grand juror **who:** [*and order that another person be drawn and sworn from the jurors then in attendance upon the court, or if no other jurors are there in attendance, from the jury list of the county, to take the place of the discharged juror on the grand jury if the grand juror:*]

[*(1)*] **(a)** Becomes sick, is out of the county or fails to appear when the grand jury is summoned to reconvene;

[*(2)*] **(b)** Is related, by affinity or consanguinity within the third degree, to the accused who is under investigation by the grand jury, or held for the commission of a crime; or

[*(3)*] **(c)** Is unable to continue in the discharge of his duties.

(2) Order that another person be drawn and sworn from the jurors then in attendance upon the court, or if no other jurors are there in attendance, from the jury list of the county, to take the place of a discharged juror.

(3) Allow at least five grand jurors to proceed upon good cause shown.

COMMENTARY

A. Summary

ORS 132.110 is amended to allow either five, six or seven grand jurors to hear testimony. Any number fewer than seven can proceed only by order of the court upon good cause shown.

B. Derivation

The proposed amendment is an original draft.

C. Relationship to Existing Law

Section 5, Article VII (Amended) of the Oregon Constitution provides, in part, that:

> "The Legislative Assembly shall so provide that the most competent of the permanent citizens of the county shall be chosen for jurors; and out of the whole number in attendance at the court, seven shall be chosen by lot as grand jurors, five of whom must concur to find an indictment."

ORS 132.010, accordingly, states that a grand jury is a body of seven persons. The statute, like the Constitution, is silent, however, as to the number of jurors that constitute a quorum to conduct the business of the grand jury. ORS 132.100 provides for the swearing of witnesses in the absence of the foreman. Therefore, by inference from this provision, a number of jurors less than seven, but made up of five or six, could hear testimony and indict, so long as five voted to indict.

However, the opposite inference occurs in ORS 132.110. This section provides various methods of obtaining additional jurors when a juror is sick, related to the accused or is otherwise unable to continue in the discharge of his duties. Here, there is

apparently adequate provision for maintaining a grand jury at the full number of seven.

Another argument for a full jury with a quorum of seven is the small number of grand jurors. Many states require 23 members, and some states 16 members. Much discussion occurred at the Constitutional Convention in 1857 concerning the number of grand jurors with proposals varying from five to 12. Seven was a compromise that was finally agreed upon by the Convention and later approved by the people. One can argue that Oregon opted for a small grand jury and therefore providing for a quorum of less than the full number was unnecessary. The states with larger grand juries needed a quorum figure because of the large size of the grand jury.

State v. Bock, 49 Or 25, 88 P 318 (1907), appears to be the only case dealing with this statute. However, *Bock* is not helpful because the grand juror who was excused was replaced by another person by direction of the court.

The proposed amendment removes any ambiguity regarding a quorum, but recognizes that there are adequate provisions for calling replacement jurors. Therefore, these provisions can be circumvented only upon a showing of good cause lest the substituting provisions be rendered nugatory. The proposed amendment also specifies that a quorum cannot be less than the number of persons necessary for indictment, five.

A conforming amendment to ORS 132.360 states that the five jurors who heard the testimony must be the same five who indict the accused.

Section 64. ORS 132.120 is amended to read:

132.120. **Duration of session.** When the [*business of*] **term of court is completed** the grand jury [*is completed it*] must be discharged by the court; but the judge may, by an order made either in open court or at chambers anywhere in his district and entered in the journal, stating the reasons, continue the grand jury in session for such period of time as the judge deems advisable.

COMMENTARY

The amendment makes clear the time of discharge of the grand jury is when the term of court is completed. Currently the statute is vague because it states the grand jury must be discharged when the business of the grand jury is completed. A grand jury may complete the business before it the first week of the term of court. If the grand jury is then discharged, any subsequent criminal offenses that occur during the term of court will require the drawing of another grand juror.

The amendment avoids the requirement of calling more than one grand jury during the term of court and allows the grand jury to continue in existence for any future business that comes before the court.

The draft repeals ORS 132.130 as it serves no particular purpose. Since 132.120 will keep the grand jury in existence during the term of court, any crime committed during the term of court will be indicted by the grand jury that is in existence. There will be no need for the recall of the grand jury because they will not have gone out of existence.

Section 65. ORS 132.210 is amended to read:

132.210. **Immunity of jurors as to official conduct.** A grand juror cannot be questioned for anything he says or any vote he gives, while acting as such, relative to any matter legally pending before the grand jury, except for a perjury **or false swearing** of which he may have been guilty in giving testimony before such jury.

COMMENTARY

The amendment incorporates the criminal offense of false swearing contained in ORS 162.075.

Section 66. ORS 132.220 is amended to read:

132.220. **Disclosure by juror of testimony of witness examined by jury.** A member of a grand jury may be required by any court to disclose:

(1) The testimony of a witness examined before the grand jury, for the purpose of ascertaining whether it is consistent with that given by the witness before the court.

(2) The testimony given before such grand jury by any person, upon a charge against such person for perjury **or false swearing** or upon his trial therefor.

COMMENTARY

The amendment is the same as the one made in ORS 132.210.

Section 67. ORS 132.310 is amended to read:

132.310. **Inquiry into crimes; presentation to court.** The grand jury shall retire into a private room [,] **and may** inquire into [*all*] crimes committed or triable in the county and present them to the court, either by presentment or indictment, as provided in ORS 132.310 to 132.390.

COMMENTARY

The amendment is for the purpose of bringing the statute in line with reality, inasmuch as no grand jury inquires into "all" crimes committed in the county.

Section 68. ORS 132.320 is amended to read:

132.320. **Consideration of evidence.** (1) **Except as provided in subsection (2) of this section,** in the investigation of a charge for the purpose of indictment, the grand jury shall receive no other evidence than such as might be given on the trial of the person charged with the crime in question.

(2) A report or a copy of a report made by a physicist, chemist,

medical examiner, physician, firearms identification expert, examiner of questioned documents, fingerprint technician, or an expert or technician in some comparable scientific or professional field, concerning the results of an examination, comparison or test performed by him in connection with a case which is the subject of a grand jury proceeding, shall, when certified by such person as a report made by him or as a true copy thereof, be received in the grand jury proceeding as evidence of the facts stated therein.

[*(2)*] **(3)** The grand jury is not bound to hear evidence for the defendant, but it shall weigh all the evidence submitted to it; and when it believes that other evidence within its reach will explain away the charge, it should order such evidence to be produced, and for that purpose may require the district attorney to issue process for the witnesses.

COMMENTARY

The amendment is based on New York Criminal Procedure Law § 190.30 (sub 2) and would dispense with the necessity of summoning and obtaining actual grand jury testimony from chemists, ballistic experts and other technicians who have compiled complete reports of examinations, and who, when required to appear, can only repeat their findings as stated in the reports. This would save the time and expense incurred in calling such persons to testify in person before the grand jury.

State v. McDonald, 231 Or 24, 361 P2d 1001 (1961), held that ORS 132.320 was admonitory only, but not mandatory, and, further, that the fact that the grand jury may have been prejudiced by hearsay evidence which it should not consider was not grounds for dismissing or quashing an indictment.

The proposed amendment to the statute is not meant to overrule *McDonald*, but is intended to allow the grand jury to receive the type of report described in subsection (2) without requiring the expert himself to be present to lay a foundation for the report.

Section 69. ORS 132.330 is amended to read:

132.330. **Submission of indictment by district attorney.** [*(1) The district attorney shall submit an indictment to the grand jury and cause the evidence in support thereof to be brought before it in the case of every person held to answer a criminal charge in the court wherein such jury is formed.*]

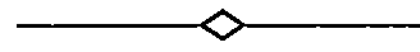
[*(2)*] The district attorney may submit an indictment to the grand jury in any case when he has good reason to believe that a crime has been committed which is triable within the county.

COMMENTARY

Subsection (1) is eliminated because the provisions are unnecessary and conflicting under the optional system of prosecution by either indictment or information. If subsection (1) were retained, then the district attorney would have to seek a grand jury indictment for every person held to answer after a preliminary hearing. This is not the intent of the Commission. The intent is that the accused who has been held to answer after a probable cause preliminary hearing can be proceeded against by a district attorney's information or by grand jury indictment. A proposed amendment to

section 5, Article VII (Amended), Oregon Constitution, which would allow the district attorney this option also was approved by the Commission.

The proposed changes do not prevent the district attorney from seeking an indictment for a higher charge than the charge for which the defendant was held to answer at the preliminary hearing.



Section 70. (ORS 132.340) Duties of district attorney to jury. The district attorney, when required by the grand jury, must prepare indictments or presentments for it and attend its sittings to advise it in relation to its duties or to examine witnesses in its presence.

COMMENTARY

The meaning of "presentment," as used in this section, is taken to mean "presentment of facts" under the procedure provided by ORS 132.370. Whenever the term "presentment" is used in this Article, it should be construed as meaning the procedure set forth in ORS 132.370. See commentary after § 72 infra.

Section 71. ORS 132.350 is amended to read:

132.350. **Juror's knowledge of an offense; action thereon.** (1) If a grand juror knows or has reason to believe that a crime which is triable in the county has been committed, he shall disclose the same to his fellow jurors, who [*shall*] **may** thereupon investigate the same.

(2) An indictment or presentment must not be found upon the statement of a grand juror unless he is sworn and examined as a witness.

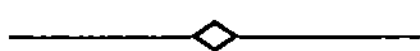
(3) A grand juror testifying as provided in subsection (2) of this section shall not vote on the indictment nor be present during deliberations thereon.

COMMENTARY

The amendment in subsection (1) deletes "shall" and inserts "may" to clearly indicate that the grand jury has discretion in deciding whether to investigate further any disclosure by a grand juror about a crime committed in the county.

This statute is amended by the new subsection (3) to prevent a conflict of interest of a "prosecuting" grand juror. A grand juror who testifies about the commission of a crime will, most likely, have an interest in voting for a true bill.

This protection is needed in light of the amendment to ORS 132.110 allowing five members of the grand jury to hear testimony and find a true bill under certain circumstances. The fifth member could be the witness and therefore provide the "swing" vote or unduly influence his fellow grand jurors during their deliberations.



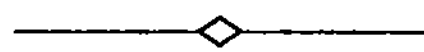
Section 72. ORS 132.360 is amended to read:

132.360. **Number of jurors required to concur.** A grand jury may indict [*or present a person,*] or present facts to the court for instruction as provided in ORS 132.370, with the concurrence of five of its members, [*and not otherwise.*] **if at least five jurors voting for indictment or presentment heard all the testimony relating to the person indicted or facts presented.**

COMMENTARY

The section is amended to conform to the amendment to ORS 132.110 which allows a grand jury of five jurors to hear testimony when two members are not present and good cause exists that prevents the call of substitute grand jurors. This section prevents a juror from voting for indictment when he has not heard the testimony relating to the person indicted.

The Commission recommends that the language "present a person" be eliminated so as to prevent the grand jury from using the common law powers of presentment. "Presentment" is intended to have the meaning provided in ORS 132.370 infra. Also, see commentary after 132.340.



Section 73. (ORS 132.370) Presentment of facts to court for instruction as to law. (1) When the grand jury is in doubt whether the facts, as shown by the evidence before it, constitute a crime in law or whether the same has ceased to be punishable by reason of lapse of time or a former acquittal or conviction, it may make a presentment of the facts to the court, without mentioning the names of individuals, and ask the court for instructions concerning the law arising thereon.

(2) A presentment cannot be found and made to the court except as provided in subsection (1) of this section, and, when so found and presented, the court shall give such instructions to the grand jury concerning the law of the case as it thinks proper and necessary.

(3) A presentment is made to the court by the foreman in the presence of the grand jury. But being a mere formal statement of facts for the purpose of obtaining the advice of the court as to the law arising thereon, it is not to be filed in court or preserved beyond the sitting of the grand jury.

COMMENTARY

See commentary after ORS 132.340 and 132.360.

Section 74. ORS 132.380 is amended to read:

132.380. **Whom the grand jury may indict.** The grand jury may indict [*or present*] a person for a crime when it believes

him guilty thereof, whether such person has been held to answer for such crime or not.

COMMENTARY

The statute is amended to delete the reference to "presenting" a person.

Section 75. ORS 132.390 is amended to read:

132.390. **When the grand jury should indict.** The grand jury [*ought to*] **may** find an indictment when all the evidence before it, taken together, is such as in its judgment would, if unexplained or uncontradicted, warrant a conviction by the trial jury.

COMMENTARY

ORS 132.390 is amended to make clear the test that the grand jury shall use in determination of indictment. The original language states that the grand jury "ought to" find an indictment under certain conditions. The verb auxiliary "ought" means that this is the desired course but not necessarily the only course. In other words, the grand jury could dismiss the indictment even if the test was apparently fulfilled. The draft favors this interpretation but uses the word "may" instead of the words "ought to" because "may" is preferred statutory language to authorize but not command.

Section 76. (ORS 132.400) Indorsement of indictment as "a true bill." An indictment, when found, shall be indorsed "a true bill," and such indorsement signed by the foreman of the jury.

Section 77. ORS 132.410 is amended to read:

132.410. **Finding of indictment; filing; inspection.** An indictment, when found and indorsed, as provided in ORS 132.400 and 132.580, shall be [*presented to the court by the foreman in the presence of the grand jury and*] filed with the clerk **of the court**, in whose office it shall remain as a public record. [*But if the*] **Until after the arrest of a** defendant **who** has not been held to answer the charge, [*neither*] the indictment [*nor*] **or** any order or process in relation thereto shall **not** be inspected by any person other than the judge , [*of*] the **clerk of the** court , [*or an*] **the district attorney or a peace** officer [*thereof*] in the discharge of a duty concerning the [*same until after the arrest of the defendant*] **indictment, order or process.**

COMMENTARY

The draft eliminates the procedure for presenting the indictment to the judge in open court in the presence of the entire grand jury. This procedure has in the past caused inconvenience to the judges involved and sometimes has necessitated additional payment to grand jurors held for an extra day. The signature of the grand jury foreman and the district attorney should be sufficient to assure the accuracy of the indictment.

The second sentence of this section is amended to state clearly who may have access to indictments and related papers before a defendant under "secret" indictment is arrested.

The amendment also allows a peace officer who is discharging a duty in relation to the indictment to have knowledge of the indictment. This is logical because the arresting officer and his supervisor need the information in order to make the arrest.

Section 78. ORS 132.420 is amended to read:

132.420. **Disclosure by juror or reporter relative to indictment not subject to inspection.** No grand juror, reporter or [*officer of the court*] **other person except the district attorney or a peace officer in the exercise of his duties in effecting an arrest** shall disclose any fact concerning any indictment while it is not subject to public inspection.

COMMENTARY

The amendment is for the purpose of realistically providing for some discretion to be exercised by the district attorney or a peace officer in making an arrest under a secret indictment. The proposed change is consistent with the amendment to ORS 132.410.

Section 79. ORS 132.430 is amended to read:

132.430. **Finding against indictment; indorsement "not a true bill."** (1) When a person has been held to answer a criminal charge and the indictment in relation thereto is not found "a true bill," it must be endorsed "not a true bill," which indorsement must be signed by the foreman [*and presented to the court*] and filed with the clerk **of the court**, in whose office it shall remain a public record. In the case of an indictment not found "a true bill" against a person not so held, the same, together with the minutes of the evidence in relation thereto, must be destroyed by the grand jury.

(2) When an indictment indorsed "not a true bill" has been [*presented in court and*] filed **with the clerk of the court**, the effect thereof is to dismiss the charge; and the same cannot be again submitted to or inquired of by the grand jury unless the court so orders.

COMMENTARY

The amendments to this section are to eliminate references to "presenting" the indictment to the court and are consistent with changes made to ORS 132.410.

Section 80. ORS 132.440 is amended to read:

132.440. **Powers and duties other than inquiry into crime.** (1) [*The*] **At least once yearly, a** grand jury shall inquire into the condition and management of every [*public prison*] **correctional facility and juvenile training school as defined in ORS 162.135** in the county [*and of the offices pertaining to the courts of justice therein*].

(2) [*It*] **The grand jury** is entitled to free access at all reasonable times to such [*prisons and offices*] **correctional facilities and juvenile training schools,** and, without charge, to all public records in the county **pertaining thereto.**

(3) Other than indictments presented under ORS 132.310 or presentments presented under ORS 132.370, the grand jury shall issue no report other than a report of an inquiry made under this section.

COMMENTARY

Several important changes involving the powers and duties of the grand jury other than inquiry into crime are made by the proposed amendments to ORS 132.440.

Subsection (1) is amended to require at least one grand jury per year whose function would be to inquire into the condition and management of "correctional facilities" and "juvenile training schools," as those terms are defined in the Criminal Code. Those would include prisons, jails and regional correctional facilities, as well as juvenile facilities. The new language is more precise and definitive than the old "public prison" and "courts of justice" terminology. Subsection (2) contains a conforming amendment.

Subsection (3) would limit *public reports* of grand jury inquiries to those made in connection with criminal indictments or presentments or those made under subsection (1) of this section. The authority of the grand jury to conduct secret investigations is not restricted; however, if a grand jury inquiry does not involve the institutions specified and if the inquiry does not result in a criminal charge, then no public report would be permitted. It is arguable that such reports are not authorized under existing law, nevertheless their use evidently has become a regular practice in some counties.

The proposed amendment reflects the concern of the Commission about the serious damage to individuals that may result from a published report that implies criminal conduct on someone's part, although no indictment is returned. A person named in such a report, because no formal charges are brought against him, has no chance to cross-examine witnesses or otherwise defend himself. The proposed amendment would prohibit this type of grand jury report without impairing the investigatory powers of the grand jury.

Section 81. ORS 132.510 is amended to read:

132.510. **Forms and sufficiency of pleadings.** [*All the forms of pleading in criminal actions heretofore existing are abolished; and hereafter*] The forms of pleading, and the rules by which the sufficiency of pleadings is to be determined, are those prescribed by the statutes relating to criminal procedure.

COMMENTARY

The amendment eliminates obsolete language relating to the ancient technical forms of pleading. There is no change in the thrust and the meaning of the law, and pleadings in criminal cases would continue to be entirely statutory.

Section 82. ORS 132.540 is amended to read:

132.540. **Matters indictment must import; previous conviction not to be alleged; use of statutory language.** (1) The indictment is sufficient if it can be understood therefrom that:

[*(a) It is entitled in a court having authority to receive it, though the name of the court is not accurately stated.*]

[*(b) It was found by a grand jury of the county in which the court was held.*]

[*(c)*] **(a)** The defendant is named, or if his name cannot be discovered, that he is described by a fictitious name, with the statement that his real name is to the jury unknown.

[*(d)*] **(b)** The crime was committed within the jurisdiction of the court, except where, as provided by law, the act, though done without the county in which the court is held, is triable therein.

[*(e)*] **(c)** The crime was committed at some time prior to the finding of the indictment and within the time limited by law for the commencement of an action therefor.

[*(f) The act or omission charged as the crime is clearly and distinctly set forth in ordinary and concise language, without repitition, in such a manner as to enable a person of common understanding to know what is intended and with such a degree of certainty as to enable the court to pronounce judgment, upon a conviction, according to the right of the case; provided, that*]

(2) The indictment shall not contain allegations that the defendant has previously been convicted of the violation of any statute which may subject him to enhanced penalties.

[*(2)*] **(3)** Words used in a statute to define a crime need not be strictly pursued in the indictment, but other words conveying the same meaning may be used.

COMMENTARY

The amendments are designed to delete provisions that are unnecessary because they are covered in ORS 132.550, as amended by § 83. The rest of the section is retained because it contains a number of guidelines for testing the sufficiency of an indictment that are not included in § 83.

Section 83. ORS 132.550 is amended to read:

132.550. **Form.** The indictment [*may be*] **shall contain** substantially [*in*] the following [*form*]:

[———————————————————

The State of Oregon)
) Circuit Court for the County of ———,
vs.)
) State of Oregon
A——— B———)

A.B. is accused by the grand jury of the County of ———, by this indictment, of the crime of ——— (here insert the name

of the crime, if it has one, such as treason, murder, arson, manslaughter, or the like; or if it is a crime having no general name, such as libel, assault, and battery, and the like, insert a brief description of it as given by law), committed as follows:

A.B., on the ——— day of —————, 19——, in the county aforesaid (here set forth the act charged as a crime).

Dated at —————, in the county aforesaid, the ——— day of —————, A.D. 19——.

(Signed): C.D., District Attorney.

(Indorsed): "A true bill."

(Signed): E.F., Foreman of the Grand Jury.

——————————————————————]

(1) The name of the circuit court in which it is filed; and

(2) The title of the action; and

(3) A statement that the grand jury accuses the defendant or defendants of the designated offense or offenses; and

(4) A separate accusation or count addressed to each offense charged, if there be more than one; and

(5) A statement in each count that the offense charged therein was committed in a designated county; and

(6) A statement in each count that the offense charged therein was committed on, or on or about, a designated date, or during a designated period of time; and

(7) A statement of the acts constituting the offense in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended; and

(8) The signatures of the foreman and of the district attorney and the date on which each signed.

COMMENTARY

ORS 132.550 is amended to modernize the language and eliminate redundant statutes. The amendments are based on NYCPL § 200.50 and also adopt language from ORS 132.520 (2) and incorporate it into subsection (7) of this section. ORS 132.520 and 132.530 would be repealed.

Section 84. (ORS 132.560) Joinder of counts and charges; consolidation of indictments. The indictment must charge but one crime, and in one form only, except that:

(1) Where the crime may be committed by the use of different ~~means, the indictment may allege the means in the alternative.~~

(2) When there are several charges against any person or per-

sons for the same act or transaction, instead of having several indictments, the whole may be joined in one indictment in several counts; and if two or more indictments are found in such cases, the court may order them to be consolidated.

COMMENTARY

ORS 132.560 (2) allows a "permissive" joinder of offenses that are part of the same act or transaction. The Supreme Court in *State v. Huennekens*, 245 Or 150, 420 P2d 384 (1966), stated that the same transaction would include crimes that are "concatenated in time, place and circumstances so that the evidence of one charge would be relevant and admissible with evidence of other charges."

The Former Jeopardy sections state the unit of required prosecution in terms of a "criminal episode." Criminal episode includes crimes that are connected in time, place and circumstance. However, for jeopardy purposes, it is narrower than the term, criminal "transaction" that is used in the above statute. The difference in definition is that a criminal episode is directed to a single criminal objective (compulsory joinder) while a criminal transaction would include crimes where evidence of one offense would be relevant to evidence of another crime (permissive joinder).

Section 85. ORS 132.580 is amended to read:

132.580. **Indorsement on indictment of name of witness before grand jury. (1)** When an indictment is found, the names of the witnesses examined before the grand jury **that returned the indictment** must be inserted at the foot of the indictment, or indorsed thereon, before it is [*presented to*] **filed** [*the court*].

(2) A witness examined before the grand jury whose name is not indorsed on the indictment shall not be permitted to testify at trial without the consent of the defendant, unless the court finds that:

(a) The name of the witness was omitted from the indictment by inadvertence; and

(b) The name of the witness was furnished to the defendant by the state at least 10 days before trial; and

(c) The defendant will not be prejudiced by the omission.

COMMENTARY

The purpose of the first amendment in subsection (1) of this section is to deal with the situation where the same matter is heard by successive grand juries. The witness-name requirement would apply only to witnesses who testified before the grand jury that indicted the defendant. The other amendment in subsection (1) deletes the words "presented to" and inserts the words "filed with" to make the section consistent with amendments to ORS 132.410 made by § 77.

Subsection (2) modifies the *McDonald* rule regarding testimony of a witness whose name is not endorsed on the indictment. Under existing practice if an indictment fails to list the name of a witness, the case is resubmitted to the grand jury. The new provision would enable the court to allow the witness to testify if the state can show to the satisfaction of the court that the requisites of paragraphs (a), (b) and (c) have been met.

If a witness testifies before the grand jury and he is to testify at the trial, the defendant should be aware of his existence. The statute does not now indicate the consequences of a failure to indorse a grand jury witness's name on the indictment.

The Oregon Supreme Court in *State v. McDonald*, 231 Or 24, 361 P2d 1001 (1961), stated that the purpose of indorsing the names of the witnesses upon the indictment is to advise the defendant of those persons who will give evidence at the trial. Therefore, the defendant could prepare an intelligent defense and avoid surprise.

The court in *McDonald* also said:

"This is a substantial right that is inherent in the American judicial conception of fair play, but the enforcement for failure to comply with this mandatory requirement rests in the rule that a witness who has appeared before the grand jury may not, if his name is not endorsed on the indictment, testify at the trial over the objection of a defendant." 231 Or at 32.

See also *State v. Warren*, 41 Or 348, 69 P 679 (1902).

Section 86. ORS 132.620 is amended to read:

132.620. **Place of crime in certain cases.** In an indictment for a crime committed as described in [*ORS 131.320 to 131.380*] **sections 15 and 16 of this 1973 Act**, it is sufficient to allege that the crime was committed within the county where the indictment is found.

COMMENTARY

The amendment conforms existing law to the proposed statutory changes relating to a crime commenced outside the state that is consummated within the state, where crime extends over more than one county, criminal nonsupport, crimes committed on water bordering on county, etc. (See Article 1.)

Section 87. (ORS 132.990) Premature inspection or disclosure of contents of indictment. Violation of ORS 132.420 or the prohibitions of ORS 132.410 is punishable as contempt.

Section 88. Statement by defendant when not advised of rights. Evidence obtained directly or indirectly as a result of failure of a magistrate to comply with ORS 133.610 shall not be admissible before the grand jury.

COMMENTARY

This section refers to the warnings and statement of rights a magistrate is required to give a defendant at time of arraignment, and is a restatement of part of ORS 136.545.

ARTICLE 4. ARRESTS AND RELATED PROCEDURES

General Provisions

Section 89. Definitions. As used in this Article, unless the context requires otherwise:

(1) "Arrest" means to place a person under actual or constructive restraint or to take a person into custody for the purpose of charging him with an offense. A "stop" as authorized under sections 30 to 32 of this Act is not an arrest.

(2) "Peace officer" means a member of the Oregon State Police or a sheriff, constable, marshal or municipal policeman, of the State of Oregon.

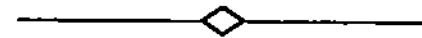
COMMENTARY

This section proposes two new definitions to apply to the arrest provisions. ORS 133.010, 133.210 and 133.250 would be repealed. Other applicable terms, such as "accusatory instrument," "complaint" and "information" are located in the General Definitions.

"Arrest" is derived, in part, from ORS 133.210 and 133.250, but specifically includes "constructive" restraint and, with respect to the purpose of custody, uses the phrase, "charging him with an offense" in place of "holding to answer for a crime." The single definition of arrest should be easier to understand than the existing double definition found in the two separate statutes.

"Peace officer" is broader than the definition of the term, "police officer" as used in the search and seizure sections. However, it is more restrictive than the definition in ORS 161.015 (4) in that it does not include the phrase, "and such other persons as may be authorized by law." ORS 133.170 would be repealed.

See § 1 of the Code for additional definitions.



Section 90. Sufficiency of information or complaint. (1) An information or complaint is sufficient if it can be understood therefrom that:

(a) The defendant is named, or if his name cannot be discovered, that he is described by a fictitious name, with the statement that his real name is unknown to the complainant.

(b) The crime was committed within the jurisdiction of the court, except where, as provided by law, the act, though done without the county in which the court is held, is triable within.

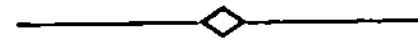
(c) The offense was committed at some time prior to the filing of the information or complaint and within the time limited by law for the commencement of an action therefor.

(2) The information or complaint shall not contain allegations that the defendant has previously been convicted of any offense which might subject him to enhanced penalties.

(3) Words used in a statute to define an offense need not be strictly followed in the information or complaint, but other words conveying the same meaning may be used.

COMMENTARY

See commentary under § 91.



Section 91. Contents of information or complaint. An information or complaint shall contain substantially the following:

(1) The name of the court in which it is filed;

(2) The title of the action;

(3) A statement that accuses the defendant or defendants of the designated offense or offenses;

(4) A separate accusation or count addressed to each offense charged, if there be more than one;

(5) A statement in each count that the offense charged therein was committed in a designated county;

(6) A statement in each count that the offense charged therein was committed on, or on or about, a designated date, or during a designated period of time;

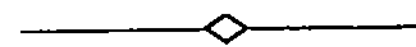
(7) A statement of the acts constituting the offense in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended;

(8) The verification by the complainant and the date of the signing of the information or complaint.

COMMENTARY TO §§ 90 AND 91

Sections 90 and 91 are slightly altered versions of the provisions covering the form, content and sufficiency of indictments. The definitions of "information" and "complaint" are set forth in the General Definitions, § 1.

Section 92. (ORS 133.020) Magistrate defined. A magistrate is an officer having power to issue a warrant for the arrest of a person charged with the commission of a crime.



Section 93. (ORS 133.030) Who are magistrates. The following persons are magistrates:

(1) Judges of the Supreme Court;

(2) Judges of the Court of Appeals;

(3) Judges of the circuit court;

(4) Judges of the district court;

(5) County judges and justices of the peace; and

(6) Municipal officers authorized to exercise the powers and perform the duties of a justice of the peace.

Citation In Lieu of Custody

Section 94. ORS 133.045 is amended to read:

133.045. **Application of ORS 133.055.** ORS 133.055 shall apply in any instance when a person is subject to arrest on a misdemeanor charge or on a felony charge which may be deemed a misdemeanor charge after sentence is imposed and:

(1) The arrest is made without a warrant pursuont to ORS 133.310; or

(2) The magistrate before whom an information or complaint is filed authorizes it; or

(3) The person is arrested by a private party pursuant to [*ORS 133.350*] **section 114 of this 1973 Act,** and is delivered to a peace officer pursuant to ORS 133.560.

COMMENTARY

The section contains a conforming amendment.

Section 95. (ORS 133.055) Citation in lieu of custody. A peace officer in lieu of taking the person into custody may issue and serve a citation to the person to appear at the court of the magistrate before whom the person would be taken pursuant to ORS 133.520.

Section 96. (ORS 133.060) Cited person to appear before magistrate; effect of failure to appear. (1) The person cited shall appear before a magistrate of the county in which he was cited at the time, date and court specified in the citation, which shall not be later than two weeks from the date the citation was issued.

(2) If the cited person fails to appear at the time, date and court specified in the citation, and a criminal complaint or information is filed, the magistrate shall issue a warrant of arrest immediately upon the person's failure to appear.

Section 97. (ORS 133.065) Service of citation; contents. (1) If a citation is issued as described in ORS 133.055, the peace officer shall serve one copy to the person arrested and shall, as soon as practicable, file a duplicate copy with the magistrate specified therein along with his proof of service.

(2) Each copy of the citation issued under authority of ORS 133.045 to 133.080, 133.110 and 156.050 shall contain:

(a) The name of the court at which the cited person is to appear.

(b) The name of the person cited.

(c) A brief description of the offense of which the person is charged, the date, the time and place at which the offense occurred, the date on which the citation was issued, and the name of the peace officer who issued the citation.

(d) The time, date and place at which the person cited is to appear in court.

(e) Whether a complaint or information had been filed at the time the citation was issued.

(f) If the arrest was made by a private party, the name of the arresting person.

(g) The following:

READ CAREFULLY

This citation is not a complaint or an information. One may be filed and you will be provided a copy thereof at the time of your first appearance. You MUST appear in court at the time set in the citation. IF YOU FAIL TO APPEAR AND A COMPLAINT OR INFORMATION HAS BEEN FILED, THE COURT WILL IMMEDIATELY ISSUE A WARRANT FOR YOUR ARREST.

Section 98. (ORS 133.070) Citation where arrest without warrant is authorized for ordinance violation. (1) In any instance in which a person is subject to arrest without a warrant for violation of an ordinance of a county, city or municipal corporation, any peace officer who is authorized to make the arrest may make the arrest but in lieu of taking the person into custody he may issue and serve a citation to the person to appear at any court within the jurisdictional unit by which he is authorized to act.

(2) Any citation issued under this section shall conform to the requirements of ORS 133.065.

(3) The person cited shall appear before the court in which his appearance is required at the time, date and court specified in the citation. If he fails to appear at that time and a criminal complaint is filed, the court immediately shall issue a warrant for his arrest.

Section 99. (ORS 133.080) Application to traffic, boating, littering, hunting and fishing violations. Nothing in ORS 133.045 to 133.080, 133.110 and 156.050 applies to violations of law enforceable under ORS 484.010 to 484.320, to violations enforceable under ORS 488.210 to 488.300, to violations enforceable under ORS 496.905 to 496.950 or to violations enforceable under ORS 133.100 and subsection (5) of ORS 449.107.

Section 100. ORS 133.075 is amended to read:

133.075. **Penalty for failure to appear on citation.** If any person wilfully fails to appear before a court pursuant to a citation issued and served under authority of ORS 133.045 to 133.080, 133.110 and 156.050 and a complaint or information is filed, he is guilty of a **Class A** misdemeanor.

COMMENTARY

The amendment to ORS 133.075 is to conform the classification of the offense to the new Criminal Code.

Section 101. ORS 133.100 is amended to read:

133.100. **Citations for certain littering violations.** A citation conforming to the requirements of ORS 484.150 to 484.220 and 484.230 shall be used for all violations of ORS [*164.440*] **164.805** and 390.665 in this state.

COMMENTARY

The amendment removes an obsolete statutory reference and inserts the number of the new section on offensive littering.

Section 102. ORS 133.110 is amended to read:

133.110. **Issuance; citation.** If the magistrate is satisfied that [*the crime complained of has been committed and that there is probable cause to believe that the person charged has committed it*] **there is reasonable cause to believe that the person charged has committed the offense complained of**, he shall issue a warrant of arrest. However, on a misdemeanor **or violation** charge or on a felony charge which [*may be deemed*] **in the discretion of the court may be considered** a misdemeanor charge [*after*] **at the time** sentence is imposed he may authorize a peace officer to issue and serve a citation as provided in ORS 133.055.

COMMENTARY

The amendment incorporates the "reasonable cause" standard that is defined in section 1 and adds a reference to a "violation" for authorization to serve a citation in lieu of an arrest. The major effect of the amendment is to clearly require a factual foundation to support the issuance of an arrest warrant. This amendment, coupled with the definition of reasonable cause and the requirements for form and content of an information or complaint are intended to specifically require more than a complainant's mere conclusion that the person charged has committed a crime.

In *Giordenello v. United States*, 357 US 480 (1958), the Supreme Court stated, "The language of the Fourth Amendment, that '. . . no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing . . . the persons or things to be seized,' of course applies to arrest as well as search warrants . . . ." That this was a Fourth Amendment requirement and not merely a federal procedural rule was developed in the subsequent cases of *Wong Sun v. United States*, 371 US 471 (1963); *Aguilar v. Texas*, 378 US 108 (1964) (search warrant); *Beck v. Ohio*, 379 US 89 (1964) and *Barnes v. Texas*, 380 US 253 (1965).

These cases make it clear that the Fourth Amendment is made applicable to the states through the Fourteenth Amendment and requires a judicial determination of probable cause as a prerequisite to the issuance of either a search or an arrest warrant. See, Harmon, "Giordenello to Sesslin to Us: Arrest Warrants in Oregon," 6 Will L J 431 (1970).

Oregon Constitution, Art. I, § 9 also demands a probable cause showing for the issuance of a warrant. In the recent case of *State v. Redeman*, 92 Adv Sh 1197, — Or App —, 485 P2d 655 (1971), the Court of Appeals held that the mere filing of a criminal complaint or of a petition in the juvenile court charging an act which if committed by an adult would constitute a crime does not alone constitute the probable cause required by the Oregon Constitution and ORS 133.110.

Warrant of Arrest

Section 103. ORS 133.120 is amended to read:

ORS 133.120. **Authority to issue.** A judge of the Supreme Court or the Court of Appeals may issue a warrant of arrest for any [*crime*] **offense** committed or triable within the state, and any other magistrate mentioned in ORS 133.030 may issue such a warrant for any [*crime*] **offense** committed or triable within his county.

COMMENTARY

The word, "crime" is deleted and replaced with "offense" which includes both crimes and violations.

Section 104. ORS 133.140 is amended to read:

133.140. **Form.** A warrant of arrest [*is an order in writing in the name of the State of Oregon, signed by a magistrate with his name of office, commanding the arrest of the defendant. It may be substantially in the following form:*

County of ————

IN THE NAME OF THE STATE OF OREGON

To any peace officer in the State of Oregon, greeting:

Information upon oath having been given before me that the

crime of (designating it) has been committed and accusing C.D. thereof, you are, therefore, hereby commanded forthwith to arrest the above-named C.D. and bring him before me at (naming the place), or in case of my absence or inability to act, before the nearest or most accessible magistrate in this county.

Dated at ———— this ——— day of ————, 19——.

E.F., Justice of the Peace (or as the case may be).

————————————————————]

shall:

(1) Be in writing;

(2) Specify the name of the person to be arrested, or if his name is unknown, shall designate the person by any name or description by which he can be identified with reasonable certainty;

(3) State the nature of the offense;

(4) State the date when issued and the county where issued;

(5) Be in the name of the State of Oregon, be signed by and bear the title of the office of the magistrate having authority to issue a warrant for the offense charged;

(6) Command any peace officer to arrest the person against whom the charge was made and to bring him before the magistrate issuing the warrant, or if the magistrate is absent or unable to act, before the nearest or most accessible magistrate in the same county; and

(7) Specify the amount of security for release.

COMMENTARY

The amendment deletes the form of warrant now contained in the statute and lists the contents of a warrant of arrest. ORS 133.130 would be repealed. The Commission believes that it should be possible for a defendant who is arrested in a county other than the county in which the warrant is issued to post the amount of security in the county of arrest and obtain his release. Subsection (6) of this section is not meant to imply that a defendant can be released only by the magistrate issuing the warrant. For further discussion of this matter see the Article on Release of Defendants.

Arrest by Peace Officer

Section 105. (ORS 133.220) Who may make. An arrest may be effected by:

(1) A peace officer under a warrant;

(2) A peace officer without a warrant; or

~~(3) A private person.~~

Section 106. Arrest by a peace officer; when and how made. (1) A peace officer may arrest a person for an offense under the provisions of this Article at any hour of any day or night.

(2) If the arrest is otherwise authorized under this Article, a peace officer who is outside the jurisdiction of his employment may make an arrest without a warrant for an offense committed within the jurisdiction where he is present. In so doing, the peace officer shall act with the same rights, privileges and immunities as are otherwise provided by law.

(3) The officer shall inform the person to be arrested of his authority and reason for the arrest, unless he encounters physical resistance, flight or other factors rendering this procedure impracticable, in which case the arresting officer shall inform the arrested person as soon as practicable.

(4) When arresting a person under a warrant, the peace officer, upon request of the arrested person, shall show the warrant.

(5) In order to make an arrest, a peace officer may use physical force as justifiable under ORS 161.235, 161.239 and 161.245.

(6) In order to make an arrest, a peace officer may enter premises in which he reasonably believes the person to be arrested to be present. Except as provided in subsection (7) of this section, the arresting officer shall give appropriate notice of his identity, authority and purpose to the person to be arrested or to the person in apparent control of the premises.

(7) If the arresting officer reasonably believes that the notice required by subsection (6) of this section would lead to the destruction of evidence, result in the escape of the suspect or increase the peril to the safety of the officer or another person, the officer may enter the premises without prior notice.

(8) If the officer is authorized to enter premises without giving notice of his authority and purpose or, if after giving notice he is not admitted, he may enter the premises, and by a breaking, if necessary.

COMMENTARY

This section, partly drawn from NYCPL §§ 120.80, 140.10 and 140.15, would repeal ORS 133.240, 133.260, 133.270, 133.290, 133.300, 133.320 and 133.330 and combine into one section the provisions covering arrests by peace officers.

Subsection (1) applies to arrests made with or without a warrant. There is no restriction as to the day of the week or the time of day.

Subsection (2) is an effort to remedy the dilemma faced by a peace officer who makes or tries to make a probable cause warrantless arrest outside his own "bailiwick" or jurisdiction of employment. For example, if a deputy sheriff who is employed by Douglas County, while in Lane County, witnesses or otherwise has probable cause to believe that a crime has been committed in Lane County, can he make an arrest as a peace officer or is he acting as a private citizen? The proposal would give the officer the same authority to make the arrest as a peace officer as if the crime had been committed in Douglas County.

Subsection (3) requires the officer to inform the person to be arrested of the officer's authority and reason for the arrest. Similar provision is found in ORS 133.330.

Subsection (4) would replace ORS 133.270.

Subsection (5) incorporates the justification sections of the new Criminal Code.

Subsection (6) permits the arresting officer to enter premises to make an arrest, and retains the "knock and announce" rules of ORS 133.290 and 133.320.

Subsection (7) permits three "no-knock" exceptions, as does NYCPL §§ 120.80-120.84. These same provisions are contained in § 136 relating to execution of search warrants. The constitutionality of such provisions is upheld in *Ker v. California*, 374 US 23 (1963), and has been approved by the Oregon Court of Appeals. *State v. Mitchell*, 93 Adv Sh 89, — Or App —, 487 P2d 1156 (1971), *State v. Steeves*, 2 Or App 163, 465 P2d 905 (1970) and *State v. Vance*, 93 Adv Sh 1779, — Or App —, — P2d — (1972).

Subsection (8) replaces the existing provisions in ORS 133.290 and 133.320 and would continue to permit the arresting officer to break into the premises if necessary to make the arrest. The breaking would be authorized in the cases where, under the provisions of subsection (7) the officer is not required to knock and announce, and also in those situations in which after giving notice he is "not admitted." Note that contrary to existing statutes, the language of the proposed provision does not state that the officer must be "refused admittance."

Section 107. ORS 133.310 is amended to read:

133.310. **Authority of officer to arrest without warrant.** (1) A peace officer may arrest a person without a warrant **if the officer has reasonable cause to believe that the person has committed**:

[*(1) For a crime committed or attempted in his presence;*

(2) When the person arrested has committed a felony, although not in his presence;

(3) When a felony has in fact been committed or a major traffic offense, as defined in subsection (5) of ORS 484.010, has been committed, and he has reasonable cause for believing the person arrested to have committed it; or

(4) When he is notified by telegraph, telephone, radio or other mode of communication by another peace officer of any state that such peace officer holds in his hands a duly issued warrant for the arrest of such person charged with a crime committed within his jurisdiction.]

(a) A crime; or

(b) A violation in the officer's presence.

(2) A peace officer may arrest a person without a warrant when he is notified by telegraph, telephone, radio or other mode of communication by another peace officer of any state that there exists a duly issued warrant for the arrest of a person charged with a crime committed within his jurisdiction.

(3) In determining whether reasonable cause exists to justify an arrest under subsection (1) of this section, a peace officer may take into account all information that a reasonably prudent officer would judge relevant to the likelihood that an offense has been committed and that the person to be arrested has committed it. The information may include information derived from any professional knowledge which the officer in fact possesses. The information may also include that received from an informant whom it is reasonable

under the circumstances to credit, whether or not at the time of making the arrest the officer knows the informant's identity. An arrest shall not be considered to have been made on insufficient cause under this section solely on the ground that the officer is unable to determine the particular offense which may have been committed.

COMMENTARY

This section amends the existing statute on warrantless arrests by a peace officer and makes significant changes in the law regarding both felony and misdemeanor arrests. The section permits an arrest without a warrant if the officer has reasonable cause to believe that the person has committed a crime, i.e., a felony or misdemeanor. "Reasonable cause" is defined in section 1 as "a substantial objective basis for believing that the person to be arrested has committed an offense."

The reasonable cause standard would apply to a belief that an *offense* has been committed as well as to the belief that the *person arrested committed it.*

A major departure from existing law is proposed to permit a misdemeanor arrest on the same reasonable cause grounds as is proposed for felonies. This change recognizes modern day law enforcement problems encountered in effecting the arrest without a warrant for a misdemeanor committed outside the presence of the officer and takes into account the necessity of allowing such arrests if the law is to be effectively enforced.

Paragraph (b) would limit the "in presence" requirement to "violations" only.

Subsection (3) states that in making the required determination an officer may rely on information if at the time he acts it is reasonable to credit the source of the information. This could include information from other peace officers or law enforcement agencies or from private citizens. Since such reliance may be reasonable on other grounds than that the source is personally known to the officer to be reliable, the subsection makes explicit that the officer is not required to know the identity of an informant on whom he relies.

The last sentence of subsection (3) provides that as long as the officer has reasonable cause to believe that an offense of the requisite degree of seriousness has been committed, he may arrest even though he cannot determine then and there the precise offense that has been committed.

Section 108. ORS 133.340 is amended to read:

133.340. **Magistrate's authority to order arrest for offense in his presence.** When [*a crime*] **an offense** is committed in the presence of a magistrate, he may, by a verbal or written order, command any person to arrest the offender and may thereupon proceed as if the offender had been brought before him upon a warrant of arrest.

COMMENTARY

The word, "crime" is deleted and the term "offense" substituted to include both crimes and violations.

Section 109. (ORS 133.360) Arrests on warrant or order transmitted by telegraph. Whenever any person has been indicted or accused on oath of any public offense, or thereof convicted, and a warrant of arrest has been issued, the magistrate issuing the war-

rant, or any judge of the Supreme Court, or of the Court of Appeals, or of a circuit or county court, may indorse thereon an order signed by him authorizing the service thereof by telegraph. Thereupon the warrant and order may be sent by telegraph to any marshal, sheriff, constable or policeman and, on receipt of the telegraphic copy thereof, as defined in ORS 757.631, by any such officer, he shall have the same authority and be under the same obligations to arrest, take into custody and detain the person as if the original warrant of arrest with the proper direction for its service duly indorsed thereon had been placed in his hands. The telegraphic copy shall be entitled to full faith and credit and shall have the same force and effect in all courts and places as the original. Prior to indictment or conviction, no such order shall be made by any officer unless in his judgment there is probable cause to believe the accused person guilty of the offense charged, but the making of such order by any officer is prima facie evidence of the regularity thereof and of all proceedings prior thereto. The original warrant and order, or a copy thereof certified by the officer making the order, shall be preserved in the telegraph office from which the same is sent and in telegraphing the same, the original or the certified copy may be used.

Uniform Act on Fresh Pursuit

Section 110. (ORS 133.410) Short title. ORS 133.410 to 133.440 may be cited as the Uniform Act on Fresh Pursuit.

Section 111. (ORS 133.420) Definitions for ORS 133.410 to 133.440. As used in ORS 133.410 to 133.440:

(1) "Fresh pursuit" includes fresh pursuit as defined by the common law; the pursuit of a person who has committed a felony or who reasonably is suspected of having committed a felony; and the pursuit of a person suspected of having committed a felony, though no felony actually has been committed, if there is reasonable ground for believing that a felony has been committed. It does not necessarily imply instant pursuit, but pursuit without unreasonable delay.

(2) "State" includes the District of Columbia.

Section 112. (ORS 133.430) Authority of officers of other states to make arrest. (1) Any member of a duly organized state, county or municipal peace unit of another state of the United States who enters this state in fresh pursuit, and continues within this state in such fresh pursuit, of a person in order to arrest him on the ground that he is believed to have committed a felony in the other state has the same authority to arrest and hold such person in custody as has any member of any duly organized state, county or municipal peace unit of this state to arrest and hold in custody a person on the ground that he is believed to have committed a felony in this state.

(2) This section shall not be construed to make unlawful any arrest in this state which otherwise would be lawful.

Section 113. (ORS 133.440) Proceedings following arrest by officer of other state. If an arrest is made in this state by an officer of another state in accordance with ORS 133.430, he shall without unnecessary delay take the person arrested before a magistrate of the county in which the arrest was made, who shall conduct a hearing for the purpose of determining the lawfulness of the arrest. If the magistrate determines that the arrest was lawful, he shall commit the person arrested to await for a reasonable time the issuance of an extradition warrant by the Governor of this state. If the magistrate determines that the arrest was unlawful, he shall discharge the person arrested.

Arrest By Private Person

Section 114. Arrest by a private person. (1) A private person may arrest another person for any crime committed in his presence if he has reasonable cause to believe the arrested person committed the crime.

(2) In order to make the arrest a private person may use physical force as is justifiable under ORS 161.255.

COMMENTARY

This section repeals ORS 133.350 and states the standard for "citizen's arrests." The degree of force authorized would continue to be found in the justification statute, ORS 161.255, which is amended accordingly.

Procedures After Arrest

Section 115. ORS 133.520 is amended to read:

133.520. **After arrest, within or without county in which warrant was issued.** (1) If the defendant is arrested in the county in which the warrant issued, he shall be taken before the magistrate who issued the warrant, or, if the magistrate is absent or unable to act, before the nearest or most accessible magistrate in the same county; but if he is arrested in another county and the crime charged in the warrant is a misdemeanor, the officer shall, upon being required by the defendant, take him before a magistrate of that county, who shall [*admit the defendant to bail and take bail from him accordingly*] **make a release decision as provided in sections 237 to 248 of this 1973 Act.** The officer shall at the same time deliver to the magistrate the warrant with his return indorsed and subscribed by him.

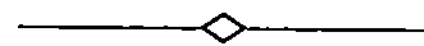
(2) [*On taking bail*] **After making the release decision,** the mag-

istrate shall certify that fact on the warrant and return the warrant and [*undertaking of bail*] **release agreement or security release** to the officer having charge of the defendant. The officer shall then discharge the defendant from arrest and without delay deliver the warrant and [*undertaking*] **release agreement or security release** to the clerk of the court in the other county at which the defendant is required to appear.

(3) If [*, on the admission of*] the defendant **is to be released and he does not agree to the release agreement, or a security deposit** [*to bail, bail*] is not forthwith given, the officer shall take the defendant before the magistrate who issued the warrant or some other magistrate in that county, as provided in this section, together with the warrant.

COMMENTARY

The statute is amended to delete references to bail and insert new terminology as used in Article 8.



Section 116. (ORS 133.560) When arrest is by private person. (1) An officer may without warrant take before a magistrate a person who, being engaged in a breach of the peace, is arrested by a bystander and delivered to him.

(2) A private person who has arrested another for the commission of a crime shall without unnecessary delay take him before a magistrate or deliver him to a peace officer.

Section 117. ORS 142.210 is amended to read:

142.210. **Receipts for property taken from person in custody (1)** Whenever any jailer, peace officer or health officer takes or receives any money or other valuables from any [*prisoner or*] person in custody for safekeeping or for other purposes, the officer or jailer receiving such valuables or money forthwith shall tender one of duplicate receipts for the property being surrendered to the [*prisoner or*] person in custody. If possible, the [*prisoner or*] person in custody shall countersign both the original and duplicate receipts. If the [*prisoner or*] person is unable to sign the receipts or receive the duplicate thereof, the same shall be signed by and delivered to the [*prisoner or*] person when reasonably possible. A file of the original receipts shall be kept for at least six months after the money or valuables have been returned to the [*prisoner*] **person in custody**, his agent or representative or other person entitled to the same.

(2) A person violating any of the provisions of subsection (1) of this section commits a Class B misdemeanor.

COMMENTARY

This section is made part of the arrest provisions, its language modernized and the penalty, now located in ORS 142.990, revised and made part of the section itself.

Section 118. (ORS 142.010) Officer's custody of stolen property is subject to order of magistrate or court. When property alleged to have been the subject of a theft comes into the custody of a peace officer, he shall hold it subject to the order of the magistrate or court, as provided in ORS 142.020.

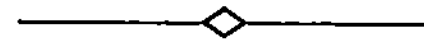
Section 119. (ORS 142.020) Delivery of stolen property to owner. (1) On satisfactory proof of the title of the owner of the property, the magistrate who examines the charge against the person accused of the crime shall order it to be delivered to the owner, or his duly authorized agent, on his paying the reasonable and necessary expenses incurred in its preservation, which shall be ascertained and certified by the magistrate.

(2) If property that is the subject of a theft has not been delivered to the owner, the court before which a trial is had for the stealing thereof may, on like proof and condition, order its delivery to the owner or his agent.

Section 120. (ORS 142.030) Rights and authority conferred by order of delivery. The order provided for in ORS 142.020 entitles the owner or his agent to demand and receive the possession of the property from the officer having it in custody and authorizes such officer to deliver it accordingly; but it does not affect the rights of third persons.

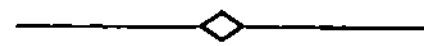
Section 121. (ORS 142.040) Disposal of unclaimed money or property; sale of property. If stolen property is not claimed by the owner within 60 days from the conviction of the person charged with the theft, the officer having it in custody shall, if it is money, pay it into the county treasury. If it is other property, he shall sell it as upon an execution and, after paying the expenses of the sale and preservation of the property, which shall be ascertained and certified by the clerk of the court, pay the proceeds into the county treasury.

Section 122. (ORS 142.050) Title of purchaser at sale. A sale of property pursuant to ORS 142.040 conveys a good title to the purchaser as against any person.



Section 123. (ORS 142.060) Crediting and appropriating proceeds of sale paid into county treasury; rights of owner. Money paid into the county treasury pursuant to ORS 142.040 shall be credited and appropriated as a fine imposed upon a person convicted of theft; but the owner of the property, at any time within six years of the conviction, upon making satisfactory proof of ownership before the county court of the county, may, by the order of such court, have the proceeds repaid to him from the county treasury.

Section 124. (ORS 142.070) Powers and duties of peace officers respecting theft and slaughter of animals and other property. All persons serving as special officers for the enforcement of any state or municipal law hereby are vested with the full powers of peace officers in so far as the same may be necessary or convenient for the apprehension of any persons engaged in, or accused of, the theft or slaughter of livestock, livestock carcasses, poultry, killed or dressed, or other personal property and products of the same or different kind from farms, pastures, ranges, industrial plants and other places of production or robbing the owners of such personal property, or other persons in possession of the same; for the prevention of such crimes; and for obtaining and seeking to obtain evidence of such crimes. It is the duty of all peace officers in the State of Oregon to enforce all laws for the protection of the property and the prevention of the crimes above mentioned.



Section 125. ORS 142.080 is amended to read:

142.080. **Forfeiture of conveyances used unlawfully to conceal or transport stolen property.** (1) Any boat, vehicle, **aircraft** or other conveyance used by or with the knowledge of the owner or the person operating or in charge thereof, other than stolen conveyances, in the unlawful transportation of livestock, livestock carcasses, poultry or other personal property, as provided in ORS 142.070, or in which any such personal property unlawfully possessed is kept or concealed by or with the knowledge of such owner or person operating or in charge thereof, shall be forfeited to the state **as provided in this section and ORS 142.090.**

(2) If the person arrested under section 126 of this 1973 Act is not the owner of the vehicle or conveyance seized, the sheriff shall make reasonable effort to determine the name and address of the

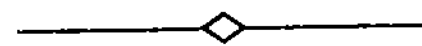
owner. If the sheriff is able to determine the name and address of the owner, he shall immediately notify the owner by registered or certified mail of the seizure and of the owner's rights and duties under this section and ORS 142.090.

(3) A person notified under subsection (2) of this section, or any other person asserting a claim to rightful possession of the vehicle or conveyance seized, except the defendant, may move the court having ultimate trial jurisdiction over any crime charged in connection with the seizure, to return the vehicle or conveyance to the movant.

(4) The movant shall serve a copy of the motion upon the district attorney of the county in which the vehicle or conveyance is in custody. The court shall order the vehicle or conveyance returned to the movant, unless the court is satisfied by clear and convincing evidence that the movant knowingly consented to the unlawful use that resulted in the seizure. If the court does not order the return of the vehicle or conveyance, the movant shall obtain the return only as provided in ORS 142.090.

(5) If the court orders the return of the vehicle or conveyance to the movant, the movant shall not be liable for any towing or storage costs incurred as a result of the seizure.

(6) If the court does not order the return of the vehicle or conveyance under subsection (4) of this section, and the arrested person is convicted for any offense in connection with the seizure, the vehicle or conveyance shall be subject to forfeiture as provided in this section and ORS 142.090 to 142.110.



Section 126. ORS 142.090 is amended to read:

142.090. **Seizure of stolen animals or other property being transported; proceedings against person arrested.** **(1)** When any **peace** officer [*of the law*] discovers any person in the act of transporting any stolen live meat food animal or fowl, any meat food animal or fowl carcass, or any part thereof, or any wool, hides, grain or any other article which has been stolen in or upon any vehicle, [*team, horse*] **boat, aircraft** or conveyance of any kind, the officer shall seize all such articles or things found therein, take possession of the vehicle [*, team, horse*] or other conveyance and arrest any person in charge thereof.

(2) The officer shall at once proceed against the person arrested, under the provisions of the law which has been violated, in any court having competent jurisdiction and shall deliver the vehicle [*, team, horse*] or other conveyance to the sheriff of the county in which such seizure has been made [*; but*] **.**

(3) The vehicle [*, team, horse*] or other conveyance shall be returned to the owner **if he is the person arrested,** upon execution of a

good and valid bond, with sufficient sureties in a sum double the value of the property, which bond shall be approved by the [*sheriff*] **court** and shall be conditioned upon the return of said property to the custody of the sheriff [*on the day of trial to abide the judgment of the court*] **at a time to be specified by the court.**

Section 127. ORS 142.100 is amended to read:

142.100. **Sale of seized property, rights of owner and lien holder.** **(1)** The court, upon conviction of a person arrested pursuant to ORS 142.090, shall, unless the bona fide owner or a bona fide lien holder registers his objection as provided in this section, [*or unless other good cause to the contrary is shown*] **subject to the ownership rights of innocent third parties**, order a sale of the property at public auction by the sheriff of the county where it was seized.

(2) The sheriff, after deducting the expense of keeping the property and the cost of sale, shall pay, according to their priorities, all liens which are established by intervention or otherwise at such hearing or in other proceedings brought for said purpose and shall pay the balance of the proceedings into the general fund of the county [*; provided, that*] **.**

(3) No claim of ownership or of any right, title or interest in the vehicle [*, team, horse*] or other conveyance shall be held [*valid*] **invalid** unless the [*claimant*] **state** shows to the satisfaction of the court, **by clear and convincing evidence** that [*he is in good faith the owner of the claim and*] **the claimant** had [*no*] knowledge that the vehicle [*, team, horse*] or other conveyance was used or to be used in violation of law [*; provided, further that*] **.**

(4) No such conveyance shall be sold uder this section [*if the bona fide owner or any bona fide lien holder, before the date set for such sale, registers his objection to such sale with the court*] and **unless the state** proves to [*the satisfaction of*] the court, [*that he*] **by clear and convincing evidence that the person asserting a claim of ownership or other right, title or interest in the conveyance** had [*no*] knowledge that such conveyance was to be used to convey stolen property, in which case the court shall order the vehicle [*, team, horse*] or other conveyance to be released. All liens against property sold under the provisions of ORS 142.100, 142.110 or 142.120 shall be transferred from the property to the proceeds of the sale of the property.

Section 128. ORS 142.110 is amended to read:

142.110. **Notice to owner.** If no one claims the vehicle [*, team, horse*] or other conveyance, as provided in ORS 142.100, the taking of the same with description thereof shall be advertised in some daily newspaper published in the city or county where taken or, if

there is no daily newspaper published in such county or city, in a newspaper having weekly circulation in the city or county once a week for two weeks and by notice posted in three public places near the place of seizure [*, and*] . The legal owner, in the case of a motor vehicle, if licensed by the State of Oregon, as shown by his name and address in the records of the Motor Vehicles Division of the Department of Transportation, shall be notified by mail [*; and*] . If no claimant appears within 10 days after the last publication of the advertisement, the property shall be sold and the proceeds, after deducting the expenses and costs, shall be paid into the general fund of the county.

COMMENTARY TO §§ 125 TO 128

The statutes are substantially changed in form and content to provide minimum due process with respect to protecting the property rights of persons whose vehicles or other conveyances may be seized under the existing law. The burden is shifted to the state to establish culpability on the part of the person whose vehicle has been seized.

The state would be required to prove the requisite guilty knowledge by clear and convincing evidence, both at the initial stage of the seizure, and also before any sale could be ordered of the vehicle in question. The amendments also create a procedure whereby a third party may assert his ownership rights in the vehicle as soon as he learns of the seizure. Affirmative duties are placed on the sheriff to determine the identity of the owner and to notify him of his rights and obligations. Identical provisions are written by amendment into ORS 471.660 and 471.665, with respect to the seizure and forfeiture of vehicles used in the commission of alcohol or narcotics or dangerous drug offenses.

Section 129. (ORS 142.120) Perishable property; livestock. If any of the property seized, as provided in ORS 142.090, is perishable, or livestock or fowls where the cost of keeping is great, the sheriff shall, upon order of the court, sell the same in the manner in which property is sold on execution.

Section 130. (ORS 142.130) Retention of property to answer order of court. The proceeds of the sale mentioned in ORS 142.120 and other property seized shall be retained by liens, if not released on bond, to answer any order that may be entered by the court upon the trial of the person arrested.

ARTICLE 5. SEARCH AND SEIZURE

General Provisions

Section 131. Definitions. As used in sections 131 to 169 of this Act, unless the context requires otherwise:

(1) "Judge" means any judge of the district or circuit court, the Oregon Court of Appeals or the Oregon Supreme Court.

(2) "Police officer" means a sheriff, municipal policeman or member of the Oregon State Police.

COMMENTARY

A. Summary

The definitions are set out to clarify who may apply for and which judicial officers may issue search warrants. The former is limited to a sheriff, municipal policeman or a state policeman. The definition of police officer is meant to include deputy sheriffs as well as sheriffs.

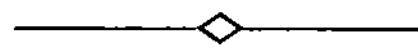
B. Derivation

The definitions are new.

C. Relationship to Existing Law

Under existing Oregon law, ORS 141.040 states that any magistrate authorized to issue an arrest warrant is authorized to issue a search warrant. Pursuant to ORS 133.030 this means all district, circuit, Court of Appeals and Supreme Court judges as well as county judges and justices of the peace. The definition of "judge" in subsection (1) of this section does not include county judges and justices of the peace. It is the position of the Commission that the complexities of search and seizure law make it mandatory that the person charged with issuing warrants be legally trained. Since it is possible that county judges and justices of the peace may be laymen, these judicial officers are eliminated from the search warrant process.

The Oregon Criminal Code of 1971 defines a peace officer in ORS 161.015 as a sheriff, constable, marshal, municipal policeman, member of the Oregon State Police and such other persons as may be designated by law. The Commission believes that this group is too broad for the purposes of this Article. Only those persons identified with regular police organizations are given the authority to apply for search warrants. Semi-official police, such as railroad detectives and plant guards, who may qualify as peace officers under the definition of ORS 161.015, should not be able to obtain a search warrant because of their inexperience in the area and less likelihood that their applications would be supervised by the district attorney.



Section 132. Permissible objects of search and seizure. The following are subject to search and seizure under sections 131 to 169 of this Act:

(1) Evidence of or information concerning the commission of a criminal offense;

(2) Contraband, the fruits of crime, or things otherwise criminally possessed;

(3) Weapons or other things used or likely to be used as means of committing a crime; and

(4) A person for whose arrest there is reasonable cause or who is unlawfully held in concealment.

COMMENTARY

A. Summary

This section is intended to specify the things—including information and individuals—that are subject to search and seizure under the ensuing sections of the draft.

Under subsections (2) and (3), the subjects of search and seizure are tangible physical objects. Ordinarily, that will also be the case under subsection (1) which reflects the Supreme Court's recent decision removing the constitutional barriers to the seizure of "mere evidence." See *Warden v. Hay-*

there is no daily newspaper published in such county or city, in a newspaper having weekly circulation in the city or county once a week for two weeks and by notice posted in three public places near the place of seizure [, *and*] . The legal owner, in the case of a motor vehicle, if licensed by the State of Oregon, as shown by his name and address in the records of the Motor Vehicles Division of the Department of Transportation, shall be notified by mail [; *and*] . If no claimant appears within 10 days after the last publication of the advertisement, the property shall be sold and the proceeds, after deducting the expenses and costs, shall be paid into the general fund of the county.

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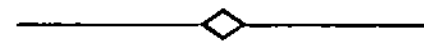

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(3) Weapons or other things used or likely to be used as means of committing a crime; and

(4) A person for whose arrest there is reasonable cause or who is unlawfully held in concealment.

COMMENTARY

A. Summary

This section is intended to specify the things—including information and individuals—that are subject to search and seizure under the ensuing sections of the draft.

Under subsections (2) and (3), the subjects of search and seizure are tangible physical objects. Ordinarily, that will also be the case under subsection (1) which reflects the Supreme Court's recent decision removing the constitutional barriers to the seizure of "mere evidence." See *Warden v. Hay-*

den, 387 US 294 (1967). The draft uses the phrase "information concerning" in addition to "evidence of" to cover the situation where the fruits of the search are not tangible objects, and where their value is negative rather than positive. When a homicide has been committed, the police may need a search warrant to examine the scene of the crime, and look for bloodstains, fingerprints, means of ingress and egress, and the like. The fact that the window in the deceased's room was locked and impossible of access from outside is not literally "evidence of the commission" of a criminal offense, but it is important "information concerning" the offense, because it establishes that the killer must have entered some other way. If the police cannot gain access by consent for such investigations, legal authority should be available.

Although subsection (4) probably is not necessary, this view is not universally entertained, and there appears to be no objection to the authorization of search warrants to enter premises for purposes of arrest or rescue.

B. Derivation

The section draft follows closely the language in section §§ 1.03 of the MCPP. The policies, if not the exact language presently contained in ORS 141.010, which sets out the grounds for issuance of search warrants, are in substantial accord with the policies in the draft.

C. Relationship to Existing Law

The existing statutory material throughout the country on this matter exhibits great variety. Several states, including Oregon in its statute setting out the purposes for which a search warrant may be issued (ORS 141.010), follow a common and apparently elderly form which covers property which is "stolen or embezzled," which has been "used as the means of committing a crime." In many other states this form is used as the base, with additions or variations. Specific reference to "stolen" or "stolen and embezzled" property is common to most of them, and no doubt reflects the ancestral common law warrant for stolen goods. Several states particularize the permissible objects by types of crime—gambling, liquor, fish and game laws, etc.—instead of by general categories.

"Evidence" as the object of a search warrant: Until the Court's recent decision in *Warden v. Hayden*, 387 US 294 (1967), there were constitutional obstacles to the issuance of a search warrant for mere "evidence" of a crime; some unlawful possessory aspect was required under the so-called "mere evidence" rule enunciated in *Gouled v. United States*, 25 US 298 (1921). But the *Gouled* case was explicitly overruled by the *Hayden* case, at least as concerns "non-testimonial" evidence.

The demise of the mere evidence rule had been widely predicted and in fact was anticipated in 1963 when the Oregon legislature added language to ORS 141.010 permitting the issuance of a search warrant for the purpose of seizing evidence of a crime, a development probably stemming from the tortured holding in *State v. Chinn,* 231 Or 259, 373 P2d 392 (1962). In *Chinn* the Oregon Supreme Court found that evidence was admissible under the instrumentality provision of ORS 141.010 when in reality the "instrumentalities" of the crime of rape (empty beer bottles, a camera, a soiled bed sheet) more closely resembled "mere evidence" of the crime.

Search and Seizure Pursuant to Warrant

Section 133. Issuance of search warrant. (1) A search warrant may be issued only by a judge.

(2) Application for a search warrant may be made only by a district attorney or by any police officer.

(3) The application shall consist of a proposed warrant in conformance with section 135 of this Act, and shall be supported by one or more affidavits particularly setting forth the facts and circumstances tending to show that such things are in the places, or in the possession of the individuals, to be searched. If an affidavit is based in whole or in part on hearsay, the affiant shall set forth facts bearing on any unnamed informant's reliability and shall disclose, as far as possible, the means by which the information was obtained.

(4) Instead of the written affidavit described in subsection (3)

of this section, the judge may take an oral statement under oath which shall be recorded and transcribed. The transcribed statement shall be considered to be an affidavit for the purposes of this section. In such cases, the recording of the sworn oral statement and the transcribed statement shall be certified by the judge receiving it and shall be retained as a part of the record of proceedings for the issuance of the warrant.

COMMENTARY

A. Summary

Subsection (1), in accordance with modern practice, confines the authority to issue search warrants to Oregon judges of the district court level and above.

Under subsection (2) only prosecuting attorneys and police officers are authorized to apply for search warrants. The definition of police officer is limited to sheriffs, municipal policemen and state policemen in section 131.

Subsection (3) embodies the Fourth Amendment's requirements of "oath or affirmation" and particularity. It also requires that affidavits be in hand at the inception of the proceedings, so as to discourage frivolous or speculative applications based on the chance that a witness may give sufficient supporting oral testimony. The second sentence embodies special requirements of particularity with respect to hearsay affidavits based on the statements of "informers," which the Supreme Court has articulated in cases such as *Aguilar v. United States*, 378 US 108 (1964), *Spinelli v. United States*, 393 US 410 (1969), and, most recently, *U. S. v. Harris*, 91 S Ct 2075 (1971).

Subsection (4) permits a police officer to obtain search warrant authority by calling the judge on the telephone. The judge, over the phone, puts the officer under oath and makes a recording of the conversation.

B. Derivation

The language of the section comes largely from MCPP section §§ 2.01 (1), (2) and (3). The language of subsection (4) on telephonic search warrants is based on California Penal Code § 1526 (1970).

C. Relationship to Existing Law

The limitations as to who may issue and apply for search warrants in subsections (1) and (2) are explained in the commentary to section 131.

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

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

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

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

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

(2) If it comes from the reliable informant, the affidavit should contain both an assertion that the informant is reliable and the facts in support of this. (In the *Harris* case the affidavit did not establish

this in the usual way, which consists of a recitation of the times the informant had previously supplied tips leading to valid arrests and seizures. Instead, in the *Harris* case, the fact, inter alia, that the informant had furnished statements against his own criminal interest were accepted largely as establishing his reliability. *Harris* also recognizes reputation evidence against the person to be searched.)

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

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

The telephonic warrant system authorized in subsection (4) is new to Oregon law and procedure. Since the definition in section 131 of the word "judge" no longer includes justices of the peace and county judges, the telephoned warrant system has been adopted especially for use in those counties which may not have a resident circuit court judge or a conveniently located district court judge. The vast spaces of eastern Oregon in particular have prompted the Commission to include this unique device. Further details of the system are included in subsection (3) of section 134.

Section 134. The hearing. Before acting on the application, the judge may examine on oath the affiants, and the applicant and any witnesses he may produce, and may himself call such witnesses as he considers necessary to a decision. He shall make and keep a fair summary of the proceedings on the application, and a record of any testimony taken before him. The summary or other record shall be admissible as evidence on any motion to suppress.

(2) If the judge finds that the application meets the requirements of section 132 of this Act and that, on the basis of the record made before him, there is probable cause to believe that the search will discover things specified in the application and subject to seizure under section 132 of this Act, he shall issue a search warrant based on his finding and in accordance with the requirements of sections 133 to 140 of this Act. If he does not so find, the judge shall deny the application.

(3) The judge may orally authorize a police officer or a district attorney to sign the judge's name on a duplicate original warrant. A duplicate original warrant shall be a search warrant for the purposes of sections 132 to 140 of this Act, and it shall be returned to the judge as provided in section 140. In such cases a judge shall enter on the face of the original warrant the exact time of the issuance of the warrant and shall sign and file the original warrant in the manner provided by law.

(4) Until the warrant is executed, the proceedings upon application for a search warrant shall be conducted with secrecy appropriate to the circumstances.

COMMENTARY

A. Summary

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

Subsection (2) embodies the constitutional requirement of probable cause. The requirement is one of probable cause to believe that things (a) specified in the application, and (b) subject to seizure under section 132 of this Act, will indeed be found by the search proposed. If the judge is satisfied that such a showing has been made, and that the application otherwise meets the requirements of the code, he makes a finding to that effect and issues a warrant.

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

Subsection (3) contains further details of the telephonic search warrant system introduced in section 133, subsection (4).

B. Derivation

The section is based on MCPP section §§ 2.01, paragraphs (4), (5) and (6). It is similar in policy to ORS 141.050 which also requires the judge to examine affiants and authorizes him to call witnesses. Subsection (3) is based on California Penal Code § 1528 (1970).

C. Relationship to Existing Law

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

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

The provision in subsection (4) on secrecy of the hearings is new to Oregon law in language but not as a practical matter of regular operation. Surprisingly few states (apparently only three) have such a provision, yet the practice clearly is one of secrecy. The language reflects this policy.

Section 135. Contents of search warrant. A search warrant shall be dated and shall be addressed to and authorize its execution by an officer authorized by law to execute search warrants.

(2) The warrant shall state, or describe with particularity:

(a) The identity of the judge issuing the warrant and the date the warrant was issued;

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

(c) The things constituting the object of the search and authorized to be seized;

(d) The period of time, not to exceed five days, after execution of the warrant except as provided in subsection (3) of this section, within which the warrant is to be returned to the issuing authority.

(3) Except as otherwise provided herein, the search warrant shall be executed between the hours of 7 a.m. and 10 p.m. and within five days from the date of issuance. The judge issuing the warrant may, however, by endorsement upon the face of the warrant, authorize its execution at any time of the day or night and may further authorize its execution after five days, but not more than 10 days from date of issuance.

COMMENTARY

A. Summary

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

Subsection (3) directs that, in the absence of unusual circumstances, the warrant require that it be executed only between the hours of 7 a.m. and 10 p.m. unless otherwise authorized on the face of the warrant. The warrant is to be executed in five days or no later than 10 days from date of issuance if so authorized.

B. Derivation

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

Subsection (3) has similarity to ORS 141.130 with an important difference as is noted in the explanation below.

C. Relationship to Existing Law

Subsection (3) contains an important innovation for Oregon law. Where possible, searches should be conducted in daylight hours. The invasion of private premises in the small hours of the night smacks of totalitarian methods and is more likely to create the terror that precipitates gun battles. Obviously there are occasions when it is imperative that the search be conducted at night. Subsection (3) permits such searches if the judge so authorizes service on the face of the warrant in the nighttime hours after 10 p.m.

Subsection (3) generally requires that the warrant be served within five days which is shorter than the basic 10 day execution requirement of ORS 141.100. Subsection (3) of the draft section does, however, provide that if five days is not enough time, a period of up to 10 days may be granted. It seems desirable to keep the time allowed for execution of search warrants as short as possible. This tends to eliminate problems with respect to staleness of the warrant which often form a fruitful basis for attack on the legality of the warrant.

Section 136. Execution of warrant. (1) A search warrant may be executed only within the period and at the times authorized therein and only by a police officer. A police officer charged with its execution may be accompanied by such other persons as may be reasonably necessary for the successful execution of the warrant with all practicable safety.

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

(3) If the executing officer reasonably believes that the notice required by subsection (2) of this section would lead to the destruc-

tion of evidence, result in the escape of a suspect or increase the peril to the officer's safety or the safety of other persons, the officer may execute the warrant without prior notice.

(4) Except as provided in subsection (3) of this section, before undertaking any search or seizure pursuant to the warrant, the executing officer shall read and give a copy of the warrant to the person to be searched, or to the person in apparent control of the premises to be searched. If the premises are unoccupied or there is no one in apparent control, the officer shall leave a copy of the warrant suitably affixed to the premises.

COMMENTARY

A. Summary

The provisions in subsection (1) make the terms of the search warrant binding on the executing police officer. The executing officer is authorized to have assistance from other officers and private persons where appropriate.

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

The notice requirement of subsection (2) may, pursuant to subsection (3), be disregarded by the executing officer if he has reasonable cause to believe that giving notice would result in increased peril to himself or other persons, the flight of the culprit, or the loss of evidence.

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

The draft also requires that a copy of the warrant be given before the search is begun except where the no-knock provisions in subsection (3) apply. This is so that the "searchee" may know that there is color of authority for the search, and that he is not entitled to oppose it by force. It likewise requires that the warrant shall be read to the person searched rather than merely handed to him, so that he will be immediately apprised of what it is, and so that problems of illiteracy may be mitigated.

B. Derivation

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

C. Relationship to Existing Law

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

Subsection (3) is intended to accomplish the same general purpose as the New York statute commonly known as the "no-knock" law. NY Code Crim Proc section 799. The constitutionality of such a provision is supported by *Ker v. California*, 374 US 23 (1963), approving a California judge-made rule dispensing with the need for notice in emergency circumstances. Oregon has recently approved the no-knock approach in *State v. Mitchell*, 93 Adv Sh 89, — Or App — (1971), 487 P2d 1156, and *State v. Gassner*, 93 Adv Sh 349, — Or App — (1971), 488 P2d 822. The approach of these two cases is reflected in the language of this section.

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

Other sections on arrest in this Code impose no such requirement in connection with arrests, whether

or not under warrant, if the officer has reasonable cause to believe that notice would enable the suspect to escape, or endanger the officer or others.

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

Section 137. Scope of the search. The scope of search shall be only such as is authorized by the warrant and is reasonably necessary to discover the persons or things specified therein. Upon discovery of the persons or things so specified, the officer shall take possession or custody of them and search no further under authority of the warrant. If in the course of the search the officer discovers things, not specified in the warrant, which he reasonably believes to be subject to seizure under section 132 of this Act which he did not reasonably expect to find, he shall also take possession of the things discovered.

COMMENTARY

A. Summary

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

B. Derivation

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

C. Relationship to Existing Law

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

It is possible that, in the course of conducting a search for things specified in the warrant, the officer may observe things not so specified which are contraband, or which for some other reason appear to be things subject to seizure under section 136. If the officer's basis for such belief is reasonable, he should be entitled to seize them, just as when he observes such things elsewhere in the lawful conduct of his duty. This latter authority is limited, however, by *Coolidge v. New Hamp.*, 91 S Ct 2022, 2040-41 (1971). The Court said that if the initial intrusion is bottomed upon a search warrant which fails to mention a particular object, though the police know its location well ahead of time and intend to seize it, then there is a violation of the express constitutional requirement of "warrants . . . particularly describing . . . the things to be seized." Pursuant to *Coolidge*, then, police must be much more careful about what they list. They will not now have the wide latitude they supposed existed under the plain view rule. Thus under *Coolidge* if the police expect to find evidence or contraband, or if the police could reasonably anticipate finding certain evidence or contraband, it may not be seized under the plain view rule.

Section 138. List of things seized. Promptly upon completion of the search, the officer shall make a list of the things seized, and shall deliver a receipt embodying the list to the person from whose

possession they are taken, or the person in apparent control of the premises or vehicle from which they are taken. If the vehicle or premises are unoccupied or there is no one present in apparent control, the executing officer shall leave the receipt suitably affixed to the vehicle or premises.

COMMENTARY

A. Summary

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

B. Derivation

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

C. Relationship to Existing Law

The requirement that a receipt, listing everything seized, be given to the occupant of the premises is a common law feature of search warrant procedure, which is usually found in statutory form, including Oregon, in ORS 141.120. All the reasons for giving the occupant a copy of the warrant apply likewise to the requirement of a receipt. And here, as in the case of the warrant, a copy should be left affixed to the premises if no responsible person is present to receive it.

Section 139. Use of force in executing warrants. (1) The executing officer and other officers accompanying and assisting him may use the degree of force, short of deadly physical force, against persons, or to effect an entry, or to open containers, as is reasonably necessary for the execution of the search warrant with all practicable safety.

(2) The use of deadly physical force in the execution of a search warrant is justifiable only:

(a) If the officer reasonably believes that there is a substantial risk that things to be seized will be used to cause death or serious physical injury if their seizure is delayed and that the force used creates no substantial risk of injury to persons other than those obstructing the officer; or

(b) If the officer reasonably believes that the use of deadly physical force is necessary to defend the officer or another person from the use or threatened imminent use of deadly physical force.

COMMENTARY

A. Summary

The notion, embodied in this section, that some degree of force may, if necessary, be used to effect the execution of the warrant, is basic to the nature of the process, and is generally recognized. Under the criteria in the proposed draft, deadly physical force is not permissible unless there is no substantial risk to innocent bystanders, and there is substantial risk that failure to effect a prompt seizure of the things sought will result in death or serious physical injury.

B. Derivation

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

C. Relationship to Existing Law

The present Oregon law embodied in ORS 144.110 provides that the amount of force which may be used to execute a search warrant, both as to breaking into premises and in overcoming resistance, is the same as that allowed for the execution of an

arrest warrant. The quantifying of the authority to break into premises and containers with the same authority under arrest law is unexceptional. But it appears desirable to differentiate the use of force in the execution of a search warrant.

Under the draft the officer may use such force, short of deadly physical force (see ORS 161.015 (3) for the definition of this term), as may be reasonably necessary for execution of the warrant. But such force shall not extend to use of deadly force except (1) where the officer is acting in self-defense or defense of others, or (2) where the things a person authorized to be searched for and seized will suffer or be used to cause death or serious bodily harm if the search is delayed, and (3) there is, in the reasonable opinion of the officer, no risk to innocent bystanders.

It will be seen that this standard of use of deadly physical force is premised on a different concept than that which provides for use of deadly force in effecting arrests as provided in the Oregon Criminal Code of 1971, ORS 161.235 and 161.239. Under these sections the policeman's authority to use force is equated generally to the dangerousness of the kind of crime for which he is attempting to make an arrest. For instance, ORS 161.239 provides that the officer may use deadly force if he reasonably believes the person to be arrested has committed the crime of kidnapping or rape. However, the seizure of evidence of either of these crimes may not in any common sense view warrant the use of deadly force in connection therewith unless there is cause to believe that failure to seize the evidence, due to inability to use deadly force, would create danger of serious harm or death. Basically, what the section's policy says is that if the police have to choose between getting evidence under a warrant by using deadly force or losing that evidence, the value of human life outweighs the deadly acquisition of the evidence (barring the exceptional circumstances stated in the draft section).

Section 140. Return of the warrant. (1) If a search warrant is not executed within the time specified therein, the officer shall forthwith return the warrant to the issuing judge.

(2) An officer who has executed a search warrant shall, as soon as is reasonably possible and in no event later than the date specified in the warrant, return the warrant to the issuing judge together with a signed list of things seized and setting forth the date and time of the search.

(3) Subject to the provisions of subsection (4) of this section, the issuing judge shall file the warrant and list returned to him, with the record of the proceedings on the application for the warrant made pursuant to section 134 of this Act.

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

COMMENTARY

A. Summary

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

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

Subsections (3) and (4) are routine filing provisions. In some jurisdictions the judges who issue search warrants may not have jurisdiction to try the offenses in connection with which the warrants are issued, and in those circumstances the records should be filed with a court having jurisdiction to proceed in the matter when so requested by the appropriate

court. This is true in Oregon counties like Lane where the district court issues almost all search warrants yet has no jurisdiction over many serious crimes in which the warrants may be involved.

B. Derivation

The section follows the language of MCPP section §§ 2.04.

C. Relationship to Existing Law

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

Apparently Georgia and Illinois are the only states that require return of a warrant which has not been executed. Still, the procedure appears to be desirable. In two states the improper issuance of a search warrant is criminally punishable, (North Carolina and Virginia), and in other jurisdictions the proceedings for issuance of an unexecuted warrant, and the reasons for its non-execution, might be relevant in subsequent tort or criminal litigation. It is the intent of subsection (1) of this section that when unexecuted warrants are returned, the issuing judge may make a thorough inquiry as to the reasons the warrant was not executed and that a record of such reasons be kept.

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

The requirement that the return include an inventory of seized property is universal and is the present Oregon law in ORS 141.130. Subsections (3) and (4) are fairly routine and will work little, if any, change in present practices.

Search and Seizure Incidental to Arrest

Section 141. Permissible purposes. Subject to the limitations in sections 141 to 146 of this Act, an officer who has made a valid arrest may, without a search warrant, conduct a search of the person, property, premises or vehicle under the apparent control of the arrested person:

(1) To effect the arrest with all practicable safety of the officer, the arrested person and others;

(2) To furnish appropriate custodial care, if the arrested person is jailed; or

(3) To obtain evidence of the commission of the offense for which the person is arrested or to seize contraband, the fruits of crime or other things criminally possessed or used in connection with the offense.

COMMENTARY

A. Summary

This section embodies the basic authorization for searches and seizures incidental to an arrest. The authority becomes effective only upon actually making the arrest. Limitations on the permissible scope of search pursuant to an arrest are contained in sections 148 to 150 of this Act. The section also specifies the several purposes for which a search incident to an arrest may legitimately be made, and which furnish the conceptual basis for both the authorization and the limitations.

B. Derivation

The section is based on section §§ 3.01 (1) of the MCPP.

C. Relationship to Existing Law

There are no comparable statutory provisions in

Oregon but the purposes authorized in this section do not appear to be in conflict with any Oregon decisional law.

In view of the almost total lack of legislative underpinnings for the search incident to arrest—a lack surely due to its taken-for-granted character for centuries past—the section specifies the permissible purposes.

The validity of the purpose stated in subsection (1) is recognized with virtual unanimity. Nor would much question be raised about the necessity for custodial searches of jailed persons; the practice, well-nigh universal, is largely devoid of statutory basis and has not been the subject of much professional consideration.

More controversial are the purposes stated in subsection (3). So far as concerns "evidence," the purpose was, of course, clearly invalid during the time (1921-67) that the "mere evidence" rule of the *Gouled* case was in effect. With the rejection of that rule in the *Hayden* case, and subject to the possible exemption of testimonial documents discussed in connection with section 132, the two parts of subsection (3) now stand on much the same footing.

Limitations on the permissible physical scope of searches incidental to an arrest are discussed under sections 144 through 146.

Section 142. Things subject to seizure. In the course of a search conducted pursuant to sections 141 to 146 of this Act, the arresting officer may seize only things subject to seizure as provided in section 132 of this Act. The provisions of section 139 of this Act with respect to the use of force shall be applicable to searches and seizures undertaken pursuant to sections 141 to 146 of this Act.

COMMENTARY

A. Summary

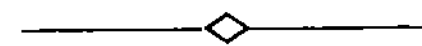
This section makes applicable to searches and seizures incidental to an arrest the general limitations on what may be seized in section 132 of this Act. The reference in the section to the amount of force which may be used is contained, as a structural matter, in MCPP provisions on warranted searches, which the Reporter has not yet developed for presentation. The provisions referred to are found in MCPP § 2.03 (7) which allows only the use of non-deadly force except that deadly force may be used for self-defense or where there is reasonable ground to believe that delay of the seizure will result in the use of the objects to be seized to cause death or serious bodily injury.

B. Derivation

This section is based on MCPP § 3.01 (2).

C. Relationship to Existing Law

Oregon has no comparable statutory provision.



Section 143. Custodial search; vehicle inventory search. (1) A person who is arrested and lawfully confined in a correctional facility or juvenile training school may be subjected to such search of the person as is reasonably necessary for custodial purposes, and things subject to seizure under section 132 of this Act, discovered in the course of the search, may be seized.

(2) If an arrest occurs of a person operating any automobile, aircraft, boat or other vehicle and the police have reasonable and justifiable grounds for impounding the vehicle to protect property in the vehicle, the police may conduct a search as may be reasonably necessary for purposes of inventorying the contents of the vehicle. Such search shall be for the purpose of finding, listing and securing

from loss, during the arrested person's detention, property found in the vehicle. Evidence of any crime found during such search is admissible in evidence.

COMMENTARY

A. Summary

(1) There may be occasions when a person charged only with a violation or a nonviolent misdemeanor must be confined for his own protection because he is drunk or otherwise helpless, or for some other nonpunitive reason. Under these circumstances, and others where confinement is reasonable, following the arrest a search may be desirable for purely custodial purposes. On the basic principle that the police are entitled to observe and seize whatever contraband comes to notice in the course of the lawful conduct of their duties, any things subject to seizure which such a custodial search turns up should be seizable.

(2) If the police arrest the operator of a vehicle, the police may search the car only for the purpose of inventorying its contents. Such inventory, however, can be made only if it is reasonable and proper for the police to take responsibility for the vehicle by impounding it to safeguard the owner's or operator's property. Any evidence of crime discovered in the inventory may be admitted as evidence.

B. Derivation

Subsection (1) is based on MCPP section § 3.02 (2). Subsection (2) is based on the decisional law of Oregon. See, *State v. Raiford*, 93 Adv Sh 1302, — Or App — (1971), 490 P2d 1036, and *State v. Keller*, 94 Adv Sh 1818, — Or App — (1972), 497 P2d 868.

C. Relationship to Existing Law

Subsection (1). Custodial search. There is no comparable statutory provision in Oregon although ORS 142.210 is indirectly relevant. Since it requires the jail custodian to receipt for a prisoner's "money or other valuables" when they are taken from the prisoner being jailed, the implication is that the jailer may conduct a search. In a related case, *State v. Whitewater*, 251 Or 304 (1968), the Oregon Supreme Court held that the clothing taken from a prisoner during booking at a jail on traffic arrest charges was subject to seizure as evidence of a different crime. See also *State v. Kangiser*, 94 Adv Sh 638, — Or App — (1972), 494 P2d 450, approving custodial searches. For a further comment on custodial searches, see the commentary to section 144. The possibility that a person may be lawfully confined in more than one kind of correctional facility necessitates authorizing such searches in "correctional facilities or juvenile training schools."

Subsection (2). Vehicle inventory search. This provision reflects closely the rule announced in *State v. Raiford*, 93 Adv Sh 1302, — Or App — (1971), 490 P2d 1036, which clearly recognized in Oregon that police under proper circumstances may inventory the contents of a vehicle following arrest of the operator. Typically, such inventory search arises in connection with an automobile, but there is no reason why the principle should not extend to trucks, planes, boats or other vehicles, and the draft so provides.

Section 144. Search of the person incident to arrest. (1) An officer making an arrest and the authorized officials at the police station or other police building to which the arrested person is brought, may conduct a search of the arrested individual's garments and personal effects ready to hand, the surface of his body, body hair and the area within his immediate control.

(2) The search authorized by subsection (1) shall be carried out with all reasonable regard for privacy, and unless exceptional circumstances otherwise require, search of the arrested person before his arrival at the police station shall be limited to such search as is reasonably necessary in order to effect the arrest with all practicable safety, or prevent destruction of evidence of the crime for which he is arrested.

(3) Search of an arrested person's body cavities may be con-

ducted as incidental to an arrest only if there is a strong probability that it will disclose things subject to seizure and related to the offense for which the person was arrested, and if it reasonably appears that the delay caused by obtaining a search warrant would probably result in the disappearance or destruction of the objects of the search, and that the search is otherwise reasonable under the circumstances of the case, including the seriousness of the offense and the nature of the physical invasion of the arrested person's body.

(4) Search of an arrested person's bloodstream may be conducted as incidental to arrest only if there is probable cause that it will disclose things or information subject to seizure and related to the offense for which the individual was arrested and if there is probable cause to believe that a delay caused by obtaining a search warrant would result in the disappearance or destruction of the evidence. The search of the bloodstream pursuant to this subsection (4) shall be performed by a licensed physician or surgeon, licensed professional nurse, or other qualified person according to accepted medical practice.

(5) A search authorized by this section may be carried out only if, and to the extent that, there is probable cause to believe that it is necessary in order to carry out one or more of the purposes specified in section 141 of this Act.

(6) Things not subject to seizure under section 132 of this Act, which are found in the course of a search conducted pursuant to this section, may be taken from the arrested person's possession if reasonably necessary for custodial purposes. All such things must be returned to the arrested person, or to someone authorized to take them in his behalf, as soon as is reasonably practicable.

COMMENTARY

A. Summary

The first subsection of this section provides for the search, incidental to an arrest, of the arrested individual's person and personal effects, which is recognized in the traditional common law of search and seizure. The geographical scope of the search is confined to the area within which the arrestee might take action to obstruct the arrest or destroy contraband or evidence of the crime for which he is arrested.

Subsection (2) limits the scope of the search at the place of arrest, in the interests of privacy, to the scope necessary for safety and to prevent destruction of evidence.

Subsection (3) limits warrantless search of body cavities to situations where there is a high degree of probability that seizable things have been concealed in this manner, and that delay might cause their disappearance or destruction.

Subsection (4) permits search of the bloodstream in certain situations. Such search is to be conducted only by a physician, nurse or other qualified person, according to accepted medical practice.

Subsection (5) imposes the general limitations which follow from the purposes for which search incidental to arrest is authorized. If, for example, letters on the arrestee's person, or the contents of his wallet, cannot reasonably be expected to bear any relation to the offense for which he was arrested, then the documents may not be read, and the wallet may be opened only if necessary for purposes of safekeeping.

Custodial search may, of course, result in taking from the arrestee things which are not subject to seizure under section 132 of this Act. Such things are required by subsection (6) to be handled with due regard for privacy, and restored to the arrestee or his authorized representative as soon as possible.

B. Derivation

The section is based on MCPP section § 3.03.

C. Relationship to Existing Law

Like most other states Oregon has no statutory provisions similar to the ones in this section but the authority to search incident to arrest is well established in Oregon and all other states as a matter of common law and practice. The constitutional validity of the search authority conveyed in this section seems clear, and it also enjoys the support of long continued practice. Furthermore in almost every case where the arrested person is jailed, full custodial search is a reasonable procedure.

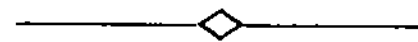
Scope of search. The permissible scope of search incidental to an arrest was dealt with extensively in the Supreme Court's recent decision, *Chimel v. California*, 395 US 752 (1969). That case dealt with a search of the premises wherein the arrest was made. The Court explicitly approved searches of the arrestee's person and "the area into which an arrestee might reach," both in order to effect the arrest with safety and to prevent the concealment or destruction of evidence. This "grabbing distance" standard is embodied in subsection (1) of the draft by the phrase "area within his immediate control," approved in the *Chimel* opinion (395 US at 763).

The *Chimel* case did not deal with custodial search requirements, and the Court appears not to have confronted them in the context of arrest. Nevertheless, there is no reason to think that custodial searches of persons, unless carried out in a brutal or oppressive way, would encounter judicial difficulties. See, e.g., *State v. Kangiser*, 94 Adv Sh 638, — Or App — (1972), 494 P2d 450.

The scope of the search must be justified by its purpose, as subsection (5) requires. Custodial search does not require a reading of documents found on the arrestee, nor can such perusal be justified in order safely to effectuate the arrest. Only if the arresting authorities have reason to believe that the documents are fruits, instrumentalities, or evidence of crime are they seizable.

Searches of the body cavities described in subsection (3) are so personally intrusive and uncomfortable that a higher degree of probable cause—strong probability—is required to justify the search. And only if there is reasonable cause to believe the evidence will be lost if the search is delayed in order to get a warrant will it be permitted.

Subsection (4) reflects the requirements announced in *Schmerber v. California*, 384 US 757 (1966), with respect to the search incidental to arrest.



Section 145. Search of vehicle incident to arrest. (1) If, at the time of the arrest, the arrested person is in a vehicle, or if he or another or others in his company are in apparent control of such vehicle, boat or aircraft in the immediate vicinity of the place where the arrest is made, and if the arresting officer reasonably believes that the vehicle, boat or aircraft contains things subject to seizure under section 132 of this Act and connected with the offense for which the arrest is made, the arresting officer may search the vehicle, boat or aircraft for such things, and seize any things subject to seizure under section 132 of this Act and discovered in the course of the search.

(2) Search of a vehicle, boat or aircraft under this section shall only be made at the same time as the arrest or as soon thereafter as is reasonably practicable.

(3) The provisions of this section shall not be construed as governing the seizure of vehicles pursuant to ORS 471.660.

COMMENTARY

A. Summary

It is to be noted that this section does not relate to the circumstances under which search of a vehicle is permissible without a warrant and independent of an arrest, under the rule of *Carroll v. United States*, 267 US 132 (1925), and related decisions. This

is covered in section 152. Rather it lays down criteria for searching a vehicle as incidental to the arrest of one of its occupants.

The essential limiting principles are that there must be reasonable ground to believe that the vehicle contains things subject to seizure and connected with the crime for which the individual is arrested, and that the vehicle is moving or readily movable, so that the things might be removed before a search warrant could be obtained.

B. Derivation

The language of the section is based on MCPP section § 3.04 (1).

C. Relationship to Existing Law

This section is in accord with existing Oregon case law on search of cars incident to arrest. See *State v. Keith*, 2 Or App 133, 465 P2d 724 (1970), which cites and applies *State v. McCoy*, 249 Or 160 (1968), an opinion of the Oregon Supreme Court dealing with a similar situation. The rationale of *McCoy*, and to a certain extent of *Keith*, is based on the fragile concept of the contemporaneousness of the search with the arrest. This rationale is no longer necessary in light of *Chambers v. Maroney*, 399 US 42, 90 S Ct 1975 (1970), in which the U. S. Supreme Court ends any indecision as to the effect of its earlier opinion in *Chimel v. California*, 395 US 752, 89 S Ct 2034 (1969), a case involving search of premises incident to arrest, on delayed car searches. *Chambers* now says clearly that the police, under appropriate and reasonable circumstances, and where probable cause to search it exists, may seize a car in which the occupant was arrested and delay its search until it is taken to the station house. The opinion explicitly states that such a delayed search is not incidental to arrest. If probable cause to search the car existed at the time of arrest and the delay in the car search was reasonable, the police need not get a warrant before they search because "there is a constitutional difference between houses and cars." *Chambers v. Maroney*, supra, 90 S Ct at 1982. The kind of circumstances which gave rise to the seizure of the car for search approved in *Chambers* are not unlike the circumstances in the recent Oregon cases like *Keith*. In *Chambers* the occupants were arrested in the car in a dark parking lot in the middle of the night thus making the search on the spot, in the Court's view, impractical and probably dangerous.

The procedures and provisions for seizing vehicles which contain alcoholic drugs or narcotics under ORS 471.660 are not affected by this section.

Section 146. Search of premises incidental to arrest. (1) If, at the time of the arrest, the arrested person is in or on premises, all or part of which he is apparently entitled to occupy, the arresting officer may search the premises or part thereof and seize any things subject to seizure under section 132 of this Act and discovered in the course of the search, provided that the arresting officer reasonably believes that the premises or part thereof contain things that:

(a) Are subject to seizure under section 132 of this Act;

(b) Are connected with the offense for which the arrest is made; and

(c) Are likely to be removed or destroyed before a search warrant can be obtained and served.

(2) Search of premises under subsection (1) of this section shall only be made at the same time as the arrest and following as a result of the entry into the premises which was made in order to make the arrest. In determining the scope of search to be undertaken, the officer shall take into account, among other things, the nature of the offense for which the arrest is made, the behavior of the person arrested and others on the premises, the size and other characteristics of the things to be searched for, and whether or not any such things are observed while making the arrest.

COMMENTARY

A. Summary

Subsection (1) of this section embodies a limited authorization for search of premises incidental to an arrest made therein. The principle is the same as for section 145, search of vehicles, except that the danger of removal of the seizable things arises not from the mobility of a vehicle, but from actions by friends or confederates of the arrested person.

Subsection (2) embodies the requirement that the search immediately follow the arrest, in line with established judicial construction of Fourth Amendment requirements. E.g., *Preston v. United States*, 376 US 365 (1964). Subsection (2) also contains standards to guide officers in determining the existence of reasonable cause for a search of premises.

Whether the arrest takes place in a vehicle or premises, the arresting officer may, of course, search the area in the immediate control of the person arrested, as authorized in section 144.

B. Derivation

The language of this section is based on MCPP section § 3.04 (2).

C. Relationship to Existing Law

Search of premises incidental to an arrest is limited to the vicinity of a person who, on the basis of reasonable belief, is a criminal. This circumstance is sufficient to justify a search of premises as a means of obtaining evidence otherwise likely to be destroyed or removed, and subject to the additional requirements embodied in the draft.

The U. S. Supreme Court's decisions in this area have made a rather murky sequence. The *Chimel* case has now indicated that an indoors arrest does not furnish justification "for routinely searching rooms other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself." Such searches "in the absence of well-recognized exceptions," the Court declared, "can only be made under the authority of a search warrant."

What the "well-recognized exceptions" may be, the Court did not explicitly state, but may be gathered by implication from other parts of the opinion. The *Chimel* case was not one of hot pursuit; the police went to the defendant's home armed with an arrest warrant (invalid because the supporting affidavit was conclusory), and there certainly was ample *time*, whether or not there was adequate *cause*, to get a search warrant. In his opinion for the Court, Mr. Justice Stewart spoke approvingly of *Trupiano v. United States*, 334 US 699 (1948), which had laid down as a "cardinal rule" that "law enforcement agents must secure and use search warrants wherever reasonably practicable." This "cardinal rule" was disavowed two years later in *United States v. Rabinowitz*, 339 US 56 (1950), and the *Rabinowitz* case was in turn overruled in the *Chimel* case. The *Chimel* case, accordingly, appears to involve a revival of the short-lived *Trupiano* "cardinal rule," and this inference is borne out by a footnote in Justice Stewart's opinion (89 S Ct 2040 note 9) stating that: "Our holding today is of course entirely consistent with the recognized principle that, assuming the existence of probable cause, automobiles and other vehicles may be searched without warrants 'where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought,' *Carroll v. United States*, 267 US 132, 153 . . . ."

It appears, therefore, that the *Chimel* case is intended to rule out "routine" searches of premises incidental to an arrest, especially if the situation is such that a search warrant could have been obtained without danger to the success of the search.

Arrest should not, of course, furnish the basis for a general search for incriminating things, but only (1) for such things as are connected with the offense for which the arrest is made, (2) on the basis of a reasonable belief that they are to be found on the premises, and (3) on reasonable belief that they may be removed or destroyed if not promptly seized. In a great many cases, the joint application of these three standards may eliminate the basis for any search beyond the arrestee's immediate vicinity, and in many more the permissible scope of the search will be very narrow.

While the arresting officer's right to search is limited in purpose to things connected with the crime for which the arrest is made, of course anything properly seizable under section 132, discovered during the search, may be taken.

The limitation in subsection (2) embodies the constitutional rule established in *Agnello v. United States*, 269 US 20 (1925), and later cases, confining the search authority to the place and occasion of the arrest. Entry into premises can be justified only under warrant, or to make an arrest on reasonable cause.

The last sentence of subsection (2) gives flexibility to the rule governing the permissible scope of search. If there are observable indications in the immediate vicinity of the spot where the arrest is made which suggest the likelihood of evidence or contraband on the premises, a broader search may then be reasonably justified. One must keep in mind, however, that this does not authorize a probable cause type search possible in the case of ve-

hicles. *Vale v. Louisiana*, 399 US 30, 90 S Ct 1969 (1970), makes this clear. In *Vale* the police arrested the defendant on the front steps of his house and, having probable cause to believe there were narcotics inside the house, went on in and conducted a search which indeed turned up the narcotics. The Supreme Court ruled the search invalid both on the theory that it was a search incidental to arrest and that there was probable cause to search. The Court listed the situations under which a broad premises search without a warrant is justified as including only consent searches, *Zap v. United States*, 328 US 624 (1945); officers responding to an emergency, *United States v. Jeffers*, 342 US 48 (1951); where the officers are in hot pursuit of a fleeing felon, *Warden v. Hayden*, 387 US 294 (1966); where the goods ultimately seized were in the process of destruction, *Schmerber v. California*, 384 US 757 (1964) (a search of the person case but relevant in principle); or where the goods were about to be removed from the jurisdiction, *Chapman v. United States*, 365 US 610 (1960).

Search and Seizure By Consent

Section 147. General authorization to search and seize pursuant to consent. (1) Subject to the limitations in sections 131 to 169 of this Act, an officer may conduct a search and make seizures, without a search warrant or other color of authority, if consent to the search is given.

(2) As used in sections 147 to 150 of this Act, "consent" means conduct or a statement to the officer, made voluntarily and in accordance with the requirements of sections 148 and 149 of this Act, giving the officer permission to make a search.

COMMENTARY

A. Summary

Subsection (1) contains the basic authorization to conduct searches on the basis of consent, and seize things subject to seizure found in the course of such a search.

Subsection (2) defines "consent" as conduct or a statement giving permission to conduct a specific search, given voluntarily and in accordance with the requirements prescribed in section 148. Pursuant to section 150, the scope of the search is limited by any limitation in the terms of the consent.

B. Derivation

The language is based on section § 4.01 of the MCPP.

C. Relationship to Existing Law

No comparable provision exists in the Oregon statutes. But the U. S. and Oregon Supreme Courts have long held that Fourth Amendment rights, like those arising under the Fifth Amendment, may be waived. *Zap v. United States*, 328 US 624 (1946); *State v. La Plant*, 149 Or 615, 42 P2d 158 (1935).

As a matter of policy, it might be argued that recognition of "consent" searches should be withheld, on the ground that they are over-productive of credibility issues, and susceptible to abuse. But such arguments might be urged with even greater force in the case of confessions or admissions made in the course of police interrogation. Nevertheless, the *Miranda* case did not go so far as to rule out such evidence, albeit the toleration accorded to confessions obtained from suspects in custody was given somewhat grudgingly.

It is apparent that, subject to the *Miranda* requirements, Fifth Amendment waivers will continue to be recognized, and confessions or admissions received in evidence, even though no counsel for the suspect is present, if the government is able to discharge the burden of proving that the waiver was voluntary and intelligent. If that is so, it would appear that, subject to comparable safeguards, "consent" searches should remain judicially cognizable, and their evidentiary fruits admissible.

Section 148. Persons from whom effective consent may be obtained. The consent justifying a search and seizure under section 147 must be given in the case of:

(1) Search of a person, by the person in question; or

(2) Search of vehicle, boat or aircraft, by the person in apparent control at the time consent is given; or

(3) Search of premises, by a person who by ownership or otherwise, is apparently entitled to determine the giving or withholding of consent.

COMMENTARY

A. Summary

If the police wish to search an individual's person based on a consent search, they must, pursuant to subsection (1), obtain the person's consent.

Subsection (2) provides that the person who is in apparent control of a vehicle is the person from whom the police may obtain consent in order to validly search the vehicle.

Subsection (3) designates any person who by ownership or otherwise is apparently entitled to give consent for police to search premises.

B. Derivation

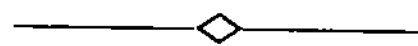
The language of this section is based on MCPP section § 4.02 (1).

C. Relationship to Existing Law

Oregon statutory law is nonexistent on the question of who may validly consent to police searches. Some case law exists but is scant. The section generally reflects what is apparently the law in Oregon.

If the police seek consent to search a juvenile, immaturity of the juvenile may well preclude him from understanding the gravity of the waiver of his Fourth Amendment rights. This issue must be in the mind of the officer at the time, but can only be settled by court decision in close cases.

The owner of premises is authorized in this section as a proper person to give valid consent for search of premises. If the person giving the consent is in fact not the owner, still the consent given will validly authorize the search if the police reasonably rely on appearances. This reflects Oregon law as well. See *State v. Cook*, 242 Or 509, 411 P2d 78 (1966); *State v. Frazier*, 245 Or 4, 418 P2d 841 (1966). Under the broad language of the section even a juvenile may effectively consent to a search if it reasonably appears to the police that the youngster has this authority. It, of course, becomes a matter for the court to determine, in light of the age of the consenting juvenile and surrounding circumstances whether it was reasonable for the police to believe the child had authority to consent.



Section 149. Required warning preceding consent search. (1) Before undertaking a search under the provisions of sections 147 to 150 of this Act, an officer present shall inform the person whose consent is sought that he is under no obligation to give such consent and that anything found may be taken and used in evidence.

(2) If the person whose consent is required under section 148 of this Act is in custody or under arrest at the time such consent is offered or invited, such consent shall not justify a search and seizure under section 147 of this Act unless such person has been informed:

(a) That he is not obliged to consent to a search and that if he does consent any evidence found may be used in evidence against him; and

(b) That he may consult with an attorney prior to making his decision to consent to a search; and

(c) If he wishes to consult with an attorney before making his decision, but is unable to afford one, an attorney will be furnished at public expense.

COMMENTARY

A. Summary

Subsection (1) of this section states the requisites of valid consent from a person *not* under arrest or other restraint at the time the consent is given. It is based on the view that a warning of rights is essential to the giving of a valid consent. The individual must be made aware that he is under no obligation to give consent and that by consenting he exposes himself to the hazard of yielding up incriminating things. But unless the person whose consent is sought is in custody, a more limited warning than that required by *Miranda v. Arizona* is deemed appropriate.

If the individual is in custody at the time his consent to a search is given, the full panoply of *Miranda* concepts comes into play. The requirement in subsection (2) that an attorney be made available to the suspect, if he so desires, appears to be constitutionally necessary.

B. Derivation

The language of this section is based on MCPP section § 4.02 (2) and (3). The provisions in subsections (2) (a), (2) (b) and (2) (c) are drafted to reflect those portions of the *Miranda* warnings deemed appropriate to the consent search situation.

C. Relationship to Existing Law

The Oregon Supreme Court held in *State v. Williams*, 248 Or 85, 432 P2d 679 (1967), that *Miranda* type warnings must be given to a person in custody or under arrest before such person can validly consent to a search. The Oregon Court has not, however, dealt with the question of whether a person not in custody or under arrest must be given some kind of warning about the consequences prior to obtaining his consent for a search. This section reflects existing law with respect to custodial consent and fills a void with respect to noncustodial consent.

It is clear from the cases that consent to a search can only be valid if it is given freely, voluntarily and knowingly. The courts have been quite unanimous in recognizing this principle. A problem arises, however, when courts attempt to define and apply the terms "free," "voluntary" and "knowing." While it is generally acknowledged that there is a presumption of involuntariness and that this presumption can be overcome only by clear and convincing evidence, the courts have faced the same problems of deciding after the fact what is such clear and convincing evidence as was the case in the confessions area.

Court decisions in other jurisdictions both before and since *Miranda* are divided on whether a warning of rights is a prerequisite to a valid consent search. But it is believed that the position of the legislature in drafting legislation is quite different than that of a court deciding in a particular case, after the fact, whether to invalidate a search because a warning of rights was not given. This seems particularly true where, as here, the legislation is designed to speak primarily to the police. If there is one thing that comes through clearly from almost all of the cases on this issue, whichever way they come out on the warning requirement, it is the extreme difficulty of determining from the record the extent to which the person whose consent was sought acted on the assumption the police had a right to make the search. Unless the police undertake some responsibility for advising the person whose cooperation is sought of his rights, there are created the same problems of establishing that a consent to search is "freely and voluntarily given," as troubled the courts with confessions and led to the requirements imposed by *Miranda*.

While conflicting arguments can be made as to whether the Fourth Amendment rights involved in the consent search issue require the protection of a warning more, the same or less than the Fifth and Sixth Amendment rights involved in *Miranda*, the underlying issue in the two situations is similar. It seems unlikely that there is any greater knowledge of one's right to refuse a search than the right to silence. The law relating to availability of a warrant, the right to search without a warrant and the admissibility of evidence seized is at least as confusing to the layman as the law relating to oral admissions.

Concern may exist about the possibility that inadvertent and relatively minor errors in the form or timing of the warning might result in the inadmissibility of evidence. The provisions in section 166 should obviate such concern.

Section 150. Permissible scope of consent search and seizure. (1) A search conducted under the provisions of sections 147 to 150 of this Act shall not exceed, in duration or physical scope, the limits of the consent given under section 147 of this Act.

(2) The things subject to seizure in course of a search under sections 147 to 150 of this Act are the same as those specified in section 132 of this Act. Upon completion of the search, the officer shall make a list of the things seized, and shall deliver a receipt embodying the list to the person consenting to the search.

(3) A consent given under section 148 or 149 may be withdrawn or limited at any time prior to the completion of the search, and if so withdrawn or limited, the search under authority of the consent shall cease, or be restricted to the new limits, as the case may be. Things discovered and subject to seizure prior to such withdrawal or limitation of consent shall remain subject to seizure despite such change or termination of the consent.

COMMENTARY

A. Summary

Subsection (1) makes explicit what is implicit in the structure of the draft: that a search based on consent may not exceed the limits of the consent.

Subsection (2) makes applicable to consent searches the provisions of section 132 of this draft, and provides for a list, similar to the list called for in the case of warranted searches.

Subsection (3) makes the consent revocable, in whole or in part, at any time during the course of the search. Of course, things already found at the time of the withdrawal remain subject to seizure. Likewise, as indicated by the phrase "under authority of the consent," the search may have disclosed the basis for an arrest, or for obtaining a warrant, in which case it may be continued, but not on the basis of the consent.

B. Derivation

This section is based on the language of section § 4.03 of the MCPP.

C. Relationship to Existing Law

No Oregon statute covers the situation with respect to limiting or withdrawing consent; nor were any cases found dealing precisely with the issues. However, Oregon cases at least analogous in policy suggest that the provisions in the draft section would not be foreign to the present concepts. It is a well settled principle in Oregon, as elsewhere, that if a warrantless search follows an arrest, the scope of the search must be reasonably related to the arrest. *State v. Krogness,* 238 Or 145, 388 P2d 120 (1964), and cases cited therein at p. 144 dealing with the rule. By analogy then, if the search must be reasonably related to the arrest, then a consent search must be reasonably related to the nature of the consent given and the object being searched for.

If the individual whose consent to a search is sought is moved to give it at all, he is unlikely to specify geographical limits, since that would not disarm suspicion, and rather would direct attention toward the prohibited areas. Nor is he likely to give the officer "five minutes but no more." However, if he is told that the police suspect he is concealing burglars' tools or a sawed-off shotgun on his premises, an invitation to come in and look is a consent to look in places large enough to contain such articles, but not to probe tiny recesses or look through files of documents.

Accordingly, the idea of a limited consent may be practically important, and of course the search must stay within the bounds laid down.

Withdrawal or modification of consent as provided in subsection (3) involves the problems presented if the individual, who has given valid consent to a search, has a change of heart in its course, and seeks to withdraw his consent or attach new limits to its scope.

The practical aspects are obvious. May a guilty suspect seek to throw the police off the track by an appearance of innocence and willing disclosure, thinking his contraband is well hidden, and then terminate the consent if the searches come dangerously close to the hiding place? Will the result not be that whenever the police find something incriminating in the course of a consent search, the defendant will subsequently claim that he withdrew

consent, and that the discovery was thus under coercive circumstances? On the basis of these considerations it has been forcefully argued that consent once effectively given is "binding" within the scope initially stated, and that a search is not "unreasonable" in the constitutional sense if it is conducted under a consent once validly obtained.

Case authority on the basic question is scanty and divided. An elderly Kentucky case held that consent once given may not be withdrawn. *Smith v. Commonwealth*, 197 Ky 192, 246 SW 449 (1923). The court did not give a reasoned basis for this conclusion, and the case was not followed in *People v. Martinez*, 65 Cal Rep 920 (1968), wherein the court thought that the *Miranda* case, insofar as it says that an arrestee may withdraw his waiver to questioning, dictates the same result for consent searches.

There is much force in the reasoning of the *Martinez* case reflected in subsection (3). In addition to the conceptual point, weight must be given to the probability that, if consent once given is irrevocable, the warning would have to include a statement to that effect. In that event, it would probably be much more difficult to secure consent at all, and the rule of irrevocability would defeat its own object.

It seems clear that a consent once given by X may be withdrawn or limited by Y, who has equal or superior control over the premises. *Lucero v. Donovan*, 354 F2d 16 (19th Cir 1965).

If subsection (3) is included, the second sentence is a necessary clarification, though ordinarily if incriminating things have already turned up, a withdrawal of consent will be unlikely.

Emergency and Other Searches and Seizures

Section 151. Emergency and other searches; general. (1) The provisions of section 139 of this Act with respect to the use of force shall be applicable to searches and seizures conducted pursuant to sections 151 to 154 of this Act.

(2) Search of a person conducted pursuant to sections 151 to 154 shall be subject to the provisions of section 144 of this Act.

(3) Upon completion of a search undertaken pursuant to sections 151 to 154, the officer making the search shall, if any things are seized, make a list of such things, and deliver a receipt embodying the list to the person from whose possession the things are taken. If the vehicle or premises searched are unoccupied or there is no one present in apparent control, the executing officer shall leave the receipt suitably affixed to the vehicle or premises.

COMMENTARY

A. Summary

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

B. Derivation

The section is based on MCPP section § 6.01.

C. Relationship to Existing Law

Oregon presently has no comparable provisions.

Section 152. Vehicular searches. (1) An officer who has probable cause to believe that a vehicle, boat or aircraft is subject to seizure or contains things subject to seizure pursuant to section 132 of this Act may, without a search warrant, stop, detain and search

the vehicle, boat or aircraft and may seize things subject to seizure discovered in the course of the search if all of the following conditions exist:

(a) The vehicle, boat or aircraft is moving or apparently readily movable; and

(b) There is probable cause to believe that a delay consequent upon procurement of a search warrant will result in the disappearance or destruction of things subject to seizure.

(2) If the officer does not find things subject to seizure by his search of the vehicle, boat or aircraft, the officer may search the occupants if:

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

(b) The officer has probable cause to believe that one or more of the occupants of the vehicle, boat or aircraft have the things subject to seizure so concealed.

(3) Subsection (2) of this section shall not apply to persons traveling as passengers in a vehicle, boat or aircraft operating as a common carrier.

(4) This section shall not be construed to limit the authority of an officer under sections 30 to 32 of this Act.

COMMENTARY

A. Summary

This section embodies the rule, based on *Carroll v. United States*, 267 US 132 (1925), that a vehicle may be searched without a warrant if the officer undertaking the search has probable cause to believe that the vehicle contains contraband or other things subject to seizure. It is to be distinguished from the search of a vehicle incident to the arrest of its occupant, as provided for in section 145. Officers are also, under limited conditions, authorized to search the occupants.

B. Derivation

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

C. Relationship to Existing Law

No similar provision is found in ORS but the doctrine embodied in the section, at least insofar as the emergency vehicular search is concerned, if not the personal search, is well established in Oregon. See the discussion in *State v. Keith*, 2 Or App 133, 465 P2d 724 (1970).

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

The authority given by this section applies to vehicles on a public way. If the vehicle is on private premises, then an entry must be made to gain access to the vehicle and the rules applicable to the search of premises will be applicable to search of the vehicle. Subsection (4) has been added to ensure that the "stop and frisk" provisions will be available to officers stopping vehicles under the *Carroll* rule.

A more difficult question is whether or not the right of vehicular search extends to the persons of individuals occupying the vehicle, as provided in this section. The Supreme Court has squarely held that officers may not enter premises without a warrant, even with probable cause to believe that seizable things are within, except to make an arrest based on

probable cause with respect to a particular individual. *Agnello v. United States*, 269 US 20 (1925). The *Carroll* case lays down a different rule for vehicles. If the *Carroll* rule is to be accepted at all, it seems both illogical and impracticable to exempt from search the occupants themselves. If they were not in the vehicle, and there was probable cause to believe that they were in unlawful possession of things they would be liable to arrest on probable cause. Why should there be a different result if they are in a vehicle, assuming probable cause to believe that within the vehicle—whether in the trunk or in their pockets—seizable things are to be found?

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

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

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

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

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

Section 153. Search of open lands. A police officer upon probable cause may, without a search warrant, search open lands and seize things which he has probable cause to believe are subject to seizure, if:

(1) The owner or person in possession has not reasonably manifested his intent to exclude trespassers; and

(2) Things subject to seizure are located within the area to be searched.

COMMENTARY

A. Summary

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

The section makes no specific provision for entry on open lands for purposes of making an arrest, a situation which will normally involve hot pursuit of a suspect. The draft dealing with arrest should make it clear that the principle of the provision (found in MCPP, Tentative Draft No. 2, section 3.06) which permits entry on private premises to make an arrest applies, with appropriate procedural modifications, to open lands.

B. Derivation

The language is taken from MCPP section § 6.04.

C. Relationship to Existing Law

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

The Fourth Amendment speaks of "persons, houses, papers, and effects," and the rationale of *Hester v. U.S.*, 265 US 57 (1924), was that these categories do not extend to "open fields," which therefore lie entirely outside the protection of the Fourth Amendment. In the application of this rule, the old word "curtilage" has been commonly accepted as marking the geographical ambit of the Amendment's coverage.

It is questionable whether the reasoning of the *Hester* case can be harmonized with *Katz v. United States*, 389 US 347 (1967), in which the Court rejected the concept of the "constitutionally protected area" and announced that "the Fourth Amendment protects people not places." There is a limit to this privacy doctrine in the *Katz* case, however, which requires the government not to be an intruder where a person might reasonably expect to enjoy privacy. Owners of unposted open fields and forests may not qualify under this last condition in the *Katz* decision. This appears to be the view adopted in *State v. Stanton*, 93 Adv Sh 1273, — Or App — (1971), 490 P2d 1274. As a matter of policy the old "open fields" rule in its full sweep no longer seems advisable. There was a trespass in the *Hester* case; rights of quiet enjoyment attach to fields as well as to dwellings, and clandestine trespasses, provocative of self-help if discovered, are not conducive to good order.

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

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

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

Section 154. Seizure independent of search. A police officer who in the course of otherwise lawful activity, observes or otherwise becomes aware of the nature and location of things which he reasonably believes to be subject to seizure under section 132 of this Act may seize such things.

COMMENTARY

A. Summary

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

B. Derivation

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

C. Relationship to Existing Law

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

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

Coolidge v. New Hampshire, 91 S Ct 2022 (1971), apparently requires that the plain view rule applies only to seizure of evidence which the police did not expect to find or could not have expected to find. The section is intended to reflect the impact of the *Coolidge* decision.

Inspectorial Searches

Section 155. Definitions. As used in sections 156 to 158 of this Act:

(1) "Inspectorial search" means an entry and examination of unlicensed premises, aircraft, boats or vehicles, for the purpose of ascertaining the existence or non-existence of conditions dangerous to health or safety or otherwise relevant to the public interest, in accordance with inspection requirements prescribed by fire, housing, sanitation, zoning, conservation and other laws or ordinances duly enacted for the promotion of public well-being. Premises, aircraft, boats or other vehicles operated pursuant to a license for an ongoing commercial, trade, occupational or recreational activity, such recreational activity including but not limited to hunting, are not subject to the provisions of sections 157 and 158 of this Act.

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

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

COMMENTARY

A. Summary

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

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

Ordinarily such inspections are made in buildings, private or commercial, but they may call for inspection of open land or vehicles, and the language is intended to cover all such possibilities. So, too, while one ordinarily thinks of inspection in connection with nuisances or hazards, they may also be necessary in connection with public housing or other construction projects. The phrase "otherwise relevant to the public interest," and use of the word "promotion" rather than "protection" of public well-being, are intended to embrace such situations. Activities authorized by licenses and subject to regulation thereunder are not included within the concept of the inspectorial search. Such license-authorized searches will continue to be governed by existing statutory provisions and decisional law.

B. Derivation

The section is based on MCPP section § 5.01.

C. Relationship to Existing Law

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

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

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

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

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

There are numerous provisions throughout ORS authorizing searches of premises or vehicles where certain commercial or recreational activity is licensed. See, e.g., ORS 632.795 (egg inspection), 632.351 (game), 527.335 (potatoes). These, and the many other similar provisions relating to other licensed activity are unaffected by the provisions on inspectorial searches in sections 157 and 158.

Section 156. Inspectorial search by consent. (1) Within the scope of his authority with respect to the places or things to be inspected and the purpose for which inspection is to be carried out, an inspection officer may conduct an inspectorial search, with the voluntary consent of an occupant or custodian of the places or things to be inspected, who reasonably appears to the inspection officer to be in control of the places or things to be inspected or otherwise authorized to give such consent.

(2) Before requesting consent for an inspectorial search, the inspection officer shall inform the person to whom the request is directed of the authority under and purposes for which the inspection is to be made and shall, upon demand, exhibit a badge or document evidencing his authority to make such inspections. If such inspection requires his entry into a dwelling, the officer shall also advise such person that he has a right to refuse to give his consent.

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

COMMENTARY

A. Summary

Under subsection (1), the consent required to validate an inspection and search must be (a) voluntary, and (b) given by someone apparently authorized to consent to such inspections. Pro tanto these are the same as for consent searches under sections 147 through 150, but the remaining provisions and requirements are quite different, as they are based on the premise, more fully explained below, that, unlike other searches, most inspectorial searches will be carried out with the consent of those affected.

The difference appears clearly in connection with subsection (2), which specifies a wholly different and more limited type of "warning" than the *Miranda*-type statements called for by section 149. Under the present paragraph, all that is required is a statement of authority and purpose supported, if necessary, by a documentary or other physical badge of authority, and a warning that consent may be refused.

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

B. Derivation

The language is taken from MCPP section § 5.02.

C. Relationship to Existing Law

Oregon presently has no comparable statutory provisions.

While it is true that an inspectorial search may disclose a condition which is evidence of a criminal

violation of public well-being laws, violations of such laws are not generally serious offenses, and they are usually punishable by fine only. Oftentimes a violation leads only to a compliance order.

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

No prior notice requirements are included, but it is the general practice in most inspection-type searches to publicize proposed inspections. To counterbalance this lack of notice as a requirement, the section in subsection (2) requires that if the place is used as a dwelling the officer advise the occupant or custodian of the place to be inspected that such person has a right to refuse to allow the inspection as a matter of right. Of course, this does not mean that the inspection will be prevented; it does mean that the officer will then have to obtain an inspection order under section 157 if he wishes to proceed with the inspection.

Section 157. Inspection orders. (1) Upon sufficient showing of the circumstances required under subsection (2) of this section, an inspection officer may make application for an inspection order. Such application shall be made to any judge authorized to issue search warrants.

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

(3) The application shall be granted and the inspection order issued upon a sufficient showing that inspection in the area in which the places or things in question are located, or inspection of the partcular places or things, is in accordance with law, and that the circumstances of the particular inspection for which application is made are otherwise reasonable. The issuing authority shall make and keep a record of the proceedings on the application, and enter thereon his finding in accordance with the requirements of this section.

(4) The issuance and execution of inspection orders shall be as follows:

(a) Upon approval of an application under this section, the issuing authority shall issue an order authorizing the applicant, or any other inspection officer duly authorized to conduct inspectorial searches of the type in question, to conduct the inspection in accordance with the terms of the order. The inspection shall be conducted within 14 days of the issuance of the inspection order.

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

Deadly force may be used only in accordance with the terms of subsection (4) of section 158 of this Act.

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

(d) Subject to the provisions of paragraph (b) of this subsection (4), force shall not be used to overcome resistance to the inspection on the part of the occupants.

(e) After execution of the order or after unsuccessful efforts to execute the order, as the case may be, the inspection officer shall return the order to the issuing authority with a verified report of the circumstances of execution or failure thereof. The order shall be returned within 10 days of the inspection.

COMMENTARY

A. Summary

Subsection (1) provides for the issuance of inspection orders, previously defined in section 155. Such orders are to be issued by magistrates the same as for search warrants.

Under subsection (2), inspection orders are to be sought only if consent under section 156 has been refused, or is unobtainable because the occupants cannot be found, or for some other reason.

Subsection (4) provides in paragraph (a) for the formal authorization to the inspection officer to carry out the inspection covered by the order. Only if the issuing authority has been shown reasons why the use of force may be necessary and appropriate may the inspection officer avail himself of police assistance to overcome resistance on the part of the occupants, as provided in paragraphs (b) and (d). However, if the premises are unoccupied, paragraph (c) authorizes him to use force to effect an entry and make the inspection. Paragraph (e) requires a return of the inspection order with a report of the action taken thereunder.

B. Derivation

The section is based on MCPP section § 5.03.

C. Relationship to Existing Law

There are no comparable provisions in ORS.

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

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

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

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

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

Section 158. Emergency inspectorial searches. (1) Whenever it reasonably appears to an inspection officer that there may be a condition arising under the laws he is authorized to enforce and imminently dangerous to health or safety, the detection or correction of which requires immediate access, without prior notice, to premises for purposes of inspectorial search, and if consent to such search is refused or cannot be promptly obtained, the inspection officer may make an emergency inspectorial search of the premises without an inspection order.

(2) If the inspection officer considers it reasonably necessary, he may have assistance from one or more police officers in making the inspection. The police officers may employ force in the same manner and for the purposes specified in paragraph (b) of subsection (4) of section 157 of this Act and subsection (4) of this section 158.

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

(4) If, in the course of an emergency inspectorial search under subsection (1) of this section or an inspectorial search under section 157, it reasonably appears that the use of deadly physical force is necessary in order to effect the search, and that failure to effect the search will cause imminent danger of death or serious physical injury, and that the force employed creates no unnecessary risk of injury to persons other than those obstructing the inspection, the inspection officer and any police officers assisting him may use deadly physical force in order to effect the search.

COMMENTARY

A. Summary

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

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

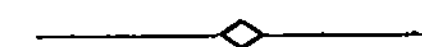
B. Derivation

The language comes from MCPP section § 5.04.

C. Relationship to Existing Law

Oregon has no comparable statutory provisions.

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



Disposition of Things Seized

Section 159. Handling and disposition of things seized. (1) The provisions of subsections (2), (3) and (4) of this section apply to all cases of seizure, except for a seizure made under a search warrant.

(2) If an officer makes an arrest in connection with the seizure, he shall, as soon thereafter as is reasonably possible, make a written list of the things seized and furnish a copy of the list to the defendant.

(3) If no claim to rightful possession has been established under sections 160 to 163 of this Act, the court shall order that the things be delivered to the officials having responsibility under the applicable laws for selling, destroying or otherwise disposing of contraband, forfeited or unclaimed goods in official custody.

(4) If things seized in connection with an arrest or under section 154 of this Act are not needed for evidentiary purposes, and if a person having a rightful claim establishes his identity and right to possession beyond a reasonable doubt to the satisfaction of the seizing officer, the officer may summarily return the things seized to their rightful possessor. If the things seized are perishable and it is not possible to return them to their rightful possessor, the seizing officer may dispose of the items as justice and the necessities of the case require.

COMMENTARY

A. Summary

A list of things seized (where no search warrant is involved) must be given by the officer to the court and the defendant.

If there is no rightful claim established, the seized items may be ordered by a judge to be sold, destroyed or otherwise disposed of according to laws applicable.

If the police seize things recently stolen and know for sure who the owner is, they are authorized to return the things to the owner. If perishable goods are seized, and the owner is unknown, the perishables may be disposed of by the police as justice and necessities dictate.

B. Derivation

The language is taken in part from MCPP section §§ 7.02 (2), (3) and (6).

C. Relationship to Existing Law

See the commentary following section 163.

Section 160. Motion for return or restoration of things seized. (1) Within 90 days after actual notice of any seizure, or at such later date as the court in its discretion may allow:

(a) An individual from whose person, property or premises things have been seized may move the appropriate court to return things seized to the person or premises from which they were seized.

(b) Any other person asserting a claim to rightful possession of the things seized may move the appropriate court to restore the things seized to the movant.

(2) The appropriate court to consider such motion is:

(a) The court having ultimate trial jurisdiction over any crime charged in connection with the seizure; or

(b) If no crime is charged in connection with the seizure, the court to which the warrant was returned; or

(c) If the seizure was not made under a warrant and no crime is charged in connection with the seizure, any court having authority to issue search warrants in the county in which the seizure was made.

COMMENTARY

A. Summary

Subsection (1) provides for filing a motion to restore things seized to the person from whose possession they were taken or any other person asserting a rightful claim to possession.

Subsection (2) describes the court in which the motion is to be filed.

B. Derivation

The section is based in part on MCPP section § 7.03.

C. Relationship to Existing Law

See the commentary following section 163.

Section 161. Grounds for motion for return or restoration of things seized. A motion for the return or restoration of things seized shall be based on the ground that the movant has a valid claim to rightful possession thereof, because:

(1) The things had been stolen or otherwise converted, and the movant is the owner or rightful possessor; or

(2) The things seized were not in fact subject to seizure under sections 131 to 169 of this Act; or

(3) The movant, by license or otherwise, is lawfully entitled to possess things otherwise subject to seizure under sections 131 to 169 of this Act; or

(4) Although the things seized were subject to seizure under sections 131 to 169 of this Act, the movant is or will be entitled to their return or restoration upon the court's determination that they are no longer needed for evidentiary purposes; or

(5) The parties in the case have stipulated that the things seized may be returned to the movant.

COMMENTARY

A. Summary

Set out in this section are the specific grounds—five in number—any one of which, if established, will entitle the movant to restoration of the things seized.

B. Derivation

This section is based in part on MCPP § 7.03.

C. Relationship to Existing Law

See the commentary following section 163.

Section 162. Postponement of return or restoration; appellate review. (1) In granting a motion for return or restoration of things seized, the court shall postpone execution of the order until such time as the things in question need no longer remain available for evidentiary use.

(2) An order granting a motion for return or restoration of things seized shall be reviewable on appeal in regular course. An order denying such a motion or entered under section 163 of this Act shall be reviewable on appeal upon certification by the court having custody of the things in question that they are no longer needed for evidentiary purposes.

COMMENTARY

A. Summary

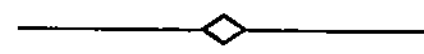
Since an order granting a motion for the return of seized things is a final order, it should be appealable in accordance with general statutory provisions for appeal. The same is true of an order denying such motion, but, for administrative convenience the appeal should be delayed until the things are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

B. Derivation

This section is based in part on MCPP § 7.03.

C. Relationship to Existing Law

See the commentary following section 163.



Section 163. Disputed possession rights. (1) If, upon consideration of a motion for return or restoration of things seized, it appears to the court that the things should be returned or restored, but there is a substantial question whether they should be returned to the person from whose possession they were seized or to some other person, or a substantial question among several claimants to rightful possession, the court may:

(a) Return the things to the person from whose possession they were seized; or

(b) Impound the things seized and set a further hearing, assuring that all persons with a possible possessory interest in the things in question receive due notice and an opportunity to be heard; and

(c) Upon completion of the hearing provided for in paragraph (b) of subsection (1) of this section, enter an order for the return or restoration of the things seized.

(2) If there is no substantial question whether the things should be returned to the person from whose possession they were seized, they must be returned to the person upon the release of the defendant from custody.

(3) Instead of conducting the hearing provided for in paragraph (b) of subsection (1) of this section and returning or restoring the property, the court in its discretion, may leave the several claimants to appropriate civil process for the determination of the claims.

COMMENTARY

A. Summary

Infrequently there will arise cases where it is clear that the state has no lawful claim to possession of the things seized, but it is not clear who has the rightful claim to possession. In some of these situations the most satisfactory solution may be to restore the status quo by returning the things to the person from whom they were seized, and the section so provides. In other circumstances the section authorizes impoundment pending settlement, or resolution of the dispute by civil litigation.

B. Derivation

The section is based in part on MCPP § 7.03.

C. Relationship to Existing Law

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

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

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

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

It should also be remarked that, in many states, the disposition provisions relate only to property seized pursuant to a search warrant, and are silent with respect to arrest or other seizures without a warrant. It is important to regularize the post-seizure procedures for seizures without a warrant, since these comprise the great majority of seizures, and the draft, in sections 159 to 163, is constructed with that end in view.

Evidentiary Exclusion

Section 164. Motions to suppress evidence. (1) Objections to the use in evidence of things seized in violation of any of the provisions of sections 131 to 169 of this Act shall be made by a motion to suppress.

(2) In any criminal proceeding in which the prosecution proposes to offer in evidence things seized, the prosecution shall give written notice to that effect to the defendant as soon as is reasonably possible after the seizure. If no such notice is given within a reasonable time, the seized things shall not be received in evidence, unless the court finds that there was good cause for such failure, and that the defendant has not been prejudiced by such failure.

(3) If, after receipt of the notice required by subsection (2) of this section, the defendant objects to use in evidence of the seized things to be offered, he shall, within a reasonable time after receipt of the notice, file a motion to suppress evidence, which shall be heard and determined by the court in advance of trial. If, despite

the prosecution's failure to give notice as required by subsection (2), the court permits the offer in evidence of seized things at the trial, the court shall, upon request, allow the defendant a reasonable time to prepare and file a motion to suppress. If the defendant fails to file such a motion within a reasonable time required after giving notice, or within such reasonable time as is allowed in the absence of notice, the court shall entertain a subsequent motion to suppress only if it finds that there was good cause for such failure, or that the interests of justice so require.

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

COMMENTARY

A. Summary

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

Subsection (1) perpetuates the existing law on where motions to suppress are filed.

Subsections (2) and (3) require the prosecution to give reasonable notice of its intention to use seized things whereupon the defendant must give reasonable notice if he intends to move to suppress.

Subsection (4) makes provision for the renewal of a motion to suppress, previously denied. Evidence of the illegality of a search may be difficult for the defendant to obtain, and he should not be foreclosed from a renewed effort to suppress on the ground of newly-discovered evidence, or other considerations of fairness. It is a matter of legislative intent that the renewal motion is to be filed in the same court where the original motion to suppress was filed.

B. Derivation

The section is based on MCPP section § 8.01 (2) and (3).

C. Relationship to Existing Law

Where made. The section continues existing Oregon law and procedure with respect to where motions to suppress are filed.

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

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

It is a matter of legislative intent that if at a preliminary hearing the defendant is successful in getting evidence suppressed, the state need not appeal such ruling. It may instead proceed to use the same evidence before the grand jury to get an indictment, and such use shall not be viewed in the context of appeal of the adverse ruling at the preliminary hearing.

The Commission considered inclusion of statements of defendants as part of this section on motions to suppress but decided Fifth Amendment issues and problems with respect to statements of defendants were not to be included in this Article on search and seizure.

Section 165. Standing to file motion to suppress. A motion to suppress may be made by any defendant against whom things seized are to be offered in evidence at a criminal trial no matter from where or from whom seized.

COMMENTARY

A. Summary

This section imparts an unlimited standing to defendants who desire to challenge introduction of seized evidence.

B. Derivation

This section is based in part on MCPP section § 8.01 (5), Tentative Draft No. 4 (April 30, 1971), but is largely unprecedented.

C. Relationship to Existing Law

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

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

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

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

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

The draft reflects the approach in *Martin* and has the effect of removing any limitations on the standing of a defendant against whom seized evidence, no matter from where or from whom seized, is to be introduced.

Section 166. Determination of substantiality of motion to suppress. A motion to suppress evidence based upon a violation of any of the provisions of sections 131 to 169 of this Act shall be granted only if the court finds that the violation was substantial.

COMMENTARY

A. Summary

If the judge finds that the violation of the particular section on search and seizure is established but is not "substantial" he may deny the motion to

suppress. What constitutes substantiality is discussed below.

B. Derivation

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

C. Relationship to Existing Law

The section is novel. It is an attempt to ameliorate the all-or-nothing effect of the exclusionary rule. In another context it is an attempt to move Fourth Amendment violations into the "harmless error" doctrine and out of the "automatic reversal" concept.

The time for this provision may be at hand if analogous reference is made to some recent cases in the U. S. Supreme Court. The entire concept of the exclusionary rule, announced in *Mapp v. Ohio* in 1961, is under increasing criticism from some current members of the Court. For example, see the statements in *Coolidge v. New Hampshire*, 403 US 443, 91 S Ct 2022 (1971), of Justice Blackmun (p. 2060). Justice White does not express much enthusiasm for the rule. Chief Justice Burger launches a major attack on the exclusionary rule in his dissenting opinion in *Bivens v. United States*, 403 US 388, 91 S Ct 1999, 2012-20 (1971). Especially significant in this dissent is the Chief Justice's direct and approving references to section § 8.02 (2) of the MCPP upon which the draft section is based. (See the dissent at p. 2019).

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

If exclusion is constitutionally required, under *Mapp*, as often will be the case, that is the end of the matter. But the constitutional issue itself may be affected by the factor of substantiality, and the presence or absence of the criteria set forth in this section.

With respect to the question of substantiality, it is the intent of the Commission that the following material constitute legislative history on the point:

In determining whether a violation is substantial the court shall consider all the circumstances, including:

(1) The importance of the particular interest violated;

(2) The extent of deviation from lawful conduct;

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

(4) The extent to which privacy was invaded;

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

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

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

Section 167. Fruits of prior unlawful search. If a search or seizure is carried out in such a manner that things seized in the course of the search would be subject to suppression, and if as a result of such search or seizure other evidence is discovered subsequently and offered against a defendant, such evidence shall be subject to a motion to suppress unless the prosecution establishes by a preponderance of the evidence that such evidence would have been discovered by law enforcement authorities irrespective of such search or seizure, and the court finds that exclusion of such evidence is not necessary to deter violations of sections 131 to 169 of this Act.

COMMENTARY

A. Summary

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

B. Derivation

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

C. Relationship to Existing Law

This section reflects fairly well-established con-

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

Section 168. Challenge to truth of the evidence. (1) Subject to the provisions of subsection (2) of this section, in any proceeding on a motion to suppress evidence the moving party shall be entitled to contest, by cross-examination or offering evidence, the good faith of the affiant with respect to the evidence presented to establish probable cause for search or seizure.

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

(3) In any proceeding under subsection (2) of this section, the moving party shall have the burden of proving by a preponderance of the evidence that the evidence presented before the issuing authority was not offered in good faith.

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

COMMENTARY

A. Summary

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

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

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

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

B. Derivation

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

C. Relationship to Existing Law

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

Section 169. Identity of informants. (1) In any proceeding on a motion to suppress evidence wherein, pursuant to section 168 of

this Act, the good faith of the testimony presented to establish probable cause is contested, and wherein such testimony includes a report of information furnished by an informant whose identity is not disclosed in the testimony, the moving party shall be entitled to prevail on the motion to suppress and evidence obtained as a result of the information furnished by the informant shall be suppressed unless:

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

(b) The judge, alone and in camera, determines from the affiant by a preponderance of the evidence that such confidential informant exists and is reliable.

(2) If the defendant is entitled to prevail on the motion to suppress under subsection (1) of this section, the evidence obtained as a result of the information furnished by the informant shall be suppressed.

COMMENTARY

A. Summary

If the police seize evidence as a result of the use of an informant whose identity is not disclosed, such evidence shall be suppressed unless as provided in paragraph (a) the evidence was seized pursuant to a search warrant and the informant testified before the issuing judge, or, as provided in paragraph (b) the judge in chambers determines after questioning the affiant that the undisclosed informant was reliable.

B. Derivation

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

C. Relationship to Existing Law

The existing Oregon statutes have no provision similar to this. The draft section has the goal of providing the defendant with a fair hearing on his motion which raises the validity of the informer-produced probable cause evidence. Yet to protect the informer, and the informer system, so important to day-to-day police work, very stringent restrictions are imposed. It is felt that the section thus achieves a fair balance.

The section does not require the police to disclose the identity of their informant. But to safeguard the defendant and to insure that the affiant (typically a police officer) is not inventing the existence of an informant and to further assure that such informant is reliable within existing legal standards, the trial judge may question the affiant in camera. It is the intent and is part of the legislative history of this section that the only persons present at such interview shall be the judge and the affiant. No record is to be kept and, hence, there will be no details of this interview to review. It is the purpose of the Commission to rely on the experience of the trial judge to spot, during this interview with the affiant, any indication of prefabrication on the part of the affiant.

Interception of Communications

Section 170. (ORS 141.720) Order for interception of telecommunications, radio communications or conversations. (1) An ex parte order for the interception of telecommunications, radio communications or conversations, as defined in ORS 165.535, may be issued by any judge of a circuit or district court upon verified ap-

plication of a district attorney setting forth fully the facts and circumstances upon which the application is based and stating that:

(a) There are reasonable grounds to believe that a crime directly and immediately affecting the safety of human life or the national security has been committed or is about to be committed.

(b) There are reasonable grounds to believe that evidence will be obtained essential to the solution of such crime, or which may enable the prevention of such crime.

(c) There are no other means readily available for obtaining such information.

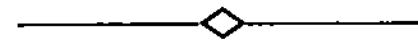
(2) Where statements are solely upon the information and belief of the applicant, the precise source of the information and the grounds for the belief must be given.

(3) The applicant must state whether any prior application has been made to obtain telecommunications, radio communications or conversations on the same instrument or from the person and, if such prior application exists, the applicant shall disclose the current status thereof.

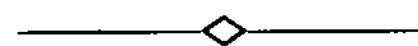
(4) The application and any order issued under this section shall identify fully the particular telephone or telegraph line, or other telecommunication or radio communication carrier or channel from which the information is to be obtained and the purpose thereof.

(5) The court shall examine upon oath or affirmation the applicant and any witness the applicant desires to produce or the court requires to be produced.

(6) Orders issued under this section shall not be effective for a period longer than 60 days, after which period the court which issued the warrant or order may, upon application of the officer who secured the original warrant by application, in its discretion, renew or continue the order for an additional period not to exceed 60 days. All further renewals thereafter shall be for a period not to exceed 30 days.



Section 171. (ORS 141.730) Proceeding under expired order prohibited. Any officer who knowingly proceeds under an order which has expired and has not been renewed as provided in ORS 141.720 is deemed to act without authority under ORS 141.720 and shall be subject to the penalties provided in subsection (2) of ORS 141.990, as though he had never obtained any such order or warrant.



Section 172. ORS 141.740 is amended to read:

141.740. **Records confidential.** The application for any order under ORS 141.720 and any supporting documents and testimony in

connection therewith shall remain confidential in the custody of the court, and these materials shall not be released or information concerning them in any manner disclosed except upon written order of the court **and as required under sections 321 to 328 of this 1973 Act.** No person having custody of any records maintained under ORS 141.720 to 141.740 shall disclose or release any materials or information contained therein except upon written order of the court **and as required under sections 321 to 328 of this 1973 Act.**

COMMENTARY

The amendments to this section take into account the provisions of the Pre-Trial Discovery Article. It should be noted that sections 170 to 172 are the statutes that have been on the books since 1955. *These are not new provisions.*

Section 173. ORS 141.990 is amended to read:

141.990. **Penalties.** (1) Any person who maliciously and without probable cause procures a search warrant to be issued and executed is guilty of a Class A misdemeanor.

(2) [*Violation of ORS 141.730 or 141.740 is punishable, upon conviction, by a fine of not more than $3,000 or by imprisonment in the penitentiary for not more than three years, or by both*] **A person who violates section 171 or 172 of this 1973 Act commits a Class C felony.**

COMMENTARY

The amendment merely classifies the penalty to conform with the Criminal Code.

ARTICLE 6. EXTRADITIONS

UNIFORM CRIMINAL EXTRADITION ACT

Section 174. ORS 147.010 is amended to read:

147.010. **Definitions; appointment of person to act in Governor's absence. (1)** Where appearing in this chapter, the term "Governor" includes any person performing the **extradition** functions of Governor by authority of [*the law of this state*] **an appointment under subsection (2) of this section.** The term "executive authority" includes the Governor and any person performing the functions of Governor in a state other than this state, and the term "state," referring to a state other than this state, includes any other state or territory, organized or unorganized, of the United States of America.

(2) The Governor may appoint a member of his legal staff to act in his behalf under this chapter in performing the extradition functions of the Governor during any absence of the Governor from the state. The appointment shall be in writing and be filed with the Secretary of State.

COMMENTARY

Under the constitutional change in the line of succession to the office of Governor, if the Governor is out of the state for an extended period of time, under existing law, extraditions would have to await the Governor's return or be delayed until the necessary papers could be airmailed to him, signed and returned. Such a delay in processing extradition requisitions could result in fugitives being released or being forced to sit in jail for an undue length of time.

Under the proposed amendment the definition of Governor is changed to include a person appointed by the Governor to perform extradition functions in his absence. Subsection (2) gives the Governor express authority to make such an appointment. The appointment would be required to be in writing and filed with the Secretary of State. Under the proposal the Governor would be free to designate an official whom he believed would be responsible and available to discharge the duties required under the chapter.

Section 175. (ORS 147.020) Fugitives from other states; Governor to cause arrest and delivery of criminals. Subject to the qualifications of this chapter and the provisions of the Constitution of the United States controlling, and Acts of Congress in pursuance thereof, it is the duty of the Governor of this state to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony, or other crime, who has fled from justice and is found in this state.

Section 176. (ORS 147.030) Form of demand. No demand for the extradition of a person charged with crime in another state shall be recognized by the Governor unless in writing and accompanied by a copy of an indictment found or by an information supported by affidavit in the state having jurisdiction of the crime, or by a copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereupon; or by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding state that the person claimed has escaped from confinement or has broken the terms of his bail, probation or parole. The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state; and the copy of indictment, information, affidavit, judgment of conviction or sentence must be authenticated by the executive authority making the demand.

Section 177. (ORS 147.040) Investigation of demand and report. When a demand shall be made upon the Governor of this state by the executive authority of another state for the surrender of a person so charged with crime, the Governor may call upon the Attorney General or any prosecuting officer in this state to investigate or assist in investigating the demand, and to report to him the situation and circumstances of the person so demanded, and whether he ought to be surrendered.

Section 178. (ORS 147.050) Facts documents must show. A warrant of extradition must not be issued unless the documents presented by the executive authority making the demand show that:

(1) Except in cases arising under ORS 147.060, the accused, when demanded upon a charge of crime, was present in the demanding state at the time of the commission of the alleged crime and thereafter fled from that state;

(2) The person demanded is in this state; and

(3) They constitute full compliance with the requirements of ORS 147.030.

Section 179. (ORS 147.060) Extradition of person not present in demanding state at time of commission of crime. The Governor of this state may also surrender, on demand of the executive authority of any other state, any person in this state charged in such other state in the manner provided in ORS 147.050 with committing an act in this state, or in a third state, intentionally resulting in a crime in the state whose executive authority is making the demand; and the provisions of this chapter not otherwise inconsistent shall apply to such cases, notwithstanding that the accused was not in that state at the time of the commission of the crime and has not fled therefrom.

Section 180. (ORS 147.070) Governor's warrant of arrest. If the Governor shall decide that the demand should be complied with, he shall sign a warrant of arrest, which shall be sealed with the state seal, and be directed to a sheriff, marshal, coroner or other person whom he may think fit to entrust with the execution thereof. The warrant must substantially recite the facts necessary to the validity of its issue

Section 181. (ORS 147.080) Execution of the warrant. Such warrant shall authorize the officer or other person to whom directed to arrest the accused at any place where he may be found within the state and to command the aid of all sheriffs and other peace officers in the execution of the warrant, and to deliver the accused, subject to the provisions of ORS 147.010 to 147.230 and 147.250 to 147.280, to the duly authorized agent of the demanding state.

Section 182. (ORS 147.090) Authority of arresting officer to command assistance. Every such officer or other person empowered to make the arrest shall have the same authority in arresting the accused to command assistance therein as sheriffs and other officers have by law in the execution of any criminal process directed to them, with the like penalties against those who refuse their assistance.

Section 183. (ORS 147.100) Rights of arrested person. No person arrested upon such warrant shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he has been informed of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand legal counsel; and if the prisoner, his friends, or counsel shall state that he or they desire to test the legality of the arrest, the prisoner shall be taken forthwith before a judge of a court of record in this state, who shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus. And when such writ is applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the public prosecuting officer of the county in which the arrest is made and in which the accused is in custody, and to the said agent of the demanding state.

Section 184. ORS 147.110 is amended to read:

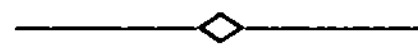
147.110. **Penalty for disobedience to ORS 147.100.** Any officer who shall deliver to the agent for extradition of the demanding state a person in his custody under the Governor's warrant in disobedience to ORS 147.100 [*shall be guilty of a misdemeanor and, on conviction, shall be fined not more than $1,000 or be imprisoned in the county jail not more than six months, or both*] **commits a Class B misdemeanor.**

COMMENTARY

The amendment grades the offense in accordance with the general penalty provisions of the Oregon Criminal Code of 1971.

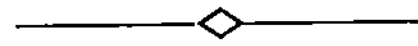
Section 185. (ORS 147.120) Confinement of prisoner. (1) The officer or person executing the Governor's warrant of arrest, or the agent of the demanding state to whom the prisoner may have been delivered, may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the person having charge of him is ready to proceed on his route, such person being chargeable with the expense of keeping.

(2) The officer or agent of a demanding state to whom a prisoner may have been delivered following extradition proceedings in another state, or to whom a prisoner may have been delivered after waiving extradition in such other state, and who is passing through this state with such a prisoner for the purpose of immediately returning such prisoner to the demanding state may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the officer or agent having charge of him is ready to proceed on his route, such officer or agent, however, being chargeable with the expense of keeping; provided, however, that such officer or agent shall produce and show to the keeper of such jail satisfactory written evidence of the fact that he is actually transporting such prisoner to the demanding state after a requisition by the executive authority of such demanding state. Such prisoner shall not be entitled to demand a new requisition while in this state.



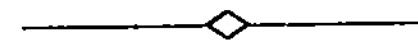
Section 186. (ORS 147.130) Arrest prior to requisition. Whenever any person within this state shall be charged on the oath of any credible person before any judge or other magistrate of this state with the commission of a crime in any other state and, except in cases arising under ORS 147.060, with having fled from justice, or with having been convicted of a crime in that state and having escaped from confinement, or having broken the terms of his bail, probation or parole, or whenever complaint shall have been made before any judge or other magistrate in this state setting forth on the affidavit of any creditable person in another state that a crime has been committed in such other state and that the accused has been charged in such state with the commission of the crime, and, except in cases arising under ORS 147.060, has fled therefrom or has been convicted of a crime in that state and escaped from confinement, or has broken the terms of his bail, probation or parole, and is believed to be in this state, the judge or magistrate shall issue a warrant directed to any peace officer commanding him to apprehend the person named therein, wherever he may be found in this state, and bring him before the same or any other judge, court or magistrate who may be convenient of access to the place where the arrest may be made, to answer the charge or complaint and affidavit, and a certified copy of the sworn charge or complaint and affidavit upon which the warrant is issued shall be attached to the warrant.

Section 187. (ORS 147.140) Arrest without warrant. The arrest of a person may be lawfully made also by an officer or a private citizen without a warrant, upon reasonable information that the accused stands charged in the courts of another state with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in ORS 147.130; and thereafter his answer shall be heard as if he had been arrested on a warrant.



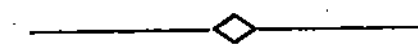
Section 188. ORS 147.150 is amended to read:

147.150. **Commitment to await arrest on requisition.** If from the examination before the judge or magistrate it appears that the person held is the person charged with having committed the crime alleged, the judge or magistrate must commit him to jail by a warrant reciting the accusation for such a time specified in the warrant as will enable the arrest of the accused to be made under a warrant of the Governor on a requisition of the executive authority of the state having jurisdiction of the offense, unless the accused [*give bail*] **is released** as provided in ORS 147.160, or until he shall be legally discharged.



Section 189. ORS 147.160 is amended to read:

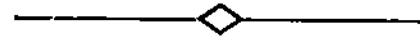
147.160. **Release.** Unless the offense with which the prisoner is charged is shown to be an offense punishable by death or life imprisonment under the laws of the state in which it was committed, the judge or magistrate must [*admit*] **make a release decision concerning** the person arrested [*to bail by bond or undertaking, with sufficient sureties and in such sum as he deems proper,*] **under the provisions of sections 236 to 247 of this 1973 Act,** for his appearance [*before him*] at a time specified in [*such bond or undertaking,*] **the security release or in the release agreement** [*and for his surrender, to be arrested upon the warrant of the Governor of this state*].



Section 190. ORS 147.170 is amended to read:

147.170. **Proceedings in absence of arrest under executive warrant within specified time.** If the accused is not arrested under warrant of the Governor by the expiration of the time specified in the warrant, [*bond or undertaking*] **security release or release agreement**, the judge or magistrate may discharge him or may recommit him to a further day, or may again [*take bail*] **set a se-**

curity release or a release agreement for his appearance and surrender, as provided in ORS 147.160; and at the expiration of the second period of commitment, or if he has been [*bailed*] **released** and appeared according to the terms of his [*bond or undertaking*] **security release or release agreement**, the judge or magistrate either may discharge him or may require him to enter into a new [*bond or undertaking*] **security release or release agreement** to appear and surrender himself at another day.



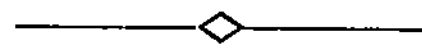
Section 191. ORS 147.180 is amended to read:

147.180. **Forfeiture; recovery thereon.** If the prisoner is [*admitted to bail*] **released** and fails to appear [*and surrender himself*] according to the condition of his [*bond*] **security release or release agreement**, the court, by proper order, shall declare the [*bond*] **security release or release agreement** forfeited, and recovery may be had thereon in the name of the state as in the case of other [*bonds or undertakings*] **security releases and release agreements** given by the accused in criminal proceedings within this state.

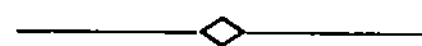
COMMENTARY TO SECTIONS 188 TO 191

The amendments to these statutes delete references to bail and insert new language to conform to the proposed changes relating to Release of Defendants.

Section 192. (ORS 147.190) Persons under criminal prosecution in this state at time of requisition. If a criminal prosecution has been instituted against such person under the laws of this state and is still pending, the Governor, at his discretion, either may surrender him on the demand of the executive authority of another state or may hold him until he has been tried and discharged, or convicted and punished in this state.



Section 193. (ORS 147.200) When guilt of accused may be inquired into. The guilt or innocence of the accused as to the crime of which he is charged may not be inquired into by the Governor or in any proceeding after the demand for extradition, accompanied by a charge of crime in legal form as provided in ORS 147.010 to 147.190, shall have been presented to the Governor, except as it may be involved in identifying the person held as the person charged with the crime.



Section 194. (ORS 147.210) Governor may recall warrant; alias writ. The Governor may recall his warrant of arrest or may issue another warrant whenever he deems proper.

Section 195. (ORS 147.220) Warrant to agent to return fugitive from this state. Whenever the Governor of this state shall demand a person charged with crime or with escaping from confinement or breaking the terms of his bail, probation or parole in this state from the chief executive of any other state, or from the Chief Justice or an Associate Justice of the Supreme Court of the District of Columbia authorized to receive such demand under the laws of the United States, he shall issue a warrant under the seal of this state to some agent or agents, commanding him to receive the person so charged if delivered to him and convey him to the proper officer of the county in this state in which the offense was committed.

Section 196. ORS 147.230 is amended to read:

147.230. **Application for requisition; filing and forwarding of papers.** (1) When the return to this state of a person charged with crime in this state is required, the district attorney of the county in which the [*offense*] **alleged crime** is committed shall present to the Governor his written application for a requisition for the return of the person charged, in which application shall be stated the name of the person so charged, the crime charged against him, the approximate time, place and circumstances of its commission, the state in which he is believed to be, including the location of the accused therein at the time the application is made, and certifying that in the opinion of the said district attorney the [*ends of justice require*] **interest of the public in the effective administration of criminal justice requires** the arrest and return of the accused to this state for trial, and that the proceeding is not instituted to enforce a private claim.

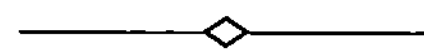
(2) When a return to this state is required of a person who has been convicted of a crime in this state and has escaped from confinement or broken the terms of his [*bail*] **release**, probation or parole, the district attorney of the county in which the offense was committed, the parole board, or the superintendent of the institution or sheriff of the county, from which escape was made, shall present to the Governor a written application for a requisition for the return of such person, in which application shall be stated the name of the person, the crime of which he was convicted, the circumstances of his escape from confinement or of the breach of the terms of his [*bail*] **release**, probation or parole, the state in which he is believed to be, including the location of the person therein at the time application is made.

(3) The application shall be verified by affidavit, shall be executed in duplicate and shall be accompanied by two certified copies of the indictment returned, or information and affidavit filed, or of the complaint made to the magistrate, stating the offense with which the accused is charged, or of the judgment of conviction or of the sentence. The prosecuting officer, parole board, superintendent or sheriff may also attach such further affidavits and other documents in duplicate as he shall deem proper to be submitted with such application. One copy of the application, with the action of the Governor indicated by indorsement thereon, and one of the certified copies of the indictment, complaint, information and affidavit, or of the judgment of conviction or of the sentence shall be filed in the office of the Secretary of State to remain of record in that office. The other copies of all papers shall be forwarded with the Governor's requisition.

COMMENTARY

The first amendment to this section deletes "offense" and replaces it with "crime" to conform to the definitions of these terms in the Oregon Criminal Code of 1971 (ORS 161.505, 161.515).

The second amendment proposes that the certification of the district attorney in the application for a requisition contain the opinion of the district attorney that the "interest of the public in the effective administration of criminal justice" requires the arrest and return of the accused. The existing "ends of justice" language would be deleted. The purpose of this amendment is to indicate that the requesting prosecutor is to consider and weigh all relevant factors about the case before making the request. These factors would include not only whether it is considered advisable to prosecute the accused for the alleged crime, but also such things as the gravity of the offense, strength of the case against the accused, the place where the accused is found and the cost to the state of the extradition of the fugitive.



Section 197. Extradition of persons imprisoned or awaiting trial in another state or who have left the demanding state under compulsion. (1) When it is desired to have returned to this state a person charged in this state with a crime, and such person is imprisoned or is held under criminal proceedings then pending against him in another state, the Governor of this state may agree with the executive authority of such other state for the extradition of such person before the conclusion of such proceedings or his term of sentence in such other state, upon condition that the person be returned to the other state at the expense of this state as soon as the prosecution in this state is terminated.

(2) The Governor of this state may also surrender on demand of the executive authority of any other state any person in this state who is charged in the manner provided in this chapter with having violated the laws of the state whose executive authority is making the demand, even though such person left the demanding state voluntarily.

COMMENTARY

This section adopts § 5 of the Uniform Criminal Extradition Act. Subsection (1) needs no explanation. The reason for subsection (2) is because there is a conflict in the decisions upon the question

whether a person who has been removed from the state under the compulsion of the authority of that state can be classed as a "fugitive" from that state so that his return can be secured through extradition proceedings. The change in the Uniform Act was the result of the case of *In re Whittington*, 167 P 404, 34 Cal App 344 (1917).

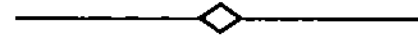
Section 198. (ORS 147.235) Appointment of agent to return fugitive from this state who waives extradition. In the event a fugitive from this state shall waive extradition, an agent or agents to secure his return may be appointed by the district attorney of the county in which the offense was committed, and the account of such agent or agents embracing necessary expenses incurred in performing the service, shall be audited and paid in the same manner as accounts presented under ORS 147.290.

Section 199. (ORS 147.250) Immunity from civil process in certain civil cases. A person brought into this state by, or after waiver of, extradition based on a criminal charge shall not be subject to service of personal process in civil actions arising out of the same facts as the criminal proceeding to answer which he is being or has been returned, until he has been convicted in the criminal proceeding, or, if acquitted, until he has had reasonable opportunity to return to the state from which he was extradited.

Section 200. (ORS 147.253) Written waiver of extradition proceedings. (1) Any person arrested in this state charged with having committed any crime in another state or alleged to have escaped from confinement, or broken the terms of his bail, probation or parole may waive the issuance and service of the warrant provided for in ORS 147.070 and 147.080 and all other procedure incidental to extradition proceedings, by executing or subscribing in the presence of a judge of any court of record within this state a writing which states that he consents to return to the demanding state; provided, however, that before such waiver shall be executed or subscribed by such person it shall be the duty of such judge to inform such person of his rights to the issuance and service of a warrant of extradition and to apply for a writ of habeas corpus as provided for in ORS 147.100.

(2) If and when such consent has been duly executed it shall forthwith be forwarded to the office of the Governor of this state and filed therein. The judge shall direct the officer having such person in custody to deliver forthwith such person to the duly accredited agent or agents of the demanding state, and shall deliver or cause to be delivered to such agent or agents a copy of such consent; provided, however, that nothing in this section shall be deemed

to limit the right of the accused person to submit voluntarily to the custody of such agent or agents for return without formality to the demanding state.



Section 201. (ORS 147.256) Nonwaiver by this state. Nothing in this chapter contained shall be deemed to constitute a waiver by this state of its right, power or privilege to try such demanded person for crime committed within this state, or of its right, power or privilege to regain custody of such person by extradition proceedings or otherwise for the purpose of trial, sentence or punishment for any crime committed within this state, nor shall any proceedings had under this chapter which result in, or fail to result in, extradition be deemed a waiver by this state of any of its rights, privileges or jurisdiction in any way whatsoever.

Section 202. (ORS 147.260) Trial of extradited person for other crimes. After a person has been brought back to this state upon extradition proceedings, he may be tried in this state for other crimes which he may be charged with having committed here as well as that specified in the requisition for his extradition.

Section 203. (ORS 147.270) Construction of Act. ORS 147.010 to 147.230 and 147.250 to 147.280 shall be so interpreted and construed as to effectuate their general purpose to make uniform the law of those states which enact the Uniform Criminal Extradition Act.

Section 204. (ORS 147.280) Short title. ORS 147.010 to 147.-230 and 147.250 to 147.280 may be cited as the Uniform Criminal Extradition Act.

Section 205. (ORS 147.290) Payment of agent's expenses. The account of the agent or agents embracing necessary expenses incurred in performing the service, after approval by the Governor, shall be paid, after being audited and allowed as other claims against the state, from any moneys appropriated therefor.

PART III. ARRAIGNMENT AND PRE-TRIAL PROVISIONS

ARTICLE 7. ARRAIGNMENT AND RELATED PROCEDURES

Section 206. ORS 135.010 is amended to read:

135.010. **Time and place.** When the [*indictment*] **accusatory instrument** has been filed, the defendant, if he has been arrested, or as soon thereafter as he may be, shall be arraigned thereon before the court in which it is found. **Except for good cause shown or at the request of the defendant, if the defendant is in custody, the arraignment shall be held during the first 36 hours of custody, excluding holidays, Saturdays and Sundays. In all other cases, the arraignment shall be held within 96 hours after the arrest.**

COMMENTARY

The amendments accomplish the following: (1) Substitute the term, "accusatory instrument" (indictment, information or complaint), for the present limitation of the section to an indictment. (2) Require the arraignment of a defendant, who is in custody, within 36 hours, not including days when the court is not open for business. (3) Even though a defendant may not be in custody, require arraignment within 96 hours after his arrest. If a person in custody were not arraigned within the prescribed period the court should order his release. The section is intended to ensure speedy arraignment of persons, particularly those in custody, and although a person's release may be ordered by the court, this would not preclude the state from proceeding with the prosecution.

ORS 133.550 is repealed.

◇

Section 207. ORS 135.020 is amended to read:

135.020. **Scope of proceedings.** The arraignment shall be made by the court, or by the clerk or the district attorney under its direction, and consists of reading the [*indictment*] **accusatory instrument** to the defendant, delivering to him a copy thereof and the indorsements thereon, including the list of witnesses indorsed on it or appended thereto **if the accusatory instrument is an indictment**, and asking him [*whether he pleads guilty or not guilty*] **how he pleads** to the [*indictment*] **charge**.

COMMENTARY

ORS 135.020 is amended to make the section apply, where appropriate, to informations and complaints, as well as indictments.

◇

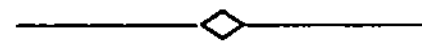
Section 208. ORS 135.110 is amended to read:

135.110. **When presence of defendant is required; appearance by counsel.** When the [*indictment is for*] **accusatory instrument charges**

a crime punishable as a felony, the defendant shall be personally present at the arraignment; but when it is for a misdemeanor [*and the defendant has been held to answer to the charge*], his personal appearance is unnecessary and he may appear by counsel.

COMMENTARY

This section contains conforming amendments.

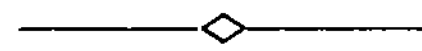


Section 209. ORS 135.140 is amended to read:

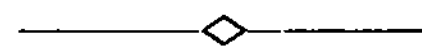
135.140. **Bringing in defendant not yet arrested or held to answer.** When an [*indictment*] **accusatory instrument** is filed in court, if the defendant has not been arrested and held to answer the charge, unless he voluntarily appears for arraignment, the court shall [*order the clerk to issue a bench warrant for his arrest*] **issue a warrant of arrest as provided in sections 89 to 104 of this 1973 Act.**

COMMENTARY

The section contains a conforming amendment with respect to accusatory instrument and incorporates by reference the warrant issuance provisions of the new Code. ORS 135.150 to 135.180, relating to bench warrants, would be repealed. (ORS 135.190 to 135.210 are repealed by the sections relating to Release of Defendants.)



Section 210. (ORS 135.310) Right of counsel. If the defendant appears for arraignment without counsel, he shall be informed by the court that it is his right to have counsel before being arraigned and shall be asked if he desires the aid of counsel.

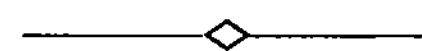


Section 211. ORS 135.320 is amended to read:

135.320. **Court appointment of counsel; waiver.** If upon arraignment of a person accused [*in the circuit court*] of a crime against the laws of this state, the person being arraigned appears without counsel, the court having jurisdiction of the case, in accordance with [*ORS 133.625*] **section 212 of this 1973 Act,** shall appoint suitable counsel to represent him unless the person waives counsel and the court approves the waiver.

COMMENTARY

See commentary to § 212.



Section 212. ORS 133.625 is amended to read:

133.625. **Court appointment of counsel.** (1) Suitable counsel for a defendant shall be appointed by a [*circuit court*] **magistrate** if:

(a) The defendant is before a court or magistrate on a matter described in subsection (3) of this section; and

(b) The defendant requests aid of counsel; and

(c) The defendant makes a verified financial statement and provides other information in writing under oath showing his lack of **financial** ability to obtain counsel and provide any other information required by the court [*as*] **that reasonably relates** to his inability to obtain counsel; and

(d) It appears to the court that the defendant is without means and is unable to obtain counsel.

[*(2) If the defendant is before a justice or district court in any proceeding described in subsection (3) of this section, and complies with the provisions of subsection (1) of this section, the magistrate shall forward to the circuit court in his judicial district all information obtained under subsection (1) of this section, along with his recommendations as to whether or not the defendant is without means and is unable to obtain counsel. The circuit court may thereupon appoint suitable counsel for the defendant.*]

(2) Appointed counsel shall not be denied to any person merely because his friends or relatives have resources adequate to retain counsel or because he has deposited or is capable of depositing security for his release.

(3) Counsel must be appointed for a defendant who meets the requirements of subsection (1) of this section and who is before the court or magistrate on any of the following matters:

(a) Charged with a crime [*for which a felony sentence could be imposed*] .

(b) For a hearing to determine whether an enhanced sentence should be imposed when such proceedings may result in the imposition of a felony sentence.

(c) For extradition proceedings under the provisions of the Uniform Criminal Extradition Act.

(d) For any proceeding concerning an order of probation, including but not limited to the revoking or amending thereof.

(4) Unless otherwise ordered by the court, the appointment of counsel under this section shall continue during all criminal proceedings resulting from the defendant's arrest through acquittal or the imposition of punishment. The court having jurisdiction of the case may substitute one appointed counsel for another at any stage of the proceedings when the interests of justice require such substitution.

(5) If, at any time after the appointment of counsel, the court

having jurisdiction of the case finds that the defendant is financially able to obtain counsel [*or to make partial payment for the services of counsel*], the court may terminate the appointment of counsel [*or require such partial payment or enter an order against the defendant in favor of the county for such fees as the county has paid and for which the defendant is liable under ORS 137.205*]. If, at any time during criminal proceedings, the court having jurisdiction of the case finds that the defendant is financially unable to pay counsel whom he has retained, the court may appoint counsel as provided in this section.

(6) A civil proceeding may be initiated by any public body which has expended monies for the defendant's legal assistance within two years of judgment if:

(a) The defendant was not qualified in accordance with subsection (1) of this section for legal assistance; or

(b) The defendant is financially able, according to subsection (1) of this section, to reimburse the county for monies expended for legal assistance.

(7) The civil proceeding shall be subject to the exemptions from execution as provided for by law.

COMMENTARY

A. Summary

Section 212 amends the current appointment of counsel statute by providing for a more specific test of indigency, a civil proceeding for recovery of counsel fees paid for criminal defense, and authorizing any magistrate to appoint counsel when the defendant is accused of a crime.

B. Derivation

The amendments are derived from ABA Standards on Providing Defense Services, § 6.1, and the Uniform Law Commissioner's Model Defense of Needy Persons Act, § 8.

C. Relationship to Existing Law

The appointment of counsel is constitutionally necessary when a person is accused of a crime that can result in imprisonment. The Supreme Court of Oregon in *Stevenson v. Holzman*, 254 Or 94, 458 P2d 414 (1969), held that:

> ". . . no person may be deprived of his liberty who has been denied the assistance of counsel as guaranteed by the Sixth Amendment. This holding is applicable to all criminal prosecutions, including prosecutions for violations of municipal ordinances. The denial of assistance of counsel will preclude the imposition of a jail sentence." 254 Or at 102.

The Criminal Code of 1971 defines "crime" as any offense for which a sentence of imprisonment is authorized (ORS 161.515). The amendments contained in sections 211 and 212 use the word "crime" to delineate the scope of appointment of counsel. Since the holding in *Stevenson* applies to any deprivation of liberty, the use of the definition for "crime" will properly determine the scope of appointment without further definition in ORS 135.320 or 133.625.

The United States Supreme Court recently held in *Argersinger v. Hamlin*, 11 Cr L 3089, — US — (June 12, 1972) that counsel must be given to all persons accused of an offense that carries a penalty of imprisonment. The Court, speaking through Justice Douglas, quoted with approval from *Stevenson v. Holzman* in holding that a person accused of a misdemeanor or felony must be afforded the opportunity for counsel.

Section 212 deletes the present subsection (2) because of the unnecessary paper work and transmittal time under the current provision for exclusive appointment of counsel by the circuit court. The appointment of counsel by any magistrate will eliminate the unnecessary paperwork of the lower court judge in requesting appointment of counsel through the circuit court. This particular amendment was suggested to the Commission by a District Judge who stated that: "The odds for abuse of discretion by a district judge or J.P. in those cases don't justify such additional time and paper consumed and delay."

The recovery of counsel fees from the defendant by the county or state has recently been discussed by the United States Supreme Court in *James v. Strange*, 11 Cr L 3109, — US — (June 12, 1972). The Court held a Kansas recoupment of appointed counsel fees statute unconstitutional as a denial of equal protection of the laws. The civil exemptions from execution, except homestead, of a judgment debtor did not apply to a judgment based on fees paid on behalf of a criminal defendant. The state perfected a lien on the assets of the defendant after payment to the appointed counsel in the amount of the fees. The statute was unconstitutional because the exemptions from execution that a civil debtor has did not apply to a criminal defendant. The Court held that this disparity, between civil debtors and criminal defendant-debtors, contravened the equal protection of the laws embodied in the Fourteenth Amendment.

Subsection (5) is amended and subsections (6) and (7) are added to provide a clear method of recoupment of appointed counsel fees. The use of a civil proceeding will insure due process is followed and that the civil exemptions, generally contained in ORS chapter 23, will apply to the criminal defendant-debtor thus insuring equal protection of the laws.

Subsection (2) is derived from § 6.1 of the ABA Standards on Providing Defense Services. The ABA commentary quotes from the American Bar Foundation survey of practice in American courts concerning the determination of eligibility:

> ". . . resources of the defendant's parents are usually considered only when he is a minor, and even then some courts recognize that the parents have no legal obligation to provide a lawyer for him. For the most part, resources of the spouse are considered a disqualification only in community-property states and only if the resources are community property."

The ABA commentary also reasons that it is the constitutional right of the individual who needs counsel which is at stake and therefore the assets of relatives and friends should not impede the needy defendant's right to counsel.

Section 213. (ORS 135.330) Appointed counsel's fee; expenses; payment of expenses and fee. (1) Counsel appointed pursuant to ORS 133.625 or 135.320, if other than the Public Defender, shall, by order of the court, and subject to the approval of the governing body of the county, be paid by the county in which the proceeding is had, fair compensation for representation in the case, and the necessary disbursements. In no event shall the minimum compensation for the services rendered in conducting the defense be less than the fees set forth in the following schedule:

(a) When the accused is charged with a misdemeanor, and a plea of "guilty" is entered, $25.

(b) When the accused is charged with a misdemeanor, and a plea of "not guilty" is entered, $50 per day of trial, but not exceeding two days in any one case.

(c) When the accused is charged with a felony, and a plea of "guilty" is entered, $50.

(d) When the accused is charged with a felony, and a plea of "not guilty" is entered, $100 per day of trial, but not exceeding five days in any one case.

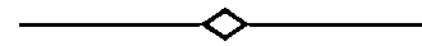
(e) When the accused is before the court for any proceedings other than those referred to in paragraphs (a), (b), (c) and (d) of this subsection, $50 per day, but not exceeding two days in any one case.

(f) In extraordinary circumstances, payment in excess of the limits stated herein may be made if the presiding judge of the circuit

court certifies that such payment is necessary to provide fair compensation for protracted representation in the case.

(2) The person for whom counsel has been appointed is entitled to a reasonal sum for investigation, preparation and presentation of his care and he or his counsel may upon cause shown, which need not be disclosed to the district attorney prior to any hearing, secure approval and authorization of payment of such sums as the court finds are necessary and proper in the investigation, preparation and presentation of his case, including but not limited to travel, telephone calls, photocopying or other reproduction of documents and expert witness fees.

(3) Upon completion of all services by the attorney or attorneys so appointed under ORS 135.320, the attorney or attorneys shall submit to the court an affidavit containing an accurate statement of all reasonable expenses of investigation and preparation paid or incurred, supported by appropriate receipts or vouchers. The court shall thereupon enter an order directing the county to pay to such attorney or attorneys the amount of the expenses, or such portion thereof as may be approved by the court.

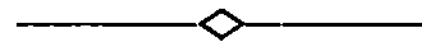


Section 214. ORS 135.340 is amended to read:

135.340. **Communication to defendant as to use of name in accusatory instrument.** When the defendant is arraigned, he shall be informed that if the name by which he is [*indicted*] **charged in the accusatory instrument** is not his true name he must then declare his true name or be proceeded against by the name in the [*indictment*] **accusatory instrument**.

COMMENTARY

This section contains a conforming amendment regarding accusatory instruments.



Section 215. ORS 135.350 is amended to read:

135.350. **Name used in further proceedings. (1)** If the defendant gives no other name, the court may proceed accordingly. If the defendant **is charged by indictment or information and** alleges that another name is his true name, the court shall direct an entry thereof to be made in its journal, and the subsequent proceedings on the [*indictment*] **accusatory instrument** may be had against him by that name, referring also to the name by which he is [*indicted*] **charged**.

(2) Upon motion of the defendant, all names, other than the true name of the defendant, shall be stricken from any accusatory instrument read or submitted to the jury.

COMMENTARY

The section contains a conforming amendment to accommodate charges brought by information as well as by indictment.

Subsection (2) is a new provision to provide the defendant a means of removing other names, such as aliases, from the accusatory instrument before trial. The purpose is to prevent prejudicing of the jury by naming the defendant by aliases. ORS 135.340 will still require the defendant to declare his true name or be proceeded against by the name used in the accusatory instrument.

Preliminary Hearing

Section 216. ORS 133.610 is amended to read:

133.610. **Information as to charge, right to counsel, use of statement and preliminary hearing.** When a defendant against whom an information has been filed **in a preliminary proceeding** appears before a magistrate on a charge of having committed a crime **punishable as a felony**, before any further proceedings are had the magistrate shall read to him the information and shall inform him:

(1) Of his right to the aid of counsel, that he is not required to make a statement and that any statement made by him may be used against him.

(2) That he is entitled to a preliminary [*examination*] **hearing** and of the nature of a preliminary [*examination*] **hearing**. If a preliminary [*examination*] **hearing** is requested, it shall be held as soon as practicable but in any event within five days, unless such time is extended for good cause shown.

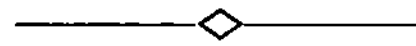
COMMENTARY

The section is amended to distinguish the "arraignment" proceedings in this section from a circuit court arraignment on an indictment or district attorney's information. The use of the word, "hearing," in place of "examination" makes the language the same as the commonly used term for the lower court hearing that is conducted at which the magistrate decides whether the defendant will be "held to answer."

The proposed amendment to Oregon Const. Art. VII (Amended), § 5, uses the same "preliminary hearing" terminology.

Section 217. (ORS 133.620) Obtaining counsel. The magistrate shall allow the defendant a reasonable time to obtain counsel and shall adjourn the proceeding for that purpose. A defendant who is committed pending examination shall be given a reasonable opportunity to obtain counsel, including but not limited to a reasonable use of the telephone.

Section 218. (ORS 133.635) Appointed counsel's affidavit of expenses; payment of expenses and fees. Upon completion of all services by the counsel so appointed under ORS 133.625, the counsel shall submit to the court an affidavit containing an accurate statement of all reasonable expenses paid or incurred in connection with such services, supported by appropriate receipts or vouchers. The court shall thereupon enter an order directing the county in which the proceeding is had to pay the counsel the amount of the expenses, or such portion thereof as may be approved by the court, together with fees as set forth in subsection (1) of ORS 135.330.



Section 219. ORS 133.660 is amended to read:

133.660. **Subpenaing witnesses.** (1) The magistrate shall issue subpenas for any witnesses within the state when requested by the district attorney or the defendant for the [*examination*] **preliminary hearing**.

(2) If either party desires to subpena more than five witnesses at public expense, application therefor shall be made in the manner provided in ORS 139.060.

(3) Any defendant may have subpenas issued for any number of witnesses at his own expense without an order of the magistrate.

COMMENTARY

The section contains a conforming amendment.

Section 220. (ORS 133.670) Examination of adverse witnesses. The witnesses shall be examined in the presence of the defendant and may be cross-examined in his behalf or against him.

Section 221. (ORS 133.680) Right of defendant to make or waive making a statement. When the examination of the witnesses on the part of the state is closed, the magistrate shall inform the defendant that it is his right to make a statement in relation to the charge against him; that the statement is designed to enable him, if he sees fit, to answer the charge and explain the facts alleged against him; that he is at liberty to waive making a statement; and that his waiver cannot be used against him on the trial.

Section 222. (ORS 133.690) Statement of defendant. (1) If the defendant chooses to make a statement, the magistrate shall take it in writing, without oath, and shall put to the defendant the following questions only:

(a) What is your name and age?

(b) Where were you born?

(c) Where do you reside and how long have you resided there?

(d) What is your business or occupation?

(e) Give any explanation you think proper of the circumstances appearing in the testimony against you and state any facts which you think will tend to your exculpation.

(2) The answer of the defendant to each of the questions shall be read to him as it is taken down. He may thereupon correct or add to his answer until it is made conformable to what he declares to be the truth.

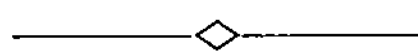
(3) The statement of the defendant shall be reduced to writing by the magistrate or under his direction and authenticated in the following form:

(a) It shall set forth that the defendant was informed of his rights, as provided in ORS 133.680, and that after being so informed he made the statement.

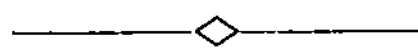
(b) It need not contain the questions put to the defendant, but shall contain his answers thereto, with the corrections and additions, if any are made.

(c) It may be signed by the defendant, but if he refuses to sign it, his reason therefor shall be stated as he gives it.

(d) It shall be signed and certified to by the magistrate.



Section 223. (ORS 133.700) Use of statement before grand jury or on trial. The statement of the defendant is competent testimony to be laid before the grand jury and may be given in evidence against the defendant on the trial.



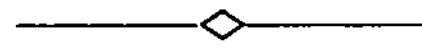
Section 224. (ORS 133.710) Memorandum of waiver of right to make statement. If the defendant waives his right to make a statement, the magistrate shall make a memorandum thereof in the proceedings; but the fact of his waiver cannot be used against the defendant on the trial.

Section 225. (ORS 133.720) Examination of defendant's witnesses. After the waiver of the defendant to make a statement or

a crime punishable as a felony, the defendant shall be personally present at the arraignment; but when it is for a misdemeanor [*and the defendant has been held to answer to the charge*], his personal appearance is unnecessary and he may appear by counsel.

COMMENTARY

This section contains conforming amendments.

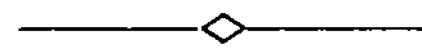


Section 209. ORS 135.140 is amended to read:

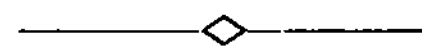
135.140. **Bringing in defendant not yet arrested or held to answer.** When an [*indictment*] **accusatory instrument** is filed in court, if the defendant has not been arrested and held to answer the charge, unless he voluntarily appears for arraignment, the court shall [*order the clerk to issue a bench warrant for his arrest*] **issue a warrant of arrest as provided in sections 89 to 104 of this 1973 Act.**

COMMENTARY

The section contains a conforming amendment with respect to accusatory instrument and incorporates by reference the warrant issuance provisions of the new Code. ORS 135.150 to 135.180, relating to bench warrants, would be repealed. (ORS 135.190 to 135.210 are repealed by the sections relating to Release of Defendants.)



Section 210. (ORS 135.310) Right of counsel. If the defendant appears for arraignment without counsel, he shall be informed by the court that it is his right to have counsel before being arraigned and shall be asked if he desires the aid of counsel.

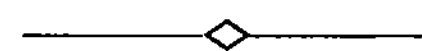


Section 211. ORS 135.320 is amended to read:

135.320. **Court appointment of counsel; waiver.** If upon arraignment of a person accused [*in the circuit court*] of a crime against the laws of this state, the person being arraigned appears without counsel, the court having jurisdiction of the case, in accordance with [*ORS 133.625*] **section 212 of this 1973 Act,** shall appoint suitable counsel to represent him unless the person waives counsel and the court approves the waiver.

COMMENTARY

See commentary to § 212.



having jurisdiction of the case finds that the defendant is financially able to obtain counsel [*or to make partial payment for the services of counsel*], the court may terminate the appointment of counsel [*or require such partial payment or enter an order against the defendant in favor of the county for such fees as the county has paid and for which the defendant is liable under ORS 137.205*]. If, at any time during criminal proceedings, the court having jurisdiction of the case finds that the defendant is financially unable to pay counsel whom he has retained, the court may appoint counsel as provided in this section.

(6) A civil proceeding may be initiated by any public body which has expended monies for the defendant's legal assistance within two years of judgment if:

(a) The defendant was not qualified in accordance with subsection (1) of this section for legal assistance; or

(b) The defendant is financially able, according to subsection (1) of this section, to reimburse the county for monies expended for legal assistance.

(7) The civil proceeding shall be subject to the exemptions from execution as provided for by law.

COMMENTARY

A. Summary

Section 212 amends the current appointment of counsel statute by providing for a more specific test of indigency, a civil proceeding for recovery of counsel fees paid for criminal defense, and authorizing any magistrate to appoint counsel when the defendant is accused of a crime.

B. Derivation

The amendments are derived from ABA Standards on Providing Defense Services, § 6.1, and the Uniform Law Commissioner's Model Defense of Needy Persons Act, § 8.

C. Relationship to Existing Law

The appointment of counsel is constitutionally necessary when a person is accused of a crime that can result in imprisonment. The Supreme Court of Oregon in *Stevenson v. Holzman*, 254 Or 94, 458 P2d 414 (1969), held that:

> ". . . no person may be deprived of his liberty who has been denied the assistance of counsel as guaranteed by the Sixth Amendment. This holding is applicable to all criminal prosecutions, including prosecutions for violations of municipal ordinances. The denial of assistance of counsel will preclude the imposition of a jail sentence." 254 Or at 102.

The Criminal Code of 1971 defines "crime" as any offense for which a sentence of imprisonment is authorized (ORS 161.515). The amendments contained in sections 211 and 212 use the word "crime" to delineate the scope of appointment of counsel. Since the holding in *Stevenson* applies to any deprivation of liberty, the use of the definition for "crime" will properly determine the scope of appointment without further definition in ORS 135.320 or 133.625.

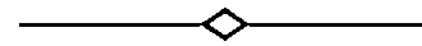
The United States Supreme Court recently held in *Argersinger v. Hamlin*, 11 Cr L 3089, — US — (June 12, 1972) that counsel must be given to all persons accused of an offense that carries a penalty of imprisonment. The Court, speaking through Justice Douglas, quoted with approval from *Stevenson v. Holzman* in holding that a person accused of a misdemeanor or felony must be afforded the opportunity for counsel.

Section 212 deletes the present subsection (2) because of the unnecessary paper work and transmittal time under the current provision for exclusive appointment of counsel by the circuit court. The appointment of counsel by any magistrate will eliminate the unnecessary paperwork of the lower court judge in requesting appointment of counsel through the circuit court. This particular amendment was suggested to the Commission by a District Judge who stated that: "The odds for abuse of discretion by a district judge or J.P. in those cases don't justify such additional time and paper consumed and delay."

court certifies that such payment is necessary to provide fair compensation for protracted representation in the case.

(2) The person for whom counsel has been appointed is entitled to a reasonal sum for investigation, preparation and presentation of his care and he or his counsel may upon cause shown, which need not be disclosed to the district attorney prior to any hearing, secure approval and authorization of payment of such sums as the court finds are necessary and proper in the investigation, preparation and presentation of his case, including but not limited to travel, telephone calls, photocopying or other reproduction of documents and expert witness fees.

(3) Upon completion of all services by the attorney or attorneys so appointed under ORS 135.320, the attorney or attorneys shall submit to the court an affidavit containing an accurate statement of all reasonable expenses of investigation and preparation paid or incurred, supported by appropriate receipts or vouchers. The court shall thereupon enter an order directing the county to pay to such attorney or attorneys the amount of the expenses, or such portion thereof as may be approved by the court.

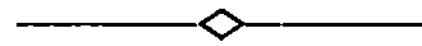


Section 214. ORS 135.340 is amended to read:

135.340. **Communication to defendant as to use of name in accusatory instrument.** When the defendant is arraigned, he shall be informed that if the name by which he is [*indicted*] **charged in the accusatory instrument** is not his true name he must then declare his true name or be proceeded against by the name in the [*indictment*] **accusatory instrument.**

COMMENTARY

This section contains a conforming amendment regarding accusatory instruments.

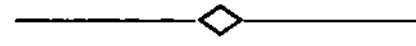


Section 215. ORS 135.350 is amended to read:

135.350. **Name used in further proceedings. (1)** If the defendant gives no other name, the court may proceed accordingly. If the defendant **is charged by indictment or information and** alleges that another name is his true name, the court shall direct an entry thereof to be made in its journal, and the subsequent proceedings on the [*indictment*] **accusatory instrument** may be had against him by that name, referring also to the name by which he is [*indicted*] **charged.**

(2) Upon motion of the defendant, all names, other than the true name of the defendant, shall be stricken from any accusatory instrument read or submitted to the jury.

Section 218. (ORS 133.635) Appointed counsel's affidavit of expenses; payment of expenses and fees. Upon completion of all services by the counsel so appointed under ORS 133.625, the counsel shall submit to the court an affidavit containing an accurate statement of all reasonable expenses paid or incurred in connection with such services, supported by appropriate receipts or vouchers. The court shall thereupon enter an order directing the county in which the proceeding is had to pay the counsel the amount of the expenses, or such portion thereof as may be approved by the court, together with fees as set forth in subsection (1) of ORS 135.330.



Section 219. ORS 133.660 is amended to read:

133.660. **Subpenaing witnesses.** (1) The magistrate shall issue subpenas for any witnesses within the state when requested by the district attorney or the defendant for the [*examination*] **preliminary hearing.**

(2) If either party desires to subpena more than five witnesses at public expense, application therefor shall be made in the manner provided in ORS 139.060.

(3) Any defendant may have subpenas issued for any number of witnesses at his own expense without an order of the magistrate.

COMMENTARY

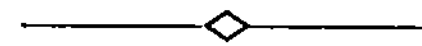
The section contains a conforming amendment.

Section 220. (ORS 133.670) Examination of adverse witnesses. The witnesses shall be examined in the presence of the defendant and may be cross-examined in his behalf or against him.

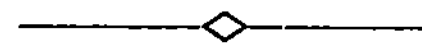
Section 221. (ORS 133.680) Right of defendant to make or waive making a statement. When the examination of the witnesses on the part of the state is closed, the magistrate shall inform the defendant that it is his right to make a statement in relation to the charge against him; that the statement is designed to enable him, if he sees fit, to answer the charge and explain the facts alleged against him; that he is at liberty to waive making a statement; and that his waiver cannot be used against him on the trial.

after he has made it, his witnesses, if he produces any, shall be sworn and examined.

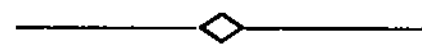
Section 226. (ORS 133.730) Exclusion of witnesses during examination of others. The magistrate may exclude the witnesses who have not been examined during the examination of the defendant or of a witness for the state or the defendant.



Section 227. (ORS 133.740) Memorandum relative to witnesses. The testimony of the witnesses need not be reduced to writing, but the magistrate shall make a memorandum of the name of each witness, his place of residence and his business or occupation.



Section 228. (ORS 133.750) Retention of statements and depositions by magistrate; inspection. The magistrate shall keep the statement and depositions taken on the information, the statement of the defendant, if any, together with the memoranda mentioned in ORS 133.710 and 133.740, until they are returned to the proper court and shall not permit them to be inspected by any person, except the district attorney of the county or the attorney who acts for him and the defendant and his counsel.



Section 229. ORS 133.760 is amended to read:

133.760. **Counsel for complainant; district attorney.** The [*informant*] **complainant** may employ counsel to appear against the defendant [*on the examination*] in every stage of the [*proceedings*] **preliminary hearing**; but the district attorney for the county, either in person or by some attorney authorized to act for him, is entitled to appear on behalf of the state and control and direct the prosecution.

COMMENTARY

The language used in the amendments is consistent with changes made in other sections. See § 1 for definition of "information" and "complainant's information."

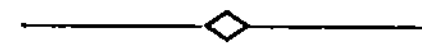
Discharge or Commitment

Section 230. ORS 133.810 is amended to read:

133.810. **Discharge.** (1) After hearing the [*proofs*] **evidence** and the statement of the defendant, if he has made one, [*if it appears either that the crime has not been committed or that there is no sufficient cause to believe the defendant guilty thereof*] **unless**

after he has made it, his witnesses, if he produces any, shall be sworn and examined.

Section 226. (ORS 133.730) Exclusion of witnesses during examination of others. The magistrate may exclude the witnesses who have not been examined during the examination of the defendant or of a witness for the state or the defendant.



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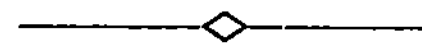

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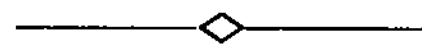


Section 229. ORS 133.760 is amended to read:

133.760. **Counsel for complainant; district attorney.** The [*informant*] **complainant** may employ counsel to appear against the defendant [*on the examination*] in every stage of the [*proceedings*] **preliminary hearing**; but the district attorney for the county, either in person or by some attorney authorized to act for him, is entitled to appear on behalf of the state and control and direct the prosecution.

COMMENTARY

The language used in the amendments is consistent with changes made in other sections. See § 1 for definition of "information" and "complainant's information."

Discharge or Commitment

Section 230. ORS 133.810 is amended to read:

133.810. **Discharge.** (1) After hearing the [*proofs*] **evidence** and the statement of the defendant, if he has made one, [*if it appears either that the crime has not been committed or that there is no sufficient cause to believe the defendant guilty thereof*] **unless**

there is a showing of probable cause that a crime has been committed and that the defendant committed it, the magistrate shall **dismiss the information and** order the defendant to be discharged [*by an indorsement on the warrant, signed by him, to the following effect: "There being no sufficient cause shown to believe the within-named A B guilty of the crime within-mentioned, I order him to be discharged."*] .

[*(2) If the arrest was without a warrant, the discharge may be made by a certificate in writing, signed by the magistrate, to the following effect: "There being no sufficient cause shown to believe A B, brought before me without warrant, guilty of the crime of (designating it generally), I order him to be discharged." This certificate shall be delivered to the defendant.*]

COMMENTARY

The amendments delete archaic and awkward provisions, and use "probable cause" language, which is in accord with that suggested in the proposed amendment to Oregon Const. Art. VII (Amended), § 5. Similar amendments appear in the next following section.

Section 231. ORS 133.820 is amended to read:

133.820. **Holding defendant to answer.** If it appears from the [*examination that a crime has been committed and that there is sufficient cause to believe the defendant guilty thereof*] **preliminary hearing that there is probable cause to believe that a crime has been committed and that the defendant committed it**, the magistrate shall make a written order [*, signed by him to the following effect: "It appearing to me from the testimony produced before me on the examination that the crime of (designating it generally) has been committed and that there is sufficient cause to believe A B guilty thereof, I order him to be held to answer the same."*] **holding the defendant for further proceedings on the charge.**

COMMENTARY

The amendment is consistent with that made in the previous section and with the proposed constitutional amendment. The "probable cause" requirement relates both to the showing that a crime has been committed and that the defendant committed it. If the "bind-over" is for a crime *punishable as a felony*, then under the proposed constitutional amendment the district attorney could take the case to the grand jury, or, at his option, file a district attorney's information in circuit court for further proceedings on the crime for which the preliminary hearing was held. However, the amendment to the instant section would permit the magistrate to hold the defendant upon a showing of probable cause that *any* crime has been committed, as does the existing statute. In that event, although the district attorney could present the case to the grand jury as he is permitted to do under existing law, he would not be able to proceed directly in circuit court on an information because the probable cause showing that a crime *punishable as a felony* would be lacking.

Section 232. ORS 133.830 is amended to read:

133.830. **Commitment.** [*(1)*] If the magistrate orders the defendant to be held to answer, he shall make out a commitment, signed by him with his name of office, and deliver it with the defendant to the officer to whom the defendant is committed or, if that officer is not present, to any peace officer, who shall immediately deliver the defendant into the proper custody, together with the commitment.

[*(2) The commitment may be in substantially the following form:*

IN THE NAME OF THE STATE OF OREGON

To the sheriff of the County of ————, greeting:
An order having been this day made by me that A B be held to answer upon a charge of (designating it generally), you are therefore commanded to receive him in your custody and to detain him until legally discharged.

Dated at ————, this —— day of ————, 19——.

C D, Justice of the Peace (or as the case may be).

———————————————————————]

COMMENTARY

The amendment deletes an unnecessary provision relating to the form of commitment.

Section 233. ORS 133.840 is amended to read:

133.840. **Indorsement in certain cases.** When the magistrate delivers the defendant to a peace officer other than the one to whom he is committed, he shall first make an indorsement on the commitment [*, signed with his name of office, to the following effect: "I hereby authorize and command E F to deliver this commitment, together with the within-named defendant, to the custody of the sheriff of the County of ————."*] **directing the officer to deliver the defendant and the commitment to the custody of the appropriate sheriff.**

COMMENTARY

The amendment merely modernizes the language used in the section.

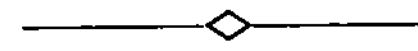
Section 234. (ORS 133.850) Direction to sheriff; detention of defendant. The commitment shall be directed to the sheriff of the county in which the magistrate is sitting. Such sheriff shall receive and detain the defendant, as thereby commanded, in the jail of his county or, if there is no sufficient jail in the county, by such means as may be necessary and proper therefor or by confining him in the jail of an adjoining county.

Section 235. ORS 133.860 is amended to read:

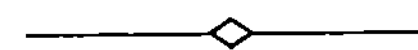
133.860. **Forwarding of papers by magistrate.** When the magistrate has held the defendant to answer, he shall at once forward to the court in which the defendant would be triable the warrant, if any; the information; the statement of the defendant, if he made one; the memoranda mentioned in ORS 133.710 to 133.740; [*and all undertakings of bail or*] **the release agreement or security release of the defendant; and, if applicable, any security taken** for the appearance of witnesses [*taken by him*] .

COMMENTARY

The section conforms the language of the statute to the new provisions relating to Release of Defendants (Art. 8).



Section 236. (ORS 133.990) Penalties. Violation of ORS 133.-750 is punishable as a contempt by the court having jurisdiction of the crime charged against the defendant.



ARTICLE 8. RELEASE OF DEFENDANTS

Section 237. Release of defendants; definitions. As used in sections 237 to 248 of this Act, unless the context requires otherwise:

(1) "Conditional release" means a non-security release which imposes regulations on the activities and associations of the defendant.

(2) "Magistrate" has the meaning provided for this term in ORS 133.030.

(3) "Personal recognizance" means the release of a defendant upon his promise to appear in court at all appropriate times.

(4) "Release" means temporary or partial freedom of a defend-

ant from lawful custody before judgment of conviction or after judgment of conviction if defendant has appealed.

(5) "Release agreement" means a sworn writing by the defendant stating the terms of the release and, if applicable, the amount of security.

(6) "Release criteria" includes the following:

(a) The defendant's employment status and history and his financial condition;

(b) The nature and extent of his family relationships;

(c) His past and present residences;

(d) Names of persons who agree to assist him in attending court at the proper time;

(e) The nature of the current charge;

(f) The defendant's prior criminal record, if any, and, if he previously has been released pending trial, whether he appeared as required;

(g) Any facts indicating the possibility of violations of law if the defendant is released without regulations;

(h) Any facts tending to indicate that the defendant has strong ties to the community; and

(i) Any other facts tending to indicate the defendant is likely to appear.

(7) "Release decision" means a determination by a magistrate, using release criteria, which establishes the form of the release most likely to assure defendant's court appearance.

(8) "Security release" means a release conditioned on a promise to appear in court at all appropriate times which is secured by cash, stocks, bonds or real property.

(9) "Surety" is one who executes a security release and binds himself to pay the security amount if the defendant fails to comply with the release agreement.

COMMENTARY

A. Summary

Section 237 defines eight terms that are unique to the release of defendants pending trial or upon appeal. The ninth term, "magistrate," incorporates the existing definition in ORS 133.030 to make it clear who has the authority to release defendants.

The term "bail" is not used in the Article because of the many meanings that have been attached to this one term. In some instances "bail" is a noun used to connote the amount of money or sureties necessary to free the defendant. In other instances, "bail" is a verb meaning to free someone from custody. In order to make the release of the defendant clear and understandable and to show the change in the philosophy of the release in defendants, the word "bail" is retired from active use in Oregon's criminal jurisprudence.

The change in philosophy is not a change in the Constitution as the Constitution grants every criminal the right to be released by sufficient sureties. The change is in effecting this right to release by sufficient sureties. The Article creates the presumption of personal recognizance release which can be overcome by a showing that the defendant is not likely to appear without more assurances.

Subsection (3) defines what personal recognizance is and subsection (6) defines what constitutes release criterion. The release criteria is essentially an assessment of community ties based on the assumption that if the accused has strong community ties, he is more likely to appear in court when directed. The magistrate must use release criteria in making a release decision determining the form of the release.

The magistrate can make personal recognizance release or a conditional release or a security release. The type of release will be decided at a release hearing and result in a release agreement between the court and the defendant. A security release can be secured by the defendant's assets or the assets of a friend or relative, a surety.

B. Derivation

Subsection (1) defines "conditional release" and is derived from the American Bar Association Standards Relating to Pretrial Release, § 5.2 (Approved Draft, 1968). See also, 18 USC, § 3146 (Bail Reform Act of 1966).

Subsection (2) defining "personal recognizance" is derived from § 1.4 (d) of the ABA Standards.

Subsection (3) defining "release" is partially an original draft and partially derived from ORS 140.030.

Subsection (5) defining "release agreement" is an original draft based on the concept that a defendant must have knowledge of the conditions of his release and is partially derived from 18 USC, § 3146 (a), and ORS 140.730.

Subsection (6) sets forth the release criteria which is derived from § 4.5 (d) of the ABA Standards and 18 USC, § 3146 (b).

Subsection (7) defines "release decision" and is based on § 5.1 *et seq.* of ABA Standards.

Subsection (8) defines "security release" and is based on § 5.3 of the ABA Standards.

Subsection (9) defines "surety" and is derived from 38 Ill Ann Stat, § 110-1.

C. Relationship to Existing Law

Subsection (1) defines conditional release, a term that is new to Oregon criminal procedure. Currently there is no specific statute that defines conditional release nor provides for different types of conditions upon release. Subsection (2) incorporates by reference the definition of magistrate contained in ORS 133.030.

The definition of "magistrate" is incorporated in this Article to clarify who has the judicial power to release defendants pending a trial. Also, the provisions of this Article would, conversely, apply to all judicial officers who would be releasing defendants.

Subsection (3) defines personal recognizance. Although ORS 140.710 through 140.750 authorizes a magistrate to release a defendant upon his personal recognizance, the current statutes do not define precisely what is "personal recognizance." The ABA commentary to section 1.4 (d) states:

> "Historically, a recognizance is a written acknowledgment of indebtedness executed to secure the performance of a promise, as for example, a promise to appear for trial. Upon default, the recognizance formed the basis for a judgment of debt against the defendant. However, the term 'release on own recognizance' has come to signify release without bail and, in most jurisdictions, does not involve the execution of a recognizance. It is used where there appears to be no need for financial security. Contemporary usage has so far departed from original concept that clarity is promoted by conforming to common understanding." At 30.

Subsection (4) defines "release" which is not specifically defined in current law but referred to in terms of "bail." ORS 140.040 (1) states that a magistrate in his discretion may ". . . discharge the defendant from custody . . . ." Also, the definition of "release" or "bail" is implicit in the provisions of ORS chapter 140 even though not specifically defined.

Subsection (5) defines "release agreement" which is not new to Oregon law. ORS 140.730 requires a defendant who is released on his own recognizance to execute a written agreement. However, the definition broadens the scope of release agreement and makes it applicable to every type of release.

Subsection (6) lists nine specific criteria that the releasing magistrate must use in his determination of release. Currently Oregon law has no criterion except the judge's discretion authorized in ORS 140.040. *Delaney v. Shobe,* 218 Or 626, 346 P2d 126 (1959), listed ten factors to be considered in fixing bail. These ten factors are essentially incorporated into the nine release criteria proposed by this draft. The factor of the character and strength of the evidence is not a draft criterion except in consideration of whether or not the offense is releasable in cases of murder and treason.

The formation and use of release criteria effect an individualization of the release determination. The state's interest in the timely appearance of the accused for trial competes with the interest of the defendant to be free from custody until convicted and help in the preparation of his defense. Currently, only the magistrate's discretion balances these interests. The criteria are aimed at creating a prediction model for the appearance of the defendant. The assumption underlying the criterion is that the defendant's roots in the community that give him a

stake in remaining in the vicinity and appearing when required. These are his residence, employment, his family ties, his financial condition as well as the familiar and often over-emphasized factors of the nature of the present charge and his prior criminal record. Similar criteria is employed in the Manhattan Bail Project, the Illinois bail provisions (38 Ill Ann Stat, § 110-5) and the Federal Bail Reform Act of 1966 (18 USC, § 3146).

Subsection (7) defines "release decision," a new term for Oregon criminal procedure. ORS 140.060 requires the magistrate to certify in writing his decision granting or denying the admission to bail. However, there is no specific statute that sets forth the definition of a release decision; the statutes merely state that the magistrate can decide whether or not a defendant may be released. ORS 140.040 states that a magistrate shall set bail if the defendant has been held to answer. Subsection (7) would not change the current law, but it would clarify the decision-making authority of the magistrate.

Subsection (8) defines "security release," a new term for an old procedure. ORS 140.310 through 140.340 sets forth the procedure for depositing money in lieu of an undertaking for bail. "Security release" is a term that includes money, stocks and real property. Although current law provides for deposit of real property, the procedure is cumbersome because it is an undertaking which must be examined by the court as to the sufficiency (ORS 140.100). The current law does not mention the placement of stocks and bonds as security but these equities would have to qualify within the undertaking provisions.

The new term of security release coupled with the later provisions do not change the idea of pledging assets to guarantee the appearance of the defendant. The posting and depositing of security for an appearance is made simpler and more explicit in the proposed draft, by eliminating the antiquated undertaking procedures and replacing it with modern and clear language.

Subsection (9) defines "surety" to distinguish this person from the defendant. The definition of surety changes current law in the respect that formerly the qualifications of bail were quite extensive (ORS 140.120). The current definition is modeled after the Illinois provision and merely states that any person with the asset in the appropriate amount may be a surety.

The Article will repeal the existing bail statutes in ORS chapter 140.

Section 238. Release Assistance Officer. (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 may either:

(a) 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, or

(b) If delegated release authority by the magistrate, make the release decision.

(3) The magistrate may appoint Release Assistance Deputies who shall be responsible to the Release Assistance Officer.

COMMENTARY

A. Summary

Section 238 creates the authority to appoint a Release Assistance Officer under the authority of a magistrate. The appointment of an officer is discretionary with the magistrate because he may be able to ascertain and verify the release criteria in open court without the assistance of another person.

If a Release Assistance Officer is appointed, his responsibility would be to interview the defendants detained in custody, verify the information obtained along the lines of the release criteria and make a release form recommendation to the magistrate. In addition, the magistrate may delegate the authority to make the release decision to the Release Assistance Officer.

B. Derivation

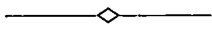
The section is derived from § 4.5 of the ABA Standards and D.C. Court Reform Act of 1970 (P.L. 91-358; D.C. Code Ann §§ 23-1301 *et seq.*).

C. Relationship to Existing Law

The provision is new. Most bail projects in the United States employ bail agencies in one form or another to conduct background inquiry of the defendants held in custody. The Manhattan Bail Project, the San Francisco Bail Project and the District of Columbia release procedure all use a bail agency to obtain, sort and verify information relevant to the defendant's release.

The provisions of this section are made discretionary with the magistrate because of the many varied situations among districts in Oregon. A magistrate in eastern Oregon may be very familiar with the defendant and would not need the services of a Release Assistance Officer. However, in metropolitan areas, the magistrates may not be familiar with the defendants and not be able to ascertain information very easily. Therefore, the magistrates will have to determine for themselves if they need a Release Assistance Officer.

The magistrate may appoint deputies to assist the Release Assistance Officer but the deputies are responsible to the Release Assistance Officer. If the magistrate desires that the Release Assistance Officer make the release decision, he may delegate this authority to the Release Assistance Officer. The delegation of the release authority would alleviate the judicial load of magistrates in the metropolitan areas of Oregon.



Section 239. Releasable offenses. (1) Except as provided in subsection (2) of this section, a defendant shall be released in accordance with sections 237 to 248 of this Act.

(2) When the defendant is charged with murder or treason, release shall be denied when the proof is evident or the presumption strong that the person is guilty.

(3) The magistrate may conduct such hearing as he considers necessary to determine whether, under subsection (2) of this section, the proof is evident or the presumption strong that the person is guilty.

COMMENTARY

A. Summary

Section 239 embodies the constitutional right to be released from custody pending trial. However, the right is qualified by the non-releasable offenses of treason and murder. The section provides that a person will not be released if he is accused of treason or murder when the proof is evident. The magistrate may also conduct a hearing to determine if the proof is strong enough to prevent a release.

B. Derivation

Subsection (1) is based upon Oregon Const. Art I, § 14, and ORS 140.030. Subsection (2) is derived from Oregon Const. Art I, § 14, ORS 140.020 and 38 Ill Ann Stat 110-4. Subsection (3) is an original draft.

C. Relationship to Existing Law

Subsection (1) restates the existing law in different language. Presently, ORS 140.030 sets forth the right to bail when the offense is not murder or treason. The right to bail extends to pretrial release and post conviction appeal by incorporation of the definition in section 1 of "release." The right to bail is a constitutional right embodied in the Oregon Const. Art. I, § 14, which is codified in this section.

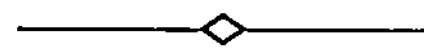
Subsection (2) follows the dictates of the Oregon Const. Art. I, § 14, which makes murder and treason non-bailable offenses ". . . when the proof is evident, or the presumption strong." However, the Oregon Supreme Court in *State ex rel Connall v. Roth*, 258 Or 428, 482 P2d 740 (1971), stated that the mere showing of the indictment for murder was not sufficient proof or presumption of guilt to deny release. The court went on to say that:

> "Bail should be denied when the circumstances disclosed indicate 'a fair likelihood' that the defendant is in danger of being convicted of murder or treason." 92 Adv Sh at 425.

Subsection (2) is an amalgam of the Illinois statute, the Oregon Constitution and ORS 140.020. The

new language is used to clearly indicate the crimes not releasable and the amount of proof that must be shown without changing the current law.

Subsection (3) gives the magistrate authority to conduct a hearing to determine if a murder or treason defendant should be released pending his trial.



Section 240. Release decision. (1) Except as provided in subsection (2) of section 239 of this Act, a person in custody shall have the immediate right to security release or shall be taken before a magistrate without undue delay. If the person is not released under the provisions of section 245 of this Act, or otherwise released before his arraignment, the magistrate shall advise the person of his right to a security release as provided in section 244 of this Act.

(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.

COMMENTARY

A. Summary

Section 240 is the activating section that requires that the defendant be brought before a magistrate without delay and that a release decision shall be made within 48 hours after arraignment if the defendant has not requested a security release. The section creates the presumption of personal recognizance release which can be rebutted by a showing that release criteria indicate the defendant is not reasonably likely to appear.

The section gives the magistrate authority to fashion a form of release that will reasonably assure the appearance of the defendant in court. Either a security release or a conditional release may be used by the magistrate, keeping in mind that criminal sanctions should be primarily used instead of financial loss to assure the appearance of the defendant.

B. Derivation

Subsection (1) is partially derived from ABA Standards § 4.1 and subsections (3) and (4) are derived from § 5.2 (a). Subsection (2) is an original draft. Subsection (3) is derived from 38 Ill Ann Stat, § 110-2.

C. Relationship to Existing Law

Subsections (1) and (2) create a time limit for the release decision by the magistrate. The specific time is new to Oregon law but is consistent with the philosophy that a defendant should not be needlessly placed in custody pending a trial. Current law, ORS 135.190, requires the arresting officer to take the defendant before a magistrate of the county wherein the arrest is made; however, there is no specific time limitation.

The ABA Standards state that the arrested person should be taken before a judicial officer without "unnecessary delay." The Model Code of Pre-Arraignment Procedure (MCPP) § 4.06 (1) (Tent. Draft No. 1, 1966) states that the defendant: ". . . shall be brought before a judicial officer at the

earliest time after the issuance of such complaint that such an officer is available."

Subsections (1) and (2) clarify the right to immediate release upon the deposit of sufficient security. The Oregon Constitution in Art. I, § 14, states that all offenses, other than murder or treason, shall be bailable by sufficient sureties. Therefore a criminal defendant has the right to release if he deposits a security with the court that is sufficient. To delay this may be to deny a constitutional right.

Section 245 will empower the magistrate to prescribe security amounts for criminal offenses. The deposit of the prescribed amounts will, of itself, be considered a sufficient surety since the magistrate previously decided that this particular amount is sufficient for this particular offense. The defendant may deposit the prescribed amount or wait for a release decision if his circumstances may result in a personal recognizance release.

In any event, the magistrate must make a release decision within 48 hours after the arraignment. The arraignment time provision, ORS 135.010, is proposed to be amended to provide for arraignment within 36 hours, excluding Saturdays, Sundays and holidays, but not later than 96 hours after being placed in custody. The net result of the speedy arraignment will be a speedy release decision based on release criteria which evidence community ties and should reasonably indicate the likelihood of future court appearance.

Subsection (3) creates a presumption in favor of personal recognizance release, thereby reversing the present statutory procedure in ORS 140.720. Present procedure places the burden of showing "good cause" for recognizance release upon the defendant. The new procedure will first define what "good cause" is through the establishment of the release criteria. Second, the new procedure will presume that the defendant will be released on his own recognizance unless release criteria indicate otherwise. Thus the burden for showing that the defendant will not appear falls on the very person who desires to keep the person in custody, the district attorney. The burden of showing that the defendant will not appear also falls on the magistrate because he must examine the release criteria to ascertain whether the defendant has any community ties and is not likely to flee.

The creation of this presumption is favored by the ABA and is the approach used in the Bail Reform Act of 1966 (18 USC, § 3146). The presumption is also logically in line with the American jurisprudential concept of innocence until proof of guilt. A person is innocent until proven guilty and therefore should not be incarcerated until the guilt is proven.

Subsection (4) gives the magistrate authority to impose conditional or security release when the release criteria show that the defendant does not have sufficient community ties and therefore is likely not to appear in court when directed.

Subsection (5) is taken from the Illinois Bail Statute (38 Ill Ann Stat 110-2) which was written so that non-monetary release would be used more in the prosecution of criminal cases. The commentary to the Illinois statute stated that:

> "If history may be relied upon, penal sanctions will be more effective than financial loss, especially when applied promptly."

Subsections (3), (4) and (5) are premised on Oregon Const. Art. I, § 16: "Excessive bail shall not be required . . . ." Oregon Const. Art. I, § 14, requires that "Offences (sic) except murder, and treason, shall be bailable by sufficient sureties."

The imposition of the least onerous condition that will assure the defendant's appearance is the statutory response to the prohibition of excessive bail. The reliance upon criminal sanctions instead of financial loss to assure defendant's appearance corresponds to the constitutional requirement of release by sufficient sureties.

When the magistrate lacks any release criteria information concerning the defendant's community ties, the magistrate is not required to release the defendant on his own recognizance. This situation may occur when the criminal defendant is a transient and knows no one in town or nearby. Here, the lack of information will be an affirmative fact which would allow the magistrate to make a conditional release or a security release in lieu of a recognizance release.

ORS 135.130, 135.190 to 135.210 would be repealed.

Section 241. General conditions of release agreement. (1) If a defendant is released before judgment, the conditions of the release agreement shall be that he will:

(a) Appear to answer the charge in the court having jurisdiction on a day certain and thereafter as ordered by the court until discharged or final order of the court;

(b) Submit himself to the orders and process of the court;

(c) Not depart this state without leave of the court; and

(d) Comply with such other conditions as the court may impose.

(2) If the defendant is released after judgment of conviction, the conditions of the release agreement shall be that he will:

(a) Duly prosecute his appeal as required by ORS 138.005 to 138.500;

(b) Appear at such time and place as the court may direct;

(c) Not depart this state without leave of the court;

(d) Comply with such other conditions as the court may impose; and

(e) If the judgment is affirmed or the cause reversed and remanded for a new trial, immediately appear as required by the trial court.

COMMENTARY

A. Summary

Section 241 sets forth the general conditions of all releases of defendants before trial and during appeal. These conditions are implicit in the release of any defendant pending trial but for clarity purposes are stated in statutory form.

B. Derivation

The section is derived from the Illinois bail provisions, 38 Ill Ann Stat, § 110-10.

C. Relationship to Existing Law

Current Oregon law does not explicitly state any general conditions for the release of a defendant. However, the forms of undertaking of bail contain a promise by those who undertake to bring the defendant to the appropriate court for prosecution at the appointed time (ORS 140.100).

The proposed draft explicitly states the general contents of the release agreement that the defendant shall agree to before he is released from custody. The codifying of the general conditions accomplishes two purposes. First, it standardizes all release agreements along explicit conditions so every releasing magistrate will have knowledge of the general conditions. Second, the general conditions will place the defendant on notice of the existence of his responsibilities when he is released from the custody of the law.

Section 242. Release agreement. (1) The defendant shall not be released from custody unless he files with the clerk of the court in which the magistrate is presiding a release agreement duly executed by the defendant containing the conditions ordered by the releasing magistrate or deposits security in the amount specified by the magistrate in accordance with sections 237 to 248 of this Act.

(2) A failure to appear as required by the release agreement shall be punishable as provided in ORS 162.195 or 162.205.

(3) "Custody" for purposes of a release agreement does not include temporary custody under the citation procedures of ORS 133.045 to 133.080.

COMMENTARY

A. Summary

Section 242 requires the defendant to file either a release agreement with the court or deposit security with the court before he is released from custody. A failure to appear in court when directed constitutes the crime of bail jumping as defined in ORS 162.195 and 162.205.

B. Derivation

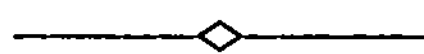
Subsection (1) is derived from ORS 140.730 and 38 Ill Ann Stat, § 110-2.

C. Relationship to Existing Iaw

The section does not change current law, ORS 140.730, which requires the defendant to file a written agreement with the clerk of the court agreeing to the general conditions of release. However, the proposed section makes it clear that breach of the agreement by a failure to appear will constitute a crime.

Many bail projects have released defendants on their personal recognizance and have good appearance rates. Denver released 1,492 defendants with 28 not appearing. The District of Columbia released 1,213 defendants with 35 not appearing. New York released 6,732 defendants with only 79 not appearing. Therefore, one of the premises of the Illinois bail revision is substantiated:

> "This approach involves three fundamental premises: (1) Factual studies prove that the great majority of persons released on bail have no intention of violating bail and will appear for trial. * * *" Commentary, 38 Ill Ann Stat, Art 110.



Section 243. Conditional release. Conditional release may include one or more of the following conditions:

(1) Release of the defendant into the care of a qualified person or organization responsible for supervising the defendant and assisting him in appearing in court. The supervisor shall not be required to be financially responsible for the defendant, nor to forfeit money in the event he fails to appear in court.

(2) Reasonable regulations on the activities, movements, associations and residences of the defendant.

(3) Release of the defendant from custody during working hours.

(4) Any other reasonable restriction designed to assure the defendant's appearance.

COMMENTARY

A. Summary

Section 243 creates conditions for the release of a defendant when personal recognizance is unwarranted. The conditions are in addition to the general conditions imposed pursuant to section 241. The conditions include release to a qualified person or organization for supervision, regulations on the defendant's associations and residences, work release and any other reasonable restrictions designed to assure the defendant's appearance.

B. Derivation

Section 243 is derived from ABA Standards, § 5.2 (b).

C. Relationship to Existing Law

The section is new to Oregon law as there is no current provision authorizing release upon certain conditions of the defendant's activities and associations. However, the concept of supervisors is not new. ORS 140.100 through 140.200 provide for an undertaking of bail. The current law allows another two persons to promise to produce the defendant at the appropriate time. The person who undertakes must promise to pay a certain amount of money if the defendant fails to appear when required by the court.

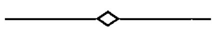
The new provisions would continue the concept of private persons undertaking to supervise the de-

fendant but would not require the supervisors to pay any money to the court when the defendant fails to appear. However, if the supervisor(s) knowingly aid in the flight of the defendant they can be punished under the contempt power of the court as authorized by § 248.

The ABA commentary states:

"The proposal grows out of the discovery by bail projects that frequently a friend, relative, employer, or perhaps clergyman would agree to help the defendant appear in court when required. Where closer and more authoritative supervision is necessary, the defendant may be required to report to a probation officer who is empowered to impose reasonable restrictions on him." At 57.

The Bail Reform Act of 1966 provides for reasonable restrictions that include: ". . . a condition requiring that the person return to custody after specified hours." 18 USC, § 3146 (a)(5). Subsection (3) sets forth the authority of the magistrate to impose this condition if he deems it necessary.



Section 244. Security release. (1) If the defendant is not released on his personal recognizance under section 242 of this Act, or granted conditional release under section 243, or fails to agree to the provisions of the conditional release, the magistrate shall set a security amount that will reasonably assure the defendant's appearance. The defendant shall execute the security release in the amount set by the magistrate.

(2) The defendant shall execute a release agreement and deposit with the clerk of the court before which the proceeding is pending a sum of money equal to 10 percent of the security amount, but in no event shall such deposit be less than $25. Upon depositing this sum the defendant shall be released from custody subject to the condition that he appear to answer the charge in the court having jurisdiction on a day certain and thereafter as ordered by the court until discharged or final order of the court. Once security has been given and a charge is pending or is thereafter filed in or transferred to a court of competent jurisdiction the latter court shall continue the original security in that court subject to sections 246 and 247 of this Act. When conditions of the release agreement have been performed and the defendant has been discharged from all obligations in the cause, the clerk of the court shall return to the accused, unless the court orders otherwise, 90 percent of the sum which has been deposited and shall retain as security release costs 10 percent of the amount deposited. The amount retained by a clerk of the court shall be deposited into the county treasury, except that the clerk of a municipal court shall deposit the amount retained into the municipal corporation treasury. However, in no event shall the amount retained by the clerk be less than $5 nor more than $100. At the request of the defendant the court may order whatever amount is repayable to defendant from such security amount to be paid to defendant's attorney of record.

(3) Instead of the security deposit provided for in subsection (2) of this section the defendant may deposit with the clerk of the court an amount equal to the security amount in cash, stocks, bonds, or real or personal property situated in this state with equity not exempt owned by the accused or sureties worth double the amount of security set by the magistrate. The stocks, bonds, real or personal

property shall in all cases be justified by affidavit. The magistrate may further examine the sufficiency of the security as he considers necessary.

COMMENTARY

A. Summary

Section 244 sets forth the authority of the magistrate to set a certain amount of money as security for the appearance of the defendant. The defendant can deposit 10 percent of the security amount with the clerk of the court, deposit the full cash amount, or deposit stocks, bonds, real or personal property as security for his appearance. The defendant will receive a refund of 90 percent of the amount deposited under the 10 percent deposit plan if he appears and performs his responsibilities. The remaining amount of money will be retained by the clerk for administrative expenses.

B. Derivation

The section is derived from 38 Ill Ann Stat, §§ 110-7 and 110-8. Subsection (3) is partially derived from ORS 140.130 and 140.140.

C. Relationship to Existing Law

This section is new and provides for the 10 percent deposit as security for appearance. Current law, ORS 140.310 through 140.340, allows for a deposit of money instead of an undertaking of bail. However, this deposit of money must be in the full amount of the security amount. The current practice in Oregon allows for a commercial surety, or bondsman, to provide the full security amount for the release of the defendant. The premiums vary according to the amount of the bond but are generally around 10 percent of the face amount. However, the premium amount is not refunded when the defendant appears as directed by the court.

In 1962 there were 51,161 commercial surety bail bonds written in the Municipal Court of Chicago and 5,487 forfeited for a forfeiture rate of 10.7 percent. After the institution of the 10 percent deposit system, the number of ten percent deposit bonds in Chicago for 1968 was 81,989 with 8,856 forfeitures for a rate of 10.7 percent. In 1969 there were 94,202 deposit bonds with 10,402 forfeitures for a default rate of 11.7 percent. (Statistics summarized from Murphy, Revision of State Bail Laws, 32 Ohio State Law J 451 (1971)).

The Illinois system proved as effective as the previous commercial bond system where there was no refund of the deposit or premium. The ABA Standards § 5.3 recommend the adoption of the 10 percent system.

A portion of subsection (2) which provides for the continuance of the security amount from one court to another changes the current Oregon law. ORS 140.050 (2) does not provide for the continuance of "bail" after the indictment of the defendant. When a defendant is released by the district court and later indicted the bail must be set by the circuit court. In some instances where a preliminary hearing was held but the district attorney chose to seek an indictment and not appear at the preliminary hearing, the original bail is dismissed by the district court only to be reset by the circuit court pursuant to the indictment. The result is that an indicted defendant must pay two 10 percent premiums to keep his freedom, neither of which is refundable. The proposed change would provide for the continuance of the security amount from one court to another.

The proposed draft changes slightly one of the provisions of the Illinois statute. The proposal places an upper limit on the dollar amount that can be retained by the clerk for administrative purposes. Although no information is available as to the cost of administering the deposit system, $100 would appear to be sufficient to handle the papers involved in the processing of the deposit bond. Illinois has no upper limit, only the lower limit of $5.

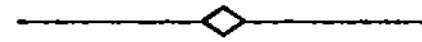
The proposal follows Illinois' proposal in giving the option of the form of security to the defendant. Illinois defendants, during 1968, generally favored the cash bail system with 60 percent depositing the full cash amount, 35 percent making the 10 percent deposit, and five percent released on personal recognizance. (See, 32 Ohio State L J at 479).

Subsection (3) allows the defendant to deposit cash, stocks, bonds, real or personal property in lieu of the 10 percent cash deposit. The property deposited could be cash in the full amount of the security, or stocks, bonds, real estate, or any other property of ascertainable value. The property so deposited must be justified by affidavit and the magistrate may examine the degree and form of ownership of the property as he considers necessary.

The requirement that sureties be worth double the amount of security set means that if a person deposits $5,000 for the defendant, he must be worth $10,000. If the defendant were to deposit the $5,000 from his own assets, he does not have to be worth twice the amount. The reason for this requirement is to prevent bankrupting a surety and therefore jeopardizing the security deposited with the court.

The Commission intends that the security amount

set by the magistrate be the amount the magistrate considers reasonable to assure the appearance of the defendant. The Commission discourages the concept of establishing the security amount 10 times the amount that the magistrate considers necessary to assure appearance because the defendant may only deposit 10 percent of the security amount. The concept of setting the security amount 10 times higher would be counter to the intent and spirit of this Article and should not be followed.



Section 245. Taking of security. When a security amount has been set by a magistrate for a particular offense or for a defendant's release, any person designated by the magistrate may take the security and release the defendant to appear in accordance with the conditions of the release agreement. The person designated by the magistrate shall give a receipt to the defendant for the security so taken and within a reasonable time deposit the security with the clerk of the court having jurisdiction of the offense.

COMMENTARY

A. Summary

Section 245 allows any person designated by the magistrate to take the deposit of security and release the defendant. The security must be turned over to the clerk of the court having jurisdiction over the offense. The section also gives the magistrate the authority to establish a security release schedule.

B. Derivation

The section is derived from 38 Ill Ann Stat § 110-9.

C. Relationship to Existing Law

The current provisions of ORS chapter 140 only allow the deposit of the bail security with the clerk of the court. However, practice in some counties, like Marion County, allows the sheriff to take the bail money and subsequently turn it over to the court clerk.

The magistrate may designate any person who would be convenient to the correctional facility to take the deposit of security. In many locations, this person will be a deputy sheriff or a municipal policeman. However, in Lane County, the correctional facility is staffed by correctional officers who are not peace officers. Their only duty is with the correctional facility and they do not engage in peace officer activities. Therefore, the section provides the authority for the magistrate to appoint whomever he thinks is proper according to the circumstances.

The use of a security release schedule will allow a person to post a security amount even though he may qualify for personal recognizance release. The security release will, in most cases, be much quicker than a personal recognizance release. The personal recognizance release, at a minimum, will take a few hours to several days for verification of information and a hearing before a magistrate. In instances where the magistrate has delegated the authority to release to a Release Assistance Officer, the time delay for a personal recognizance release may not be very great.

However, a security release schedule runs the risk of excluding persons from release who cannot pay the scheduled amount. Here, the interest in speedy release competes against the constitutional interest of the defendants to have a hearing on the release decision and to have equal treatment in the application of the state bail laws. Recently, a federal court in Florida held that the bail schedule in Dade County violated the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. The court, in *Ackies v. Purdy*, 322 F Supp 38 (S.D. Fla 1970), found that defendants who cannot afford the scheduled amount remain in jail from three days to three weeks before a judicial appearance. During a two year period:

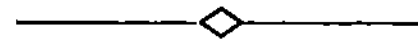
> ". . . a minimum of 680 persons were incarcerated in the Dade County Jail because of their inability to post the master bail bond for approximately 30 days between the time of arrest and their first appearance before a judicial officer." 322 F Supp at 40.

The court in *Ackies* went on to state that the complete loss of liberty for days or weeks for the group of defendants who could not afford the scheduled bail was a "fundamental interest" of the defendant's which could be restricted by the operation of the state bail schedule only if a compelling

state interest supported the restriction. The court found no such interest and stated:

"A poor man with strong ties in the community may be more likely to appear than a man with some cash and no community involvement." 322 F Supp at 42. (See also, Murphy, Revision of State Bail Laws, 32 Ohio State L J 451, 481 (1971).)

The problem of unnecessary pretrial incarceration outlined in *Ackies* should not appear in Oregon if the 36 hour arraignment rule coupled with the time provisions of section 240 are implemented and adopted. If no security release schedule is implemented then the magistrate could be available for immediate release decision. His availability could either be physical presence or through a telephonic hearing. The institution of a security release schedule will fully insure the right of the defendant to be released upon the deposit of sufficient sureties provided in Oregon Const. Art. I, § 14. (See commentary to section 240.)



Section 246. Forfeiture and apprehension. (1) Upon failure of a person to comply with any condition of a release agreement or personal recognizance, the court having jurisdiction may, in addition to any other action provided by law, issue a warrant for the arrest of the person at liberty upon a personal recognizance, conditional or security release.

(2) A warrant issued under subsection (1) of this section by a municipal officer as defined in subsection (6) of ORS 133.030 may be executed by any peace officer authorized to execute arrest warrants.

(3) If the defendant does not comply with the conditions of the release agreement, the court having jurisdiction shall enter an order declaring the security to be forfeited. Notice of the order of forfeiture shall be given forthwith by personal service, by mail or by such other means as are reasonably calculated to bring to the attention of the defendant and, if applicable, his sureties, the order of forfeiture. If the defendant does not appear and surrender to the court having jurisdiction within 30 days from the date of the forfeiture or within such period satisfy the court that appearance and surrender by the accused is impossible and without his fault, the court shall enter judgment for the state against the defendant and, if applicable, his sureties, for the amount of security and costs of the proceedings.

(4) 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 244 of this Act. The cash shall be used to satisfy the judgment and costs and paid into the treasury of the municipal corporation wherein the security release was taken if the offense was defined by an ordinance of a political subdivision of this state, or into the treasury of the county wherein the security was taken if the offense was defined by a statute of this state. The provisions of this section shall not apply to:

(a) Money deposited pursuant to ORS 484.150 for a traffic offense;

(b) Money deposited pursuant to ORS 488.220 for a boating offense;

(c) Money deposited pursuant to ORS 496.905 for a fish and game offense.

(5) The stocks, bonds, personal property and real property shall be sold in the same manner as in execution sales in civil actions and the proceeds of such sale shall be used to satisfy all court costs, prior encumbrances, if any, and from the balance a sufficient amount to satisfy the judgment shall be paid into the treasury of the municipal corporation wherein the security was taken if the offense was a crime defined by an ordinance of a political subdivision of this state, or into the treasury of the county wherein the security was taken if the offense was a crime defined by a statute of this state. The balance shall be returned to the owner. The real property sold may be redeemed in the same manner as real estate may be redeemed after judicial or execution sales in civil actions.

COMMENTARY

A. Summary

Section 246 provides for the procedure on the forfeiture of the security amount and the apprehension of the defendant who fails to comply with conditions of the release agreement.

B. Derivation

Subsection (1) is derived from 38 Ill Ann Stat, § 110-3. Subsection (2) is a Commission modification on the Illinois provision. Subsection (3) is derived from 38 Ill Ann Stat, § 110-7 (g) and 110-8 (g). Subsections (4) and (5) are derived from 38 Ill Ann Stat § 110-8(h).

C. Relationship to Existing Law

The current provisions of ORS 140.510 to 140.530 provide for the arrest of a defendant who does not comply with the provisions of his release. The proposed subsection (1) provides for the same result as current law but simplifies the language. The provision in ORS 140.510 (3) is not incorporated into the current proposal. This subsection provides for arrest at any time after an indictment is issued after a defendant has been released. There appears to be no purpose in arresting a person who has already been released merely because of an indictment.

Subsection (2) would permit municipal court bench warrants upon failure of a defendant to appear to be served anywhere in the state. Otherwise, a municipal judge may be reluctant to grant a recognizance release because of inability to secure the later attendance of the defendant.

Subsection (3) follows the current law stated in ORS 140.620 in allowing 30 days of grace for a forfeiting defendant. However, the proposed subsection delineates the guidelines for grace as being ". . . appearance and surrender by the accused is impossible and without his fault . . . ." ORS 140.620 states that the defendant must satisfactorily excuse his failure to appear. The proposed section provides for notice to the defendant and, if applicable, his sureties in the case of forfeiture. Present law does not provide for any statutory notice.

The present law allows for a discharge of the deposit upon such terms as are just (ORS 140.620). The proposed section states that once the forfeiture is inexcusable, then the total security amount plus the costs of the proceedings must be entered as a judgment against the defendant, and, if applicable, his sureties.

Subsections (4) and (5) provide specific procedure for the enforcement of the security release agreement that has been forfeited by the defendant. Current law, ORS 140.630, states that the district attorney may proceed by action only against the bail upon their undertaking. In cases of money deposited as security, the current law provides that such bail be deposited with the county treasurer. The proposed procedure provides that the money shall be deposited with the county treasurer when the crime was a state crime and deposited with the city if the crime was defined by a city ordinance.

Current law makes no specific provision for the disposition and method of forfeiture enforcement for stocks, bonds and real property. The proposed subsection (5) incorporates the civil method of execution sales and a disposition similar to the disposition of money security that has been forfeited.

The dispositions of fines for various violations

are provided for in different ORS sections and are to be distinguished from the forfeiture of release security. The forfeiture of release security does not exonerate the state's cause of action against the defendant. The state can still arrest a defendant who has forfeited the security and bring him to arraignment.

The forfeiture and disposition of money provisions of subsection (4) do not apply to the deposit of security or bail for minor violations of the traffic laws (ORS ch 484), the boating laws (ORS ch 488), or the fish and game laws (ORS ch 496). The deposit of money instead of appearance for a minor offense does not involve custody; therefore the provisions of this Article will not apply. It follows that the disposition of money deposited for a minor violation will not be distributed in accordance with this section.

Subsection (4) clarifies this procedure on two points. First, it applies to a judgment on security given for a release. The money deposited in lieu of appearance for a minor offense is *not* security given for a release from custody. Second, the last part of the subsection specifically excludes money deposited for minor offenses cited under the uniform citation procedure.

Section 247. Release decision review and release upon appeal. (1) If circumstances concerning the defendant's release change, the court, on its own motion or upon request by the district attorney or defendant, may modify the release agreement or the security release.

(2) After judgment of conviction in municipal, justice or district court, the court shall order 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.

COMMENTARY

A. Summary

Section 247 provides for a discretionary review of the terms of the release agreement and the amount of security deposited. The review would be with the court that has jurisdiction over the defendant. In cases where the release decision is made in district court, district court may review its decision unless the case has been transferred to the circuit court which could then review the release decision. The section also provides for release pending appeal. Any party may appeal the granting of release pending the appeal from conviction seeking a decrease or increase in conditions or security.

B. Derivation

Subsection (1) is an original draft. Subsection (2) is derived from 38 Ill Ann Stat, § 110-7 (d), and ORS 140.030.

C. Relationship to Existing Law

Subsection (1) would modify the current provisions of ORS 140.070 in preventing an appeal to the circuit court upon a bail matter. Subsection (1) would allow the circuit court to review the release decision only if it had jurisdiction over the defendant. The intent of subsection (1) is to allow the defendant to request a change in the conditions of release at any time so long as there are circumstances which would indicate a different form of release or amount of security is warranted. ORS 140.090, preventing reapplication for bail after a denial, and 140.990, making such reapplication punishable as contempt, would be repealed. The district attorney may also request a change if, for example, a more serious crime is later charged.

The reassertion of the release decision for a modification will be made only at the trial court level and will not be appealable unless there is an abuse of discretion by the magistrate. If the magistrate abused his discretion, the defendant could seek relief through mandamus.

Subsection (2) changes the current law of ORS 140.030 from the right of the defendant to release upon an appeal to release upon appeal subject to the discretion of the court. The only instances where there will be a right to release upon appeal is an appeal from the lower trial courts to the circuit court for a trial de novo. If the defendant appeals from his conviction in circuit court, the court may grant release subject to its discretion.

Section 248. Penalties. (1) A supervisor of a defendant on conditional release who knowingly aids the defendant in breach of the conditional release is punishable by contempt.

(2) A defendant who knowingly breaches any of the regulations in his release agreement imposed pursuant to section 243 of this Act is punishable by contempt.

COMMENTARY

A. Summary

Section 248 provides penalties for a defendant who breaches the conditions of his release agreement and any supervisor who knowingly aids the defendant in any breach of the release agreement.

B. Relationship to Existing Law

The current law punishes a person by contempt if he applies for release after it has been denied. This provision is not continued in the new proposal. The proposed penalties of contempt are to prevent an agreement by a supervisor who intends to aid in the escape of the defendant and merely enters the release agreement to effect the escape of the defendant. The current provisions of ORS 140.100 require those who undertake to pay money if the accused does not appear. Since the money basis is eliminated, there must (or should) be some penalty to prevent the situation of the conspiring supervisor.

The defendant can be arrested under a warrant if he breaches the conditions of his release agreement. However, the arrest is only to reconsider the conditions of the release agreement and, if the breach is substantial, to arrest the defendant for the crime of bail jumping. However, if the defendant's appearance date has not occurred and he breaches a regulation of residence laid down in the release agreement, then contempt could be the appropriate penalty because the defendant has not committed a crime for failure to appear. The contempt proceeding, under ORS 33.010 (1)(i), would be available to ensure that the defendant followed the conditions of the release agreement.

Subsection (2) gives the magistrate a choice of a lesser punishment than revoking the defendant's release. The magistrate may impose a fine, require imprisonment, or merely admonish the defendant. Subsection (2) will give the magistrate flexibility in dealing with the myriad situations that will occur in the release of defendants pending trial.

ARTICLE 9. PLEADINGS AND RELATED PROCEDURES

Defendant's Answer Generally

Section 249. ORS 135.420 is amended to read:

135.420. **Types of answer.** If the defendant does not require time, as provided in [*ORS 135.410*] **section 259 of this 1973 Act,** or if he does, then on the next day or at such further day as the court may have allowed him, he may, in answer to the arraignment, move [*the court to set aside*] **against** the [*indictment*] **accusatory instrument** or demur or plead thereto.

COMMENTARY

The amendments are to make the section consistent with the sections on plea discussions and agreements, and with other amendments relating to accusatory instruments.

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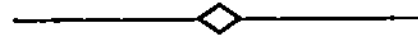
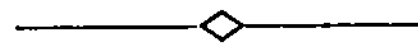
COMMENTARY

The amendments are to make the section consistent with the sections on plea discussions and agreements, and with other amendments relating to accusatory instruments.

Section 250. (ORS 135.430) Types of pleading. The only pleadings on the part of the defendant are the demurrer and plea.



Section 251. (ORS 135.450) Pleading a judgment. In pleading a judgment or other determination of or proceeding before a court or officer of special jurisdiction, it is not necessary for the defendant to state the facts conferring jurisdiction; but the judgment, determination, or proceeding may be stated to have been duly given or made. The facts conferring jurisdiction, however, must be established on the trial.



Plea

Section 252. Pleading by defendant; alternatives. (1) The kinds of plea to an indictment, information or complaint, or each count thereof, are:

(a) Guilty.

(b) Not guilty.

(c) No contest.

(2) A defendant may plead no contest only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

COMMENTARY

The pleas provided for in paragraphs (a) and (b) of subsection (1) are the same as in ORS 135.820. The existing statute refers only to pleas to an indictment, whereas the proposed section includes the other charging instruments of informations and complaints. The section also specifically provides for a plea to a part of an indictment, *i.e.*, a "count," in order to codify the common practice of pleading separately to individual counts in an indictment or complaint.

Paragraph (c) represents the most radical departure from the existing statute and was written into the section to provide for an "Alford" type of plea. In *North Carolina v. Alford*, 400 US 25 (1970), the Supreme Court held that a first degree murder defendant's protestations of innocence did not bar the acceptance of his plea of guilty to second degree murder that was made with advice of counsel, was supported by substantial prosecution evidence of guilt and was motivated by a desire to avoid the death penalty, since the Fourteenth Amendment does not require the admission of guilt as a prerequisite to the acceptance of guilty pleas.

In spite of the *Alford* decision, there apparently is no assurance in Oregon that a particular judge will accept such a plea, and paragraph (c) is an attempt to formally provide for the use of the plea. The standards to be followed by the court are set forth in a later section.

The ABA Standards Relating to Pleas of Guilty § 1.1 (Approved Draft 1968) contain a thorough dismussion of the differing views for and against the nolo contendere plea, concluding that:

"First, the case for the nolo plea is not strong enough to justify a minimum standard supporting its use. Second, because use of the plea contributes in some degree to the avoidance of unnecessary trials (a major goal in these standards), the minimum standards should not proscribe use of the nolo plea. Finally, because some risks are involved in accepting nolo pleas without suf-

ficient inquiry, it is necessary in these standards to establish safeguards to govern the taking of the nolo plea . . . ." (Commentary p. 16).

The Commission believes that the utility of a no contest plea outweighs any potential disadvantage, particularly in light of the *Alford* decision which came some two years after the ABA Standards were drafted. Federal Rule 11 and ABA Standards § 1.1 (b) are the sources of subsection (2) which makes it clear that a defendant may not plead no contest as a matter of right, and that acceptance of the plea is discretionary with the court under the criteria set forth.

Section 253. Legal effect of plea of no contest. A judgment following entry of a no contest plea is a conviction of the offense to which the plea is entered.

COMMENTARY

As noted in the commentary to section 252, the purpose of the "no contest" plea is to provide for more flexibility in the criminal pleading process, particularly in the "Alford" type of case. The plea, however, would be considered to have the same force and effect as a "guilty" plea.

Section 254. ORS 135.830 is amended to read:

135.830. **Presentation of plea; entry in journal; form.** Every plea shall be oral and shall be entered in the journal of the court in substantially one of the following forms:

(1) "The defendant pleads that he is guilty of the crime charged in this indictment."

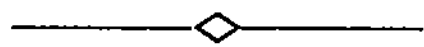
(2) "The defendant pleads that he is not guilty of the crime charged in this indictment."

[*(3) "The defendant pleads that he has already been convicted (or acquitted, as the case may be) of the crime charged in this indictment by the judgment of the court of ——— (naming it), rendered at ——— (naming the place), on the —— day of ———, 19——."*]

(3) "The defendant pleads no contest to the crime charged in this indictment."

COMMENTARY

The amendment is consistent with the proposal for a "no contest" plea and the proposal to deal with former jeopardy by a motion.



Section 255. ORS 135.840 is amended to read:

135.840. **Special provisions relating to presentation of plea of guilty and no contest.** (1) Except as provided in subsection (2) of

this section, a plea of guilty **or no contest to a crime punishable as a felony** shall in all cases be put in by the defendant in person in open court unless upon an [*indictment*] **accusatory instrument** against a corporation, in which case it may be put in by counsel.

(2) Any circuit judge may, within any county in his own district other than the county where the accusation is pending, accept pleas of guilty **or no contest** from persons charged with [*felonies*] **a crime punishable as a felony** and pass sentence thereon upon written request of the accused and his attorney and upon not less than one day's notice to the district attorney. All orders entering such pleas and such sentences shall be as effective as though heard and determined in open court in the county where the accusation is pending and shall be transmitted by the judge to the clerk of the court in the county where the accusation is pending, whereupon the same shall be filed and entered and become effective from the date of filing thereof.

COMMENTARY

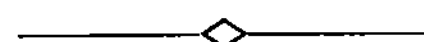
The amendments conform the section to other sections of this draft and to other provisions relating to guilty and no contest pleas. The requirement that the plea be put in by the defendant is limited to felonies, although the provisions covering plea agreements may require a defendant to plead in person in order that he may be completely apprised of his rights even though charged only with a misdemeanor.

Section 256. ORS 135.850 is amended to read:

138.850. **Withdrawal of plea of guilty or no contest.** The court may at any time before judgment, upon a plea of guilty **or no contest,** permit it to be withdrawn and a plea of not guilty substituted therefor.

COMMENTARY

The section contains a conforming amendment. Additional provisions regarding withdrawal of a plea that results from a plea agreement are set forth in section 266.



Section 257. ORS 135.860 is amended to read:

135.860. **Not guilty plea as denial of allegations of indictment.** The plea of not guilty controverts and is a denial of every material allegation in the [*indictment*] **accusatory instrument**.

COMMENTARY

The section contains a conforming amendment.

Section 258. Pleading to other offenses. (1) As used in this section:

(a) "Initiating county" means the county in which the defendant appears for the purpose of entering a plea to a criminal charge.

(b) "Responding county" means a county in which another criminal charge is pending against the defendant entering a plea in the initiating county.

(2) Upon entry of a plea of guilty or no contest, or after conviction on a plea of not guilty, if a charge is pending against the defendant for a crime which is within the jurisdiction of a coordinate court of a responding county in the state, the defendant may state in writing that he desires:

(a) To waive venue and trial in the responding county;

(b) To waive indictment by the grand jury of the responding county;

(c) To plead guilty or no contest; and

(d) To consent to disposition of the case by the court in the initiating county.

(3) Upon receipt of the request and the written approval of the district attorney of the initiating county, the clerk of the court shall forthwith transmit copies of the request and approval to the court and the district attorney of the responding county.

(4) Upon receipt of the papers described in subsection (3) of this section and the written approval of the district attorney of the responding county, the clerk of the court shall forthwith transmit certified copies of the papers in the proceeding to the court of the initiating county.

(5) Upon receipt of the papers described in subsection (4) of this section, the court may allow the defendant to enter the plea.

(6) The original judgment order entered by the court of the initiating county shall be transmitted to the court of the responding county for filing. The judgment shall thereafter be considered, for all purposes, the same as a judgment of the court of the responding county.

COMMENTARY

This section is based on ABA Standards § 1.2, and is similar, also, to Federal Rule 20. The rationale for the provision is stated in the ABA commentary at pp. 19-20:

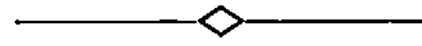
> "It is not unusual for a defendant to have committed several crimes in more than one governmental unit . . . of the state, or to have committed in one governmental unit several crimes which cannot be joined in one indictment. If the defendant is willing to enter a plea of guilty or nolo contendere to such offenses, several separate proceedings should not be required to accomplish that result. It is also usually preferable to have one judge impose sentence on all offenses at one time."

The ABA also points out the benefits to the defendant as being: (1) he will be able to start with a clean slate when he is released from prison; (2) he may gain some benefit from the imposition of concurrent sentences or similar consideration in sentencing; and (3) he can avoid the risk of an intrastate detainer being lodged against him while he is serving his sentence. The public is also benefited by a prompt disposition of all those offenses.

The draft section differs from the ABA Standard in two important ways. First, it is limited in appli-

cation to charges that are "pending," whereas the ABA section is intended to apply to all offenses whether or not the defendant has been previously charged with them. The Commission believes that such a procedure would be impracticable if applied to potential charges; therefore, the section contemplates the allowance of a plea to other offenses only if a formal charge has been filed in a court. Second, the section tries to spell out more precisely than does the ABA recommendation the actual procedure to be followed in each county in handling the paperwork involved.

It should be emphasized that the procedure is discretionary with the court of the "initiating county" and requires the written approval of the district attorney of each county.



Section 259. Time of entering plea; aid of counsel. (1) A defendant shall not be required to plead to an offense punishable by imprisonment until he is represented by counsel, unless the defendant knowingly waives his right to counsel.

(2) A defendant with counsel may plead guilty or no contest on the day of arraignment or any time thereafter. A defendant without counsel shall not be allowed to plead guilty or no contest to a felony on the day of arraignment.

(3) Upon completion of the arraignment, unless the defendant enters a plea in the manner provided in sections 249 to 258 of this Act, he shall be considered to have entered a plea of not guilty.

COMMENTARY

A. Summary

This section establishes the basic procedure for entering pleas to criminal charges. The following rules are incorporated within the section:

(1) A defendant who faces the possibility of imprisonment shall not be required to enter a plea without the assistance of a lawyer, unless the defendant knowingly waives his right to counsel. (2) If a defendant with counsel is to plead "not guilty" he shall do so upon completion of the arraignment on the charge. He may plead guilty or no contest on the day of arraignment, but is not required to do so. If he is without counsel, he shall not be allowed to plead guilty or no contest to a felony on the same day as the arraignment. If a defendant without counsel desires to plead guilty or no contest, and the arraignment must be set over to the following day of court because of the requirements of subsection (2), judges are urged to give the warnings required by sections 260, 261 and 262 and repeat them the following day before the plea of guilty is accepted. (3) Upon completion of the arraignment, if the defendant does not enter a plea in the manner provided for in the Article, a "not guilty" plea is entered automatically.

The section deals only with *pleas* and is not meant to change ORS 135.430 which provides that the pleadings on the part of the defendant are the demurrer and plea. Neither is the entry of a plea of not guilty meant to prevent the defendant from otherwise moving against the indictment or complaint.

The main purpose of the section is to try to provide for the efficient and expeditious handling of pleas by the courts, while protecting the rights of the individual defendant during a "critical stage" of the criminal proceedings against him. The section also triggers the time table for subsequent events such as pre-trial conference and trial dates.

B. Derivation

Subsection (1) is based on ABA Standards § 1.3 (Approved Draft, 1968). Subsection (2) is new. Subsection (3) is similar to ORS 135.440.

C. Relationship to Existing Law

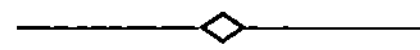
Two existing statutes deal generally with the time allowed for answering or pleading to an indictment, ORS 135.410 and 135.810. Pleading to a complaint in district or justice court is in the same manner as pleading to an indictment, by operation of ORS 156.080 and 156.610.

The ABA reporter makes the point that "because

it is seldom possible to engage in effective negotiations minutes before the defendant is to be called upon to plead, this means that some reasonable interval must elapse between appointment of counsel and the pleading stage." (Commentary, p. 22). In practice, the usual procedure followed is to enter a plea of "not guilty" to the crime charged, and to later change the plea if it becomes necessary.

The section does not require appointment of counsel against his wishes simply because of the nature of his plea. A defendant can waive his right to counsel if he does so understandingly and intelligently. *Johnson v. Zerbst*, 304 US 458 (1938). It has been held that if a defendant pleads guilty, or the record shows that an offer of counsel was made and refused by the defendant, the burden is on the defendant to show that he did not understandingly and intelligently waive his right to counsel. *Moore v. Michigan*, 355 US 155 (1957).

Subsection (2) subscribes to the ABA position that even if the defendant has effectively waived counsel, he nonetheless should not be hurried through the plea of guilty process without sufficient time to consider his decision.



Section 260. Defendant to be advised by court. (1) The court shall not accept a plea of guilty or no contest to a felony or other charge on which the defendant appears in person without first addressing the defendant personally and determining that he understands the nature of the charge.

(2) The court shall inform the defendant:

(a) That by his plea of guilty or no contest he waives his right:

(A) To trial by jury;

(B) Of confrontation; and

(C) Against self-incrimination.

(b) Of the maximum possible sentence on the charge, including the maximum possible sentence from consecutive sentences.

(c) When the offense charged is one for which a different or additional penalty is authorized by reason of the fact that the defendant may be adjudged a dangerous offender, that this fact may be established after his plea in the present action, thereby subjecting him to different or additional penalty.

COMMENTARY

A. Summary

This section requires the court to address the defendant personally and to determine that he understands the true nature of the charge against him. Subsection (1) sets forth this requirement. The language "or other charge on which the defendant appears in person" is an attempt to meet the requirements of *Boykin v. Alabama*, 395 US 238 (1969), without creating an impossible situation in the lower courts in the disposition of misdemeanor cases. Subsection (2)(a) requires the judge to inform the defendant of the constitutional rights that are waived by a plea of guilty. Subsection (2)(b) and (c) contain other warnings about the consequences of the plea.

B. Derivation

Section 260 is based on ABA Standards § 1.4 and *Boykin v. Alabama*.

C. Relationship to Existing Law

Subsection (1). "[R]eal notice of the true nature of the charge . . . [is] the first and most universally recognized requirement of due process . . . ." *Smith v. O'Grady*, 312 US 334 (1941). The ABA commentary notes that the standard as set out in this subsection accords with what is said to be required of the judge under Federal Rule 11.

In *McCarthy v. United States*, 394 US 459 (1968), the U. S. Supreme Court said:

> "A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be an 'intentional relinquishment or abandonment of a known right or privilege.' (Citing Johnson v.

Zerbst). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts."

The subsection requires no specific procedure, as is true in Rule 11. As the ABA commentary states, "The most appropriate procedure for the judge will vary from case to case. While in some instances he can do this best by reading the indictment, . . . [i]n many cases the indictment, which is usually couched in technical language, is more understandable to the defendant if the charge is explained to the defendant by the judge in simple everyday language."

In a case recently decided, the Oregon Court of Appeals held that the record of criminal proceedings in which the defendant entered a guilty plea must contain an affirmative showing from questions addressed personally to the defendant by the trial judge, that the plea was voluntary. The court observed that in *McCarthy* the Supreme Court had refused to impose a specific procedure on the lower courts because, "The nature of the inquiry required by Rule 11 must necessarily vary from case to case, and, therefore, we do not establish any general guidelines other than those expressed in the Rule itself."

The Oregon opinion then states:

> "For similar reasons, we decline to impose a rigid formula on our own courts. The judge who accepts a guilty plea must have sufficient latitude to tailor his questions to the needs of the defendant before him." *Raisley v. Sullivan*, 94 Adv Sh 339, 342, — Or App — (1972).

Subsection (2)(a). The *McCarthy* and *Boykin* opinions both emphasize that a defendant who pleads guilty waives several constitutional rights, including his right to trial by jury, his right to confront his accusers and his privilege against compulsory self-incrimination. This subsection requires that the judge specifically inform the defendant that his plea constitutes a waiver of these important rights.

Subsection (2)(b). Advising the defendant of the "consequences of the plea" is the fundamental reason for section 260. No distinction is made between the defendant with counsel and the one who is not represented. This follows Federal Rule 11 and the ABA Standards. The Oregon cases hold that there is a constitutional right to be advised of the basic legal consequences of a guilty plea, although the court is not specifically required to give this advice, and a record that shows that the defendant's counsel has advised him appears to suffice.

The Oregon Court of Appeals held in *Lay v. Cupp*, 1 Or App 296, 462 P2d 443 (1969):

> "A defendant accused of crime has a constitutional right to be advised before a guilty plea of the basic legal consequences of the plea, including the maximum penalty assessable under the charge . . . ."

Cf., Fletcher v. Cupp, 1 Or App 467, 463 P2d 365 (1969); *Dixon v. Gladden*, 250 Or 580, 444 P2d 11 (1968); *Jones v. Cupp*, 93 Adv Sh 1247, — Or App — (1971).

One of the possible consequences could be the imposition of consecutive sentences and, where necessary, the court would be required to warn the defendant of this possibility.

Subsection (2)(c). Under the Oregon Criminal Code of 1971 (ORS 161.725, 161.735), there is the possibility in certain felony convictions of being sentenced to an increased penalty as a dangerous offender. In any case in which this could occur, the warning would be required. The ABA Standards, § 1.4 (c) (iii) use the following language:

> "[W]hen the offense charged is one for which a different or additional punishment is authorized by reason of the fact that the defendant has previously been convicted of an offense, that this fact may be established after his plea in the present action if he has been previously convicted, thereby subjecting him to such different or additional punishment."

The Oregon dangerous offender provisions might be applied to either first time or repeated offenders, so the language of the statute should be broad enough to cover either eventuality.

There is basis for this requirement in Oregon case law. In *Nealy v. Cupp*, 2 Or App 240, 467 P2d 649 (1970), the defendant pleaded guilty to sodomy. At the time he entered his plea he was told by the court that the maximum possible sentence was 15 years. Apparently, the defendant's attorney had also so advised him. Defendant was then ordered to have a psychiatric examination under ORS 137.112, and as a result received an indeterminate life sentence as a sexual offender. The Court of Appeals affirmed the post-conviction court's relief, which was vacation of the guilty plea, saying:

> ". . . [T]he information regarding the maximum sentence must be accurate. If the defendant is not fully informed, as here, he cannot be said to understand the true legal consequences of his guilty plea." At 242.

Section 261. Determining voluntariness of plea. (1) The court shall not accept a plea of guilty or no contest without first determining that the plea is voluntarily and intelligently made.

(2) The court shall determine whether the plea is the result of prior plea discussions and a plea agreement. If the plea is the result of a plea agreement, the court shall determine the nature of the agreement.

(3) If the district attorney has agreed to seek charge or sentence concessions which must be approved by the court, the court shall advise the defendant personally that the recommendations of the district attorney are not binding on the court.

COMMENTARY

A. Summary

This section requires an in-court inquiry into the voluntariness and intelligence of the plea, and an examination of the plea discussions, if any, that brought about the plea.

B. Derivation

Source of the section is ABA Standards § 1.5 and *Boykin v. Alabama*, 395 US 238 (1969).

C. Relationship to Existing Law

Subsection (1) codifies the *Boykin* requirements. Subsections (2) and (3) adopt the ABA recommendation that plea discussions and plea agreements be given "visibility" by court inquiry.

In *Boykin* the defendant, represented by court-appointed counsel, pleaded guilty to five counts of robbery and was sentenced to death. So far as the record showed, the judge asked no questions of the defendant about his plea, and the defendant made no statement to the court. The U. S. Supreme Court reversed the judgment, holding that "it was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was *intelligent and voluntary*." (Emphasis supplied). The term, "intelligently," as used in the draft is meant to have the same meaning it has in *Boykin* and *Raisley*, synonymous with "understandingly."

The *Boykin* opinion, delivered by Mr. Justice Douglas, notes that several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial: the privilege against compulsory self-incrimination, the right to trial by jury and the right to confront one's accusers.

Boykin thus imposed on state trial courts the duty of interrogating defendants who enter guilty pleas so that the waiver of their constitutional rights will affirmatively appear in the record. *McCarthy* was given prospective application only by the Court in *Halliday v. U. S.*, 394 US 381 (1969), and most federal circuits and many state courts have followed the *Halliday* case and denied retroactivity of the *Boykin* rule. The Oregon Court denied retroactive application in the case of *Endsley v. Cupp*, 1 Or App 169, 459 P2d 448 (1969), *petit. for rev. den.* (1970).

The Oregon Court of Appeals stated, however:

"*Boykin* illustrates the necessity for a trial court to make careful inquiry into the knowledge and state of mind of an accused person who pleads guilty. The case does not specify precise rules of procedure for state trial courts to follow, but does require that a court ascertain whether the accused is aware of his constitutional rights and whether he knowingly waives those rights." *Endsley v. Cupp* at 174-75.

Section 262. Determining accuracy of plea. After accepting a plea of guilty or no contest, the court shall not enter a judgment without making such inquiry as may satisfy the court that there is a factual basis for the plea.

COMMENTARY

A. Summary

This section requires a determination by the judge accepting a plea into the accuracy of the plea. It does not state specifically a particular "probability of guilt" standard, which is left to the discretion of the judge. As the ABA commentator observes, the circumstances of the case will often dictate the kind and amount of inquiry which is necessary. The court would be free to use any appropriate procedure which seems best suited to the court and for the kind of case involved.

The ABA commentary points out that although inquiry into the accuracy of guilty pleas deprives the guilty plea process of some of its efficiency, these inquiries take far less time and are far less demanding of criminal justice resources than full-scale trials. The benefits derived for defendants and for the system far outweigh the loss in efficiency. Primarily, inquiry ensures that the defendant actually committed a crime at least as serious as the one to which he is willing to plead. Furthermore, investigation into the factual basis of guilty pleas helps to increase the visibility of charge reduction practices, a common form of plea agreement. Also, inquiries provide a more adequate record of the conviction process and minimize the chances of a defendant successfully challenging his conviction later. Finally, increased knowledge about the circumstances of the defendant's crime allows the court to better evaluate his competency, his willingness to plead guilty, and his understanding of the charges against him. The scope of the inquiry would be left to the court's discretion and the section is not intended to require a "mini-trial" on the facts of the case. It should be noted also, that the section should not be interpreted as precluding an "Alford" type of plea. There may be a "factual basis" for the plea without the defendant actually admitting "guilt."

B. Derivation

The section is based on ABA Standards § 1.6.

C. Relationship to Existing Law

There is no such general provision regarding accuracy of guilty pleas in Oregon law; however, Federal Rule 11 so provides. The kind and amount of inquiry would be left to the judge's discretion as in the federal rule and probably would not change the current practice of most Oregon trial courts.

Plea Discussions and Agreements

Section 263. Plea discussions and plea agreements. (1) In cases in which it appears that the interest of the public in the effective administration of criminal justice would thereby be served, and in accordance with the criteria set forth in section 264 of this Act, the district attorney may engage in plea discussions for the purpose of reaching a plea agreement.

(2) The district attorney shall engage in plea discussions or reach a plea agreement with the defendant only through defense counsel, except when, as a matter of record, the defendant has effectively waived his right to counsel or, if the defendant is not eligible for court-appointed counsel, has not retained counsel.

(3) The district attorney in reaching a plea agreement may agree to, but is not limited to, one or more of the following, as required by the circumstances of the individual case:

(a) To make or not to oppose favorable recommendations as to the sentence which should be imposed if the defendant enters a plea of guilty or no contest to the offense charged;

(b) To seek or not to oppose dismissal of the offense charged if the defendant enters a plea of guilty or no contest to another offense reasonably related to the defendant's conduct; or

(c) To seek or not to oppose dismissal of other charges or to refrain from bringing potential charges if the defendant enters a plea of guilty or no contest to the offense charged.

COMMENTARY

A. Summary

This section adopts the ABA recommendation that the plea negotiation process should be formally recognized and controlled. Subsection (1) is a general provision regarding the district attorney's authority to engage in plea discussions. Subsection (2) requires negotiation through defense counsel except when the defendant is not represented by his own voluntary choice. Although a defendant might elect not to have counsel, if the court appoints counsel to advise the defendant, the lawyer could be with defendant during any negotiations to advise him. For the purposes of this section then, the defendant would not have waived his right to counsel. Note, also, that subsection (2) is not intended to prevent the defendant from being present during plea discussions, but to assure that he has the benefit of counsel during the process. Subsection (3) sets forth the types of concessions that the district attorney may make in reaching a plea agreement. Under paragraph (c) the district attorney may agree to seek or not to oppose dismissal of other charges or to refrain from bringing potential charges against the defendant *or a third person.* Earlier drafts limited this type of agreement to charges against the defendant, however, the paragraph was amended by the Commission in recognition that agreements might include concessions involving co-defendants.

B. Derivation

The section is derived from ABA Standards § 3.1, but broadened to include specific reference to "no contest" pleas.

C. Relationship to Existing Law

In Oregon criminal justice administration, as elsewhere in this country, the practice known as "plea negotiation," "plea bargaining," "cop out" or "deal" is regularly engaged in by prosecutors and defense lawyers. The Oregon Criminal Law Handbook recognizes that the negotiated plea serves a useful public purpose and suggests that the terms employed in connection with the practice should be stripped of their anti-social implications. See, Oregon State Bar Criminal Law Handbook, ch. 6 (1969).

During the past few years the subject of plea bargaining has been more closely scrutinized than ever before. The President's Commission on Law Enforcement and Administration of Justice, realizing the importance of it in this time of overloaded court dockets, stated in its report:

"The negotiated guilty plea serves important functions. As a practical matter, many courts could not sustain the burden of having to try all cases coming before them. The quality of justice in all cases would suffer if overloaded courts were faced with a great increase in the number of trials. Tremendous investments of time, talent, and money, all of which are in short supply and can be better used elsewhere, would be necessary if all cases were tried. It would be a serious mistake, however, to assume that the guilty plea is no more than a means of disposing of criminal cases at minimal cost. It relieves both the defendant and the prosecution of the inevitable risks and uncertainties of trial. It imports a degree of certainty and flexibility into a rigid, yet frequently erratic system." *Challenge of Crime in a Free Society* 135 (1967).

The extent to which plea bargaining is used seems to vary greatly from county to county in Oregon. A survey of district attorneys detailed in a recent law review article stated that "estimates of the number of cases resolved by a plea of guilty as a result of negotiations range all the way from 0 percent in one county to 95 percent in another." Klonoski, Mitchell and Gallagher, "Plea Bargaining in Oregon: An Exploratory Study," 50 Or L Rev 114, 118 (1971). At pages 136-137 the authors make several recommendations that were considered in connection with this draft:

"(1) We recommend attempts to increase the general public's awareness of plea bargaining for the following reasons:

"(a) The idea of a bargain in relation to justice gives the average citizen the idea that underhanded, unethical dealings take place. Although such practices appear to be rare, increased public knowledge would provide a safeguard against such abuses.

"(b) The ever increasing caseload in our courts heightens the probability of mistakes, especially in the plea-bargaining process. By making the general public more aware of the operation of the judicial system and of the possibilities for injustice through neglect, the public might support additional financial resources for our court systems.

"(c) To free prosecutors from unfounded criticism and to improve the image of the legal system, a full and honest disclosure of its workings is essential.

"(2) We recommend reforms in the handling

of indigents' cases to minimize the effect of financial pressures tempting the established attorney to bargain quickly and the marginal attorney to bargain not at all. This could be done either through careful screening by the courts of attorneys available for the handling of indigent cases or through a public defender system.

"(3) We recommend that prior to sentencing, the presiding judge be given a detailed report of what occurred in the bargaining process and an account of the factors that influenced both defense counsel and the district attorney to reach agreement. This should be done in writing. Included in this report at the request of any concerned party should be a psychological evaluation of the defendant's competence to distinguish a guilty from a not guilty plea. This examination might be requested by the prosecutor for protection from subsequent appeals or by a friend of the defendant who believes him to be mentally incapable of comprehending the legal questions confronting him. Hopefully, the 'bargaining report' would reduce the possibility of excessive leniency, bring to light errors of an attorney, and reduce the possibility of a defendant misunderstanding. Though we are sensitive to the wish of a majority of the district attorneys that these statements should be confidential to protect both the accused and the victim from unnecessary publicity, on balance we would favor Oregon following California and New York in making the statements part of the public record. This gives the greatest assurance that we could 'exhume the process from stale obscurantism and let [in] the fresh light of open analysis.'" (Footnotes omitted.)

In a recent opinion the U. S. Supreme Court again put its stamp of approval on the negotiated plea practice, with the Chief Justice saying:

"The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining' is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.

"Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pre-trial release; and by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned." *Santobello v. New York,* 10 Cr L 3017 (Dec. 20, 1971). The Court had previously expressed approval of plea bargaining in *Brady v. United States,* 397 US 742 (1970).

The Oregon application for a federal grant under the Omnibus Crime Control and Safe Streets Act of 1968 observes that "plea bargaining necessarily occurs frequently in Oregon, but courts remain detached from the process, thus causing later judicial distrust and withdrawals of guilty pleas." The application contains the recommendation that "plea bargaining should be made a matter of record subject to judicial scrutiny." State of Oregon, *Priorities for Law Enforcement* A-17 (Executive Department 1970). For further discussion of the need for recording plea bargains in Oregon, see 7 Will LJ 347 (1971).

Section 264. Criteria to be considered in plea discussions and plea agreements. In determining whether to engage in plea discussions for the purpose of reaching a plea agreement, the district attorney may take into account, but is not limited to, any of the following considerations:

(1) The defendant by his plea has aided in ensuring the prompt and certain applications of correctional measures to him.

(2) The defendant has acknowledged his guilt and shown a willingness to assume responsibility for his conduct.

(3) The concessions made by the state will make possible alternative correctional measures which are better adapted to achieving rehabilitative, protective, deterrent or other purposes of

correctional treatment, or will prevent undue harm to the defendant from the form of conviction.

(4) The defendant has made public trial unnecessary when there are good reasons for not having the case dealt with in a public trial.

(5) The defendant has given or offered cooperation when the cooperation has resulted or may result in the successful prosecution of other offenders engaged in equally serious or more serious criminal conduct.

(6) The defendant by his plea has aided in avoiding delay in the disposition of other cases and thereby has increased the probability of prompt and certain application of correctional measures to other offenders.

COMMENTARY

A. Summary

Section 264 sets forth six different considerations, any of which may justify the district attorney in reaching a plea agreement and the court in granting charge or sentence concessions. As the ABA acknowledges, it is clear that no single consideration serves to explain or justify all concessions which are granted.

B. Derivation

The section is patterned after ABA Standards Relating to Pleas of Guilty § 1.8 (Approved Draft 1968).

C. Relationship to Existing Law

The Klonoski Study of plea bargaining in Oregon shows that of district attorneys responding to his questionnaire (58 percent), the factors taken into account when they considered charge reduction were, in order of importance: (1) Strength of case. (2) Nature of crime. (3) Past record of defendant. (4) Personal impression of defendant. (5) Caseload.

It should be noted that factors listed on the questionnaire are very specific reasons for agreeing to a charge reduction. In contrast, the draft proposal sets forth general criteria to be followed by both the district attorney and the trial judge (see § 266) and is in language broad enough to include the more specific factors. Furthermore, the district attorney is not limited to considering only those listed.

The rationale behind each criterion, as stated in the ABA Standards, is as follows:

Subsection (1): Promptness and certainty in punishment are both important in accomplishing the goals of the criminal justice system. The swift and certain punishment of a given defendant aids in the deterrence of others and in accomplishing rehabilitation of that defendant. A defendant who pleads guilty may substantially contribute to both the promptness and the certainty of his punishment.

Subsection (2): This factor recognizes the defendant's acknowledgment of guilt and willingness to assume responsibility for his conduct as a valid consideration in dealing with the guilty plea defendant. It is consistent with prevailing and accepted sentencing criteria, which emphasizes the relevance of the "attitudes of the defendant" and his willingness to assume responsibility for his actions.

Subsection (3): In view of the wide range of sentencing options that Oregon judges have for most crimes, the main purpose in including this standard is to recognize that in many cases a plea to a reduced charge is to avoid a felony conviction, or conviction of a crime that carries a particularly reprehensible label.

Subsection (4): In some cases there may be good reasons for avoiding a public trial. This is particularly true in certain sex offenses where the victim would be required to appear in court and repeat the details of what occurred. Or there may be other types of cases, such as coercion or theft by extortion, in which the protection of the victim from public trial would be a valid consideration.

Subsection (5): This factor gives formal recognition to the "deal." Circuit Judge Edwin E. Allen, writing in the Oregon Criminal Law Handbook, observes:

> "The 'deal' generally implies that there is some type of quasi-consideration which the state receives in exchange for the defendant's being allowed to plead guilty to one of several offenses or to a lesser offense." § 6.2.

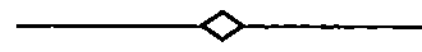
The state's objective is obvious—to convict an offender who, without the cooperation of the defendant, would go unpunished. The ABA states that the Advisory Committee believed that whatever is lost by the reduced punishment of one offender is gained by the resulting conviction of one or more other offenders.

Subsection (6): In commenting upon this factor, the ABA notes:

"[I]n localities with a significant court congestion problem, guilty plea defendants as a class do make a meaningful contribution toward the attainment of the objectives of the criminal justice system. If a substantial number of cases are disposed of without trial, then those cases requiring trial may be reached without excessively long delays. In this way, the imposition of punishment on *all* guilty defendants occurs much more promptly than otherwise would be the case. The certainty of punishment is likewise increased, as the chances of conviction at trial appear to decrease as time passes and witnesses forget or disappear. Inasmuch as prompt and certain punishment increases the effectiveness of the criminal justice system, it is not inappropriate to grant concessions to those defendants who by their plea increase both the proximity and probability of punishment for other guilty defendants. Such concessions are consistent with and aid in attaining the rehabilitative, preventive, and deterrent objectives of the criminal law." Commentary, § 1.8.

The Klonoski Study reported that when asked how the administration of justice is aided by the plea bargaining process, over half of the responding district attorneys indicated that it saved time, money and reduced the caseload of the courts. 50 Or L Rev supra at 131.

The standard set out in this subsection is consistent with the above observations and recognizes that avoiding delay in the disposition of other cases is a proper matter to be taken into account by a district attorney or trial judge in determining whether to agree to a "bargained for" plea.



Section 265. Responsibilities of defense counsel. (1) Defense counsel shall conclude a plea agreement only with the consent of the defendant, and shall ensure that the decision whether to enter a plea of guilty or no contest is ultimately made by the defendant.

(2) To aid the defendant in reaching a decision, defense counsel, after appropriate investigation, shall advise the defendant of the alternatives available and of factors considered important by him or the defendant in reaching a decision.

COMMENTARY

A. Summary

This section provides that the plea agreement process must have the consent of the defendant, and that any decision whether to enter a guilty plea is made by the defendant. The decision of the defendant, in order to be an informed one, must be based on the kind of advice of counsel required by the section.

B. Derivation

This section is taken from ABA Standards § 3.2.

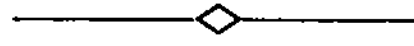
C. Relationship to Existing Law

The section embodies established professional ethics regarding the role of defense counsel in negotiated pleas. Commentary in the ABA Standards makes the obvious point that although the court must inquire into the defendant's understanding of the possible consequences at the time the plea is received, this is not a complete substitute for advice by counsel.

There may be important considerations besides those which the judge is required to cover in his discussion with the defendant. The defendant needs to know the probability of being convicted should he decide to stand trial. He also needs whatever information is available upon which it can be predicted what consequences would follow a plea of guilty as compared to those which would follow conviction at trial. Therefore, the defendant should be informed fully regarding concessions offered by or agreeable to the district attorney. Defense counsel is the person best able to evaluate the concessions offered by the prosecutor and the probable effect of the ultimate disposition of the case. The ABA notes that defense counsel cannot predict many of the matters involved with certainty, but the defendant is nevertheless entitled to his best professional judgment.

The standard suggested by the ABA recognizes the need for counsel to advise the defendant on "considerations deemed important" by him or the

defendant. The draft uses the language "factors considered important." Collateral consequences that may follow conviction, such as loss of civil rights, ineligibility for certain licenses granted by the state and ineligibility to engage in certain callings should be made known to the defendant by counsel.



Section 266. Responsibilities of trial judge. (1) The trial judge shall not participate in plea discussions.

(2) If a tentative plea agreement has been reached which contemplates entry of a plea of guilty or no contest in the expectation that charge or sentence concessions will be granted, the trial judge, upon request of the parties, may permit the disclosure to him of the tentative agreement and the reasons therefor in advance of the time for tender of the plea. The trial judge may then advise the district attorney and defense counsel whether he will concur in the proposed disposition if the information in the presentence report or other information available at the time for sentencing is consistent with the representations made to him.

(3) If the trial judge concurs, but later decides that the final disposition of the case should not include the sentence concessions contemplated by the plea agreement, he shall so advise the defendant and allow the defendant a reasonable period of time in which to either affirm or withdraw his plea of guilty or no contest.

(4) When a plea of guilty or no contest is tendered or received as a result of a prior plea agreement, the trial judge shall give the agreement due consideration, but notwithstanding its existence, he is not bound by it, and may reach an independent decision on whether to grant sentence concessions under the criteria set forth in section 264 of this Act.

COMMENTARY

A. Summary

Subsection (1) subscribes to the ABA view that the judge should not participate in plea discussions and is consistent with the prevailing attitude and practice in Oregon trial courts.

Subsection (2) provides, however, that the judge may permit disclosure of the tentative agreement before the plea is tendered and advise the parties whether he will concur in the proposed disposition if the information regarding the defendant at time for sentencing is consistent with the representations made to him.

The subsection contemplates that when a plea agreement has been reached and the court is informed of its particulars, the judge, before accepting the plea of guilty or no contest, may inform the defendant personally that the matter of sentence is entirely up to the court and that the recommendations of the district attorney are not binding upon the court.

Subsection (3) provides that if the trial judge later changes his mind, he shall advise the defendant and allow him a reasonable time in which to affirm or withdraw his guilty or no contest plea.

Subsection (4) provides that the trial judge is not expected to automatically approve every plea agreement and grant the concessions contemplated by it. He, as Oregon trial judges have done in the past, is to reach an independent decision on whether to grant the sentencing concessions contemplated by the agreement.

B. Derivation

This section is based on ABA Standards, amended § 3.3.

C. Relationship to Existing Law

(1) This will not change the approach to plea

bargaining by Oregon trial judges. The judge usually is aware of the fact that a guilty plea is the result of a prior agreement, although he may not be apprised of all of the details thereto. In fact, it is not uncommon for the court to be advised by the district attorney and defense counsel in open court of the agreement, e.g., *State v. Scharbrough,* 245 Or 328, 421 P2d 976 (1966).

Actually participating in the plea discussions is a different matter, though, and is not favored in the profession. Informal Opinion No. 779, ABA Professional Ethics Committee declares: "A judge should not be a party to advance arrangements for the determination of sentence, whether as a result of a guilty plea or a finding of guilty based on proof."

(2) This is a new provision wholly compatible with the position taken in subsection (1). The judge only becomes involved after the parties have reached agreement. It recognizes that it is proper for the judge, when requested by the parties, to permit certain procedures that will allow a greater degree of certainty when the proposed concessions involve the sentence or the dismissal of other charges before the court.

The ABA emphasizes that the Standard does not compel the trial judge to receive advance notice of the agreement and the reasons therefor or to make any advance indication of the probable disposition.

(3) This provision continues the rationale of permitting utmost latitude by the court while at the same time protecting the interests of the defendant who has pleaded guilty on the expectation that he will be granted certain concessions. Certainly, the court should not be bound in advance to concur in an agreement that it may later decide is inadvisable.

The subsection would permit the judge to indicate precisely in what respect he does not now concur in the plea agreement, but he would not be required to do so.

(4) Because the factors which justify plea discussion and a plea agreement are the same as those which justify the granting of charge or sentence concessions by the judge, the judge probably would concur in most cases. But the trial judge's assessment of these factors may not always correspond to the district attorney's or defense counsel's assessment. The court, as is now the case, is not expected to rubber stamp the plea agreement and automatically grant the concessions contemplated by the agreement. The court remains in a position to reach an independent decision.

Existing law, ORS 134.150, provides that the *court* may, either on its own motion or upon application of the district attorney, and in furtherance of justice, order an action, after indictment, to be dismissed. The proposed section is consistent with the policy embodied in that statute and in ORS 134.160 which provides that the entry of nolle prosequi is abolished, and the district attorney cannot discontinue or abandon a prosecution for a crime, except under ORS 134.150.

Section 267. Discussion and agreement not admissible. (1) Except as provided in subsection (2) of this section, none of the following shall be received in evidence for or against a defendant in any criminal or civil action or administrative proceeding:

(a) The fact that the defendant or his counsel and the district attorney engaged in plea discussions.

(b) The fact that the defendant or his attorney made a plea agreement with the district attorney.

(c) Any statement or admission made by the defendant or his attorney to the district attorney and as a part of the plea discussion or agreement.

(2) The provisions of subsection (1) of this section shall not apply if, subsequent to the plea discussions or plea agreement, the defendant enters a plea of guilty or no contest which is not withdrawn.

COMMENTARY

A. Summary

Unless the defendant subsequently enters a plea of guilty or no contest which is not withdrawn, the section prohibits the use as evidence in later proceedings of plea discussions, plea agreements or statements made in connection thereto.

B. Derivation

The section is similar to ABA Standards § 3.4. The Standard is based upon Cal. Pen. Code § 1192.4.

C. Relationship to Existing Law

There is a split of authority on the question of whether, in the absence of a statute, an offer to plead guilty or participation in plea discussions is admissible. The rationale behind an exclusionary rule is that neither defendant nor the state should be penalized for engaging in practices which are consistent with the objectives of the criminal justice system. See 4 Wigmore, Evidence §§ 1061, 1067.

No comparable Oregon statute exists and no reported Oregon cases on this point were found. However, *State v. Thompson,* 203 Or 1, 278 P2d 142 (1954), held that admission in evidence of a withdrawn plea of guilty was reversible error. The opinion observes that according to modern text writers, the majority rule is that such evidence is inadmissible, and quotes from 20 Am Jur 420, Evidence, § 481:

> "* * * There is no doubt merit in the contention that the plea should be admitted, yet the majority rule seems to have the advantage of fairness and justice. As has been said, considerations of fairness forbid a court permitting a plea to be withdrawn for cause and at the next moment allowing the fact of the plea having been made to be admitted in evidence with all its injurious consequences as an admission or confession of guilt of the accused." At 6.

Although the situation of a withdrawn guilty plea is not identical to an offer to plead guilty or participation in plea discussion, it would seem that the latter should be no more admissible than the former because of the same "considerations of fairness." Although they are divided on the question, a majority of Commission members generally hold the view that if plea negotiations should break down and trial follows, the state should not be allowed to use defendant's statements made during negotiations against him.

Section 268. Withdrawn plea or statement not admissible. (1) A plea of guilty or no contest which is not accepted or has been withdrawn shall not be received against the defendant in any criminal proceeding.

(2) No statement or admission made by a defendant or his attorney during any proceeding relating to a plea of guilty or no contest which is not accepted or has been withdrawn shall be received against the defendant in any criminal proceeding.

COMMENTARY

Subsection (1) is taken from ABA Standards § 2.2 and is consistent with the current Oregon position regarding guilty pleas. See commentary § 267.

Subsection (2) is included for the purpose of restricting the later use of statements or admissions as under section 267; however, here the prohibition is limited to subsequent criminal proceedings only. The distinction between the two situations is made because a plea of guilty or no contest may not necessarily be the result of plea discussions or a plea agreement. Furthermore, the "bargaining" atmosphere of plea discussions under section 267 is not present in this instance.

Related Procedures

Section 269. (ORS 135.875) Notice prior to trial of intention to rely on alibi evidence; content of notice; effect of failure to supply notice. (1) If the defendant in a criminal action proposes to rely in any way on alibi evidence, he shall, not less than five days before

the trial of the cause, file and serve upon the district attorney a written notice of his purpose to offer such evidence, which notice shall state specifically the place or places where the defendant claims to have been at the time or times of the alleged offense together with the name and residence or business address of each witness upon whom the defendant intends to rely for alibi evidence. If the defendant fails to file and serve such notice, he shall not be permitted to introduce alibi evidence at the trial of the cause unless the court for good cause orders otherwise.

(2) As used in this section "alibi evidence" means evidence that the defendant in a criminal action was, at the time of commission of the alleged offense, at a place other than the place where such offense was committed.

COMMENTARY

See Article 11 for a discussion of this statute.

Section 270. ORS 135.880 is amended to read:

135.880. **Defect in accusatory instrument as affecting acquittal on merits.** When the defendant [*was*] **is** acquitted on the merits, he is [*deemed*] **considered** acquitted of the [*same*] crime **charged in the accusatory instrument**, notwithstanding a defect in form or substance in the [*indictment*] **accusatory instrument** on which he [*was*] **is** acquitted.

COMMENTARY

This section contains conforming amendments with respect to accusatory instruments and makes other minor style changes.

Pre-trial Motions

Section 271. Motion to dismiss accusatory instrument on grounds of former jeopardy. (1) The court shall dismiss the accusatory instrument if, upon motion of the defendant, it appears, as a matter of law, that a former prosecution bars the prosecution for the offense charged.

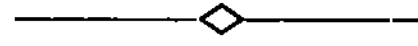
(2) The time of making the motion and its effect shall be as provided for a motion to set aside the indictment in sections 273 and 274 of this Act.

(3) An order to dismiss the accusatory instrument on grounds of former jeopardy is a bar to a future prosecution of the defendant for the offense charged in the accusatory instrument.

COMMENTARY

This is an entirely new provision to provide a different method of raising a former jeopardy defense. ORS 135.820 and 135.830 now deal with the matter by way of a separate plea, and ORS 136.620 provides for a separate kind of general verdict on a plea of former jeopardy. These statutes make it appear as if it were an issue of fact, although the issue frequently is handled as one of law decided by the trial court. ORS 138.060(2) permits the state to appeal an order sustaining a plea of former conviction or acquittal.

The new section treats the question as a matter of law to be decided by the court. The related statutes are amended accordingly. For further discussion of this area generally, see Article 1.



Section 272. ORS 135.510 is amended to read:

135.510. **Grounds for motion to set aside the indictment. (1)** The indictment shall be set aside by the court upon the motion of the defendant in either of the following cases:

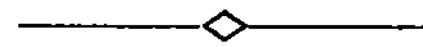
[*(1)*] **(a)** When it is not found, indorsed and presented as prescribed in ORS 132.360, 132.400 to 132.430 and 132.580.

[*(2)*] **(b)** When the names of the witnesses examined before the grand jury are not inserted at the foot of the indictment or indorsed thereon.

(2) Nothing in paragraph (b) of subsection (1) of this section shall affect the application of ORS 132.580.

COMMENTARY

The amendment is to make the section consistent with the amendment to ORS 132.580.

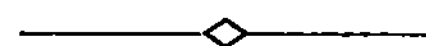


Section 273. ORS 135.520 is amended to read:

135.520. **Time of making motion; hearing.** [*The*] **A** motion to set aside the indictment **or dismiss the accusatory instrument** shall be made and heard at the time of the arraignment **or within 10 days thereafter,** unless for good cause the court [*postpones the hearing to a future time*] **allows additional time**. If not so made, the defendant is precluded from afterwards taking the objections [*mentioned in ORS 135.510*] **to the indictment or accusatory instrument**.

COMMENTARY

The section is amended to provide for a motion to dismiss, as well as the existing statutory motion to set aside the indictment. As amended, the section would allow a defendant 10 days from the time of arraignment in which to move to set aside or dismiss or such further time as the court allows.



Section 274. ORS 135.530 is amended to read:

135.530. **Effect of allowance of motion. (1)** If the motion **to set aside or dismiss** is allowed, the court shall order that the defendant, if in custody, be discharged therefrom or, if he has [*given bail or deposited money in lieu thereof, that his bail be exonerated or his money refunded to him,*] **been released, that his release agreement be discharged and his security deposit be refunded as provided by law,** unless [*it*] **the court** [*directs that*] **allows** the case **to** be **refiled or** resubmitted to the same or another grand jury.

(2) If the court allows the case to be resubmitted or refiled, it must be resubmitted or refiled by the state within 30 days from the date on which the court enters the order. If the case is not resubmitted or refiled within that time, the defendant shall be released from custody or his release agreement discharged or his security deposit returned.

COMMENTARY

The statute, as amended, would continue to leave it to the discretion of the court whether to permit a case to be resubmitted after the allowance of the motion. However, the new provisions allow a refiling of an information or complaint, and also specifically limit the time for refiling to 30 days from the date the court announces the order. If the matter is not refiled within that time, the defendant must be discharged from custody or his release agreement discharged. The same provisions are proposed for ORS 135.670, relating to demurrers.

Section 275. ORS 135.540 is amended to read:

135.540. **Effect of resubmission of case to grand jury. Subject to the limitations of subsection (2) of ORS 135.530,** if the court [*directs that*] **allows** the case **to** be resubmitted **or refiled**, the defendant, if then in custody, shall so remain, unless he is [*admitted to bail*] **released as provided by law.** If he has already [*given bail or deposited money in lieu thereof, the bail or money is answerable for*] **been released, the release agreement or any security deposited as provided by law, shall continue to insure** the appearance of the defendant to answer a new indictment, if one is found.

COMMENTARY

The amendment is to make the section consistent with proposed changes in related sections.

Section 276. ORS 135.560 is amended to read:

135.560. **Order to set aside is no bar to future prosecution. Except for an order dismissing an accusatory instrument on grounds of former jeopardy,** an order to set aside an indictment [*, as provided in ORS 135.510 to 135.550,*] **or to dismiss an accusatory instrument** is no bar to future prosecution for the same crime.

COMMENTARY

This amendment makes the statute consistent with the new provisions in § 271.

Demurrers

Section 277. ORS 135.610 is amended to read:

135.610. **Demurrer; generally. (1)** The demurrer shall be [*put in, in open court,*] **entered** either at the time of the arraignment or at such other time as may be allowed to the defendant for that purpose.

(2) The demurrer shall be in writing, signed by the defendant or his attorney and filed. It shall distinctly specify the ground of objection to the accusatory instrument.

COMMENTARY

The section combines this statute with ORS 135.620 and uses the new "accusatory instrument" terminology.

Section 278. ORS 135.630 is amended to read:

135.630. **Grounds of demurrer.** The defendant may demur to the [*indictment*] **accusatory instrument** when it appears upon the face thereof [*that*]:

(1) **If** the **accusatory instrument is an indictment, that the** grand jury by which it was found had no legal authority to inquire into the crime charged because the same is not triable within the county;

(2) **If the accusatory instrument is an indictment, that** it does not substantially conform to the requirements of ORS 132.510 to 132.570, 132.590, 132.610 to 132.690, 132.710 and 132.720;

(3) **That the accusatory instrument charges** more than one crime [*is charged in the indictment*] **not separately stated**;

(4) **That** the facts stated do not constitute [*a crime*] **an offense;** [*or*]

(5) **That** the [*indictment*] **accusatory instrument** contains [*any*] matter which, if true, would constitute a legal justification or excuse of the crime charged or other legal bar to the action [*.*]; **or**

(6) That the accusatory instrument is not definite and certain.

COMMENTARY

The section embodies conforming amendments, generally. Subsection (6) sets out new language that specifically applies the requirements that an indictment be definite and certain to other accusatory instruments. The intent of the amendment in subsection (3) is not to change the meaning of the

present statute, but merely to state it more precisely. Neither should this amendment be interpreted as contrary to the policy of compulsory joinder embodied in the former jeopardy sections of the draft.

Section 279. ORS 135.640 is amended to read:

135.640. **When objections which are grounds for demurrer may be taken.** When the objections mentioned in ORS 135.630 appear upon the face of the [*indictment*] **accusatory instrument**, they can only be taken by demurrer, except that the objection to the jurisdiction of the court over the subject of the [*indictment*] **accusatory instrument**, or that the facts stated do not constitute a crime, may be taken at the trial, under the plea of not guilty and in arrest of judgment.

COMMENTARY

This section contains conforming amendments.

Section 280. (ORS 135.650) Hearing of objections specified by demurrer. Upon the filing of the demurrer, the objections presented thereby shall be heard either immediately or at such time as the court may direct.

Section 281. (ORS 135.660) Judgment on demurrer; entry in journal. Upon considering the demurrer, the court shall give judgment, either allowing or disallowing it, and an entry to that effect shall be made in the journal.

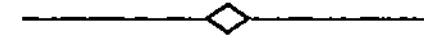
Section 282. ORS 135.670 is amended to read:

135.670. **Allowance of demurrer. (1)** If the demurrer is allowed, the judgment is final upon the [*indictment*] **accusatory instrument** demurred to and is a bar to another action for the same crime unless the court, being of the opinion that the objection on which the demurrer is allowed may be avoided in a new [*indictment*] **accusatory instrument**, [*directs*] **allows** the case to be resubmitted **or refiled.** [*to the same or another grand jury.*]

(2) If the court allows the case to be resubmitted or refiled, it must be resubmitted or refiled by the state within 30 days from the date on which the court enters the order. If the case is not resubmitted or refiled within that time, the defendant shall be discharged from custody or his release agreement discharged or his security deposit returned as provided in ORS 135.680.

COMMENTARY

See commentary to § 274.

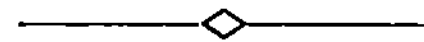


Section 283. ORS 135.680 is amended to read:

135.680. **Failure to resubmit case after allowance of demurrer.** If the court does not [*direct*] **allow** the case to be resubmitted **or an amended complaint or information filed**, the defendant, if in custody, shall be discharged. If he has been [*admitted to bail, his bail shall be exonerated*] **released his release agreement shall be discharged.** If he has deposited [*money in lieu of bail, the money shall be refunded to him*] **any security, the security shall be returned to the defendant as provided by law.**

COMMENTARY

This section contains conforming amendments.

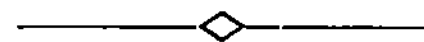


Section 284. ORS 135.690 is amended to read:

135.690. **Resubmission of case to grand jury.** If the court [*directs that*] **allows** the case **to** be resubmitted, the same proceedings shall be had thereon as are prescribed in ORS 135.540 [*and 135.550*].

COMMENTARY

The section contains conforming amendments.



Section 285. ORS 135.700 is amended to read:

135.700. **Disallowance of demurrer.** If the demurrer is disallowed, the court shall permit the defendant, at his election, to plead, which he must do forthwith or at such time as the court may allow; but if he does not plead, [*judgment shall be given against him*] **a plea of not guilty shall be entered.**

COMMENTARY

The amendment conforms the section to the plea provisions of the draft.

Compromise

Section 286. ORS 134.010 is amended to read:

134.010. **Crimes subject to being compromised.** When a defendant is [*held to answer on a charge of*] **charged with a crime punish-**

able as a misdemeanor for which the person injured by the act constituting the crime has a remedy by a civil action, the crime may be compromised, as provided in ORS 134.020, except when it was committed:

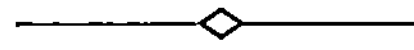
(1) By or upon [*an officer of justice*] **a peace officer** while in the execution of the duties of his office;

(2) Riotously; or

(3) With an intent to commit a felony.

COMMENTARY

The statute is amended to permit "indictable misdemeanors" to be compromised and to delete antiquated language.



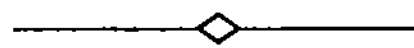
Section 287. ORS 134.020 is amended to read:

134.020. **Satisfaction of injured person; discharge of defendant.** If the party injured [*appears before the court at which the defendant is bound to appear*] at any time before trial on an [*indictment*] **accusatory instrument** for the crime, [*and*] acknowledges in writing that he has received satisfaction for the injury, the court may, in its discretion, on payment of the costs and expenses incurred, order all further proceedings to be stayed upon the prosecution and the defendant to be discharged therefrom; but the order and the reasons therefor must be entered in the journal.

COMMENTARY

The amendments substitute "accusatory instrument" for "indictment" and delete the apparent existing requirement of having the injured party appear before the court. Under the section, as amended, the court, if it believed it necessary to be fully advised, could require this, but it would be discretionary.

Section 288. (ORS 134.030) Discharge as bar to prosecution. The order authorized by ORS 134.020, when made and entered, is a bar to another prosecution for the same crime.



Section 289. (ORS 134.040) Exclusiveness of procedure. No crime can be compromised nor can any proceeding for the prosecution or punishment thereof be stayed upon a compromise, except as provided in ORS 134.010 to 134.160.

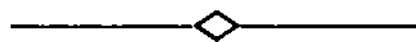
Sufficiency of Accusatory Instruments

Section 290. ORS 132.570 is amended to read:

132.570. **Necessity of stating presumptions of law and matters judicially noticed.** Neither presumptions of law nor matters of which judicial notice is taken need be stated in an [*indictment*] **accusatory instrument.**

Section 291. ORS 132.590 is amended to read:

132.590. **Effect of nonprejudicial defects in form of accusatory instrument.** No [*indictment*] **accusatory instrument** is insufficient, nor can the trial, judgment or other proceedings thereon be affected, by reason of a defect or imperfection in a matter of form which does not tend to the prejudice of the substantial rights of the defendant upon the merits.



Section 292. ORS 132.610 is amended to read:

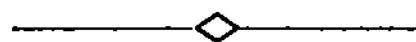
132.610. **Time of crime.** The precise time at which the crime was committed need not be stated in the [*indictment*] **accusatory instrument**, but it may be alleged to have been committed at any time before the finding thereof and within the time in which an action may be commenced therefor, except where the time is a material [*ingredient*] **element** in the crime.

Section 293. ORS 132.620 is amended to read:

132.620. **Place of crime in certain cases.** In an [*indictment*] **accusatory instrument** for a crime committed as described in [*ORS 131.320 to 131.380*] **sections 15 and 16 of this 1973 Act**, it is sufficient to allege that the crime was committed within the county where the indictment is found.

COMMENTARY

The amendment is consistent with the revised venue provisions relating to a crime commenced outside the state that is consummated within the state, where crime extends over more than one county, criminal nonsupport, crimes committed on water bordering on county, etc.

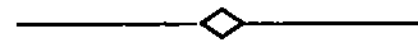


Section 294. (ORS 132.630) Person injured or intended to be injured. When a crime involves the commission of or an attempt to commit a private injury and is described with sufficient certainty in

other respects to identify the act, an erroneous allegation as to the person injured or intended to be injured is not material.

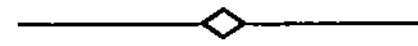
Section 295. ORS 132.640 is amended to read:

132.640. **Description of animal.** When a crime involves the taking of or injury to an animal, the [*indictment*] **accusatory instrument** is sufficiently certain in that respect if it describes the animal by the common name of its class.



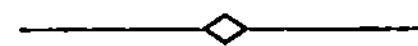
Section 296. ORS 132.660 is amended to read:

132.660. **Judgments; facts conferring jurisdiction.** In pleading in an [*indictment*] **accusatory instrument** a judgment or other determination of or proceeding before a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction; but the judgment, determination or proceeding may be stated to have been duly given or made. The facts conferring jurisdiction, however, must be established on the trial.



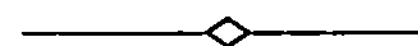
Section 297. ORS 132.670 is amended to read:

132.670. **Definition.** An [*indictment*] **accusatory instrument** for criminal defamation need not set forth any extrinsic facts for the purpose of showing the application to the party defamed of the defamatory matter on which the [*indictment*] **accusatory instrument** is founded; but it is sufficient to state generally that the same was published concerning him; and the fact that it was so published must be established on the trial.



Section 298. ORS 132.680 is amended to read:

132.680. **Forgery; misdescription of forged instrument.** When an instrument which is the subject of an [*indictment*] **accusatory instrument** for forgery has been destroyed or withheld by the act or procurement of the defendant and the fact of the destruction or withholding is alleged in the [*indictment*] **accusatory instrument** and established on the trial, the misdescription of the instrument is immaterial.



Section 299. ORS 132.690 is amended to read:

132.690. **Perjury.** In an [*indictment*] **accusatory instrument** for perjury, attempted perjury, solicitation of perjury or conspiracy to

commit perjury it is sufficient to set forth the substance of the controversy or matter in respect to which the crime was committed, in what court or before whom the oath alleged to be false was taken and that the court or person before whom it was taken had authority to administer it, with proper allegations of the falsity of the matter on which the perjury is assigned; but the [*indictment*] **accusatory instrument** need set forth neither the pleadings, record or proceedings with which the oath is connected nor the commission or authority of the court or person before whom the perjury was committed.

Section 300. ORS 132.710 is amended to read:

132.710. **Construction of words and phrases used.** The words used in an [*indictment*] **accusatory instrument** must be construed in their usual acceptation in common language, except words and phrases defined by law, which are to be construed according to their legal meaning.

Section 301. ORS 132.720 is amended to read:

132.720. **Fictitious or erroneous name; insertion of true name.** When a defendant is [*indicted*] **charged in an accusatory instrument** by a fictitious or erroneous name and in any stage of the proceedings his true name is discovered, it may be inserted in the subsequent proceedings, referring to the fact of his being [*indicted*] **charged** by the name mentioned in the [*indictment*] **accusatory instrument.**

ARTICLE 10. SPEEDY TRIAL PROVISIONS

Section 302. ORS 134.110 is amended to read:

134.110. **Delay in finding an indictment or filing an information.** When a person has been held to answer for a crime, if an indictment is not found against him within 30 days **or the district attorney does not file an information in circuit court within 30 days** after the person is held to answer, the court shall order the prosecution to be dismissed, unless good cause to the contrary is shown.

COMMENTARY

The amendment makes allowance for a district attorney's information as a means of charging a crime in circuit court.

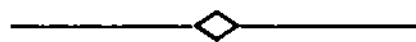
Sufficiency of Accusatory Instruments

Section 290. ORS 132.570 is amended to read:

132.570. **Necessity of stating presumptions of law and matters judicially noticed.** Neither presumptions of law nor matters of which judicial notice is taken need be stated in an [*indictment*] **accusatory instrument.**

Section 291. ORS 132.590 is amended to read:

132.590. **Effect of nonprejudicial defects in form of accusatory instrument.** No [*indictment*] **accusatory instrument** is insufficient, nor can the trial, judgment or other proceedings thereon be affected, by reason of a defect or imperfection in a matter of form which does not tend to the prejudice of the substantial rights of the defendant upon the merits.



Section 292. ORS 132.610 is amended to read:

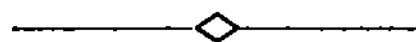
132.610. **Time of crime.** The precise time at which the crime was committed need not be stated in the [*indictment*] **accusatory instrument**, but it may be alleged to have been committed at any time before the finding thereof and within the time in which an action may be commenced therefor, except where the time is a material [*ingredient*] **element** in the crime.

Section 293. ORS 132.620 is amended to read:

132.620. **Place of crime in certain cases.** In an [*indictment*] **accusatory instrument** for a crime committed as described in [*ORS 131.320 to 131.380*] **sections 15 and 16 of this 1973 Act**, it is sufficient to allege that the crime was committed within the county where the indictment is found.

COMMENTARY

The amendment is consistent with the revised venue provisions relating to a crime commenced outside the state that is consummated within the state, where crime extends over more than one county, criminal nonsupport, crimes committed on water bordering on county, etc.



Section 294. (ORS 132.630) Person injured or intended to be injured. When a crime involves the commission of or an attempt to commit a private injury and is described with sufficient certainty in

commit perjury it is sufficient to set forth the substance of the controversy or matter in respect to which the crime was committed, in what court or before whom the oath alleged to be false was taken and that the court or person before whom it was taken had authority to administer it, with proper allegations of the falsity of the matter on which the perjury is assigned; but the [*indictment*] **accusatory instrument** need set forth neither the pleadings, record or proceedings with which the oath is connected nor the commission or authority of the court or person before whom the perjury was committed.

Section 300. ORS 132.710 is amended to read:

132.710. **Construction of words and phrases used.** The words used in an [*indictment*] **accusatory instrument** must be construed in their usual acceptation in common language, except words and phrases defined by law, which are to be construed according to their legal meaning.

Section 301. ORS 132.720 is amended to read:

132.720. **Fictitious or erroneous name; insertion of true name.** When a defendant is [*indicted*] **charged in an accusatory instrument** by a fictitious or erroneous name and in any stage of the proceedings his true name is discovered, it may be inserted in the subsequent proceedings, referring to the fact of his being [*indicted*] **charged** by the name mentioned in the [*indictment*] **accusatory instrument.**

ARTICLE 10. SPEEDY TRIAL PROVISIONS

Section 302. ORS 134.110 is amended to read:

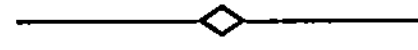
134.110. **Delay in finding an indictment or filing an information.** When a person has been held to answer for a crime, if an indictment is not found against him within 30 days **or the district attorney does not file an information in circuit court within 30 days** after the person is held to answer, the court shall order the prosecution to be dismissed, unless good cause to the contrary is shown.

COMMENTARY

The amendment makes allowance for a district attorney's information as a means of charging a crime in circuit court.

Section 303. ORS 134.120 is amended to read:

134.120. **Delay in bringing defendant to trial.** If a defendant [*indicted for*] **charged with** a crime, whose trial has not been postponed upon his application or by his consent, is not brought to trial within a reasonable period of time, the court shall order the [*indictment*] **accusatory instrument** to be dismissed.

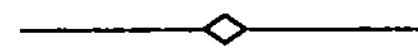


Section 304. ORS 134.130 is amended to read:

134.130. **Where there is reason for the delay.** If the defendant is not [*indicted*] **proceeded against** or tried, as provided in ORS 134.110 and 134.120, and sufficient reason therefor is shown, the court may order the action to be continued and in the meantime may [*discharge*] **release** the defendant from custody [*on his own undertaking of bail*] **as provided in sections 237 to 248 of this 1973 Act**, for his appearance to answer the charge or action [*at the time to which the same is continued*].

COMMENTARY

The amendments are in accord with the previous section and with the proposed changes in the bail statutes.



Section 305. ORS 134.140 is amended to read:

134.140. **Effect of dismissal.** (1) If the court directs the charge or action to be dismissed, the defendant, if in custody, shall be discharged. If he has been [*admitted to bail*] **released**, his [*bail*] **release agreement** is exonerated and [*money*] **security** deposited [*in lieu of bail*] shall be refunded to him.

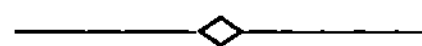
(2) An order for the dismissal of a charge or action, as provided in ORS 134.010 to 134.160, is a bar to another prosecution for the same crime if the crime is a **Class B or C** misdemeanor; but it is not a bar if the crime charged is a **Class A misdemeanor or a** felony.

COMMENTARY

The amendment in subsection (1) is consistent with changes proposed in the bail statutes. Subsection (2) is in accord with a similar amendment in the trial provisions, which takes into account the relative seriousness of some Class A misdemeanors and equates them with felonies for the purpose of this statute.

Section 306. ORS 134.150 is amended to read:

134.150. **Dismissal on motion of court or district attorney.** The court may, either of its own motion or upon the application of the district attorney, and in furtherance of justice, order [*an action, after indictment,*] **the proceedings** to be dismissed; but in that case, the reasons of the dismissal shall be set forth in the order, which shall be entered in the journal.



Section 307. (ORS 134.160) Nolle prosequi; discontinuance by district attorney. The entry of a nolle prosequi is abolished, and the district attorney cannot discontinue or abandon a prosecution for a crime, except as provided in ORS 134.150.

Prosecution of Prisoners

Section 308. ORS 134.510 is amended to read:

134.510. **Notice requesting early trial on pending charge.** (1) Any inmate [*of the Oregon State Penitentiary or the Oregon State Correctional Institution*] **in the custody of the Corrections Division** against whom there is pending at the time of commitment or against whom there is filed at any time during imprisonment, in any court of this state, an indictment, information or criminal complaint charging him with the commission of a crime, may give written notice to the district attorney of the county in which the inmate is so charged requesting the district attorney to prosecute and bring him to trial on the charge forthwith.

(2) The notice provided for in subsection (1) of this section shall be signed by the inmate and set forth the place and term of imprisonment. A copy of the notice shall be sent to the court in which the inmate has been charged by indictment, information or complaint.

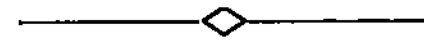
COMMENTARY

This section, ORS 134.540 and 134.560 are amended to make them consistent with the sentencing statutes custody provisions.

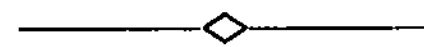
Section 309. (ORS 134.520) Trial within 90 days of notice unless continuance granted. (1) The district attorney, after receiving a notice requesting trial under ORS 134.510, shall, within 90 days

of receipt of the notice, bring the inmate to trial upon the pending charge.

(2) A continuance may be granted upon the request of the district attorney and with the consent of the inmate. The court shall grant any continuance with the consent of the defendant. The court may grant a continuance on motion of the district attorney for good cause shown. The fact of imprisonment is not good cause for the purposes of this subsection.



Section 310. (ORS 134.530) Dismissal of criminal proceeding not brought to trial within allowed time. On motion of the defendant or his counsel, or on his own motion, the court shall dismiss any criminal proceeding not brought to trial in accordance with ORS 134.520.



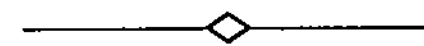
Section 311. ORS 134.540 is amended to read:

134.540. **Presence of prisoner at proceedings.** (1) Whenever the presence of an inmate [*of the Oregon State Penitentiary or the Oregon State Correctional Institution*] **in the custody of the Corrections Division** is necessary in any criminal proceeding under ORS 134.510 to 134.570, the court wherein the inmate is charged with the commission of a crime may issue an order directing the [*Superintendent of the Oregon State Penitentiary or the Superintendent of the Oregon State Correctional Institution*] **Administrator of the Corrections Division** to surrender the inmate to the sheriff of the county where the inmate is to be tried.

(2) The costs of transportation and maintenance of any inmate removed under this section [*from the penitentiary or correctional institution*] shall be paid by the county where the inmate is charged with commission of a crime.

(3) At the conclusion of any criminal proceeding under ORS 134.510 to 134.570, notwithstanding the provisions of ORS 137.140 or 137.150, the inmate shall be returned by the sheriff to the [*institution from which he was removed, there to serve the balance of the unexpired sentence and any other term imposed under any additional sentence*] **custody of the Corrections Division.**

(4) The time during which an inmate is in the custody of the sheriff under this section is part of and shall be counted as time served under the original sentence.



Section 312. ORS 134.550 is amended to read:

134.550. **Release of prisoner prohibited.** No inmate in the custody of a sheriff under ORS 134.540 shall be released [*on*

bail] pending a criminal proceeding under ORS 134.510 to 134.570 or any appeal therefrom.

COMMENTARY

The amendment deletes the reference to bail to conform to the new release of defendants sections.

Section 313. ORS 134.560 is amended to read:

134.560. **District attorney to furnish certain documents.** The district attorney shall, in all proceedings against inmates under ORS 134.510 to 134.570, obtain for and furnish to the court a certified copy of the judgment, sentence or commitment order pursuant to which the inmate is imprisoned [*in the penitentiary or correctional institution*].

Agreement on Detainers

Section 314. ORS 134.605 is amended to read:

134.605. **Agreement on Detainers.** The Agreement on Detainers is hereby enacted into law and entered into by this state with all other jurisdictions legally joining therein in the form substantially as follows:

AGREEMENT ON DETAINERS

The contracting states solemnly agree that:

ARTICLE I

The party states find that charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints. The party states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

ARTICLE II

As used in this agreement:

(a) "State" shall mean a state of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

(b) "Sending state" shall mean a state in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to Article III of this agreement or at the time that a request for custody or availability is initiated pursuant to Article IV of this agreement.

(c) "Receiving state" shall mean the state in which trial is to be had on an indictment, information or complaint pursuant to Article III or Article IV of this agreement.

(d) "Penal or correctional institution" of this state shall mean [*the Oregon State Penitentiary or the Oregon State Correctional Institution*] **any institution operated by the Corrections Division.**

ARTICLE III

(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within 180 days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint: Provided, that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.

(b) The written notice and request for final disposition referred to in paragraph (a) of this Article shall be given or sent by the prisoner to the warden or other official having custody of him, who shall promptly forward it together with the certificate to the prosecuting official and court by registered or certified mail, return receipt requested.

(c) The warden or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information or complaint on which the detainer is based.

(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) of this Article shall operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against the prisoner from the state to whose prosecuting official the request for final disposition is specifically directed. The warden or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the state to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request and the certificate. If trial is not had on any indictment, information or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) of this Article shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) of this Article, and a waiver of extradition to the receiving state to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending state. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) of this Article shall void the request.

ARTICLE IV

(a) The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with paragraph (a) of Article V of this agreement upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated: Provided, that the court having jurisdiction of such indictment, information or complaint shall have duly approved, recorded and transmitted the request; And provided further, that there shall be a period of 30 days after receipt by the appropriate authorities before the request be honored, within which period the governor of the sending state may disapprove the request

for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

(b) Upon receipt of the officer's written request as provided in paragraph (a) of this Article, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner and any decisions of the state parole agency relating to the prisoner. Such authorities simultaneously shall furnish all other officers and appropriate courts in the receiving state who have lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

(c) In respect of any proceeding made possible by this Article, trial shall be commenced within 120 days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

(d) Nothing contained in this Article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) of this Article, but such delivery may not be opposed or denied on the ground that the executive authority of the sending state has not affirmatively consented to or ordered such delivery.

(e) If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to paragraph (e) of Article V of this agreement, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

ARTICLE V

(a) In response to a request made under Article III or Article IV of this agreement, the appropriate authority in a sending state shall offer to deliver temporary custody of such prisoner to the appropriate authority in the state where such indictment, information or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in Article III of this agreement. In the case of a federal prisoner, the appropriate authority in the receiving state shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in federal custody at the place for trial, whichever custodial arrangement may be approved by the custodian.

(b) The officer or other representative of a state accepting an offer of temporary custody shall present the following upon demand:

(1) Proper identification and evidence of his authority to act for the state in to whose temporary custody the prisoner is to be given.

(2) A duly certified copy of the indictment, information or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

(c) If the appropriate authority shall refuse or fail to accept temporary custody of such prisoner, or in the event that an action on the indictment, information or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in Article III or Article IV of this agreement, the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending state.

(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending state and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

(h) From the time that a party state receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending state, the state in which the one or more untried indictments, informations or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping and returning the prisoner. The provisions of this paragraph shall govern unless the states concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves.

Nothing contained in this paragraph shall be construed to alter or affect any internal relationship among the departments, agencies and officers of and in the government of a party state, or between a party state and its subdivisions, as to the payment of costs, or responsibilities therefor.

ARTICLE VI

(a) In determining the duration and expiration dates of the time periods provided in Articles III and IV of this agreement, the running of such time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

(b) No provision of this agreement, and no remedy made available by this agreement, shall apply to any person who is adjudged to be mentally ill.

ARTICLE VII

Each state party to this agreement shall designate an officer who, acting jointly with like officers of other party states, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide within and without the state, information necessary to the effective operation of this agreement.

ARTICLE VIII

This agreement shall enter into full force and effect as to a party state when such state has enacted the agreement into law. A state party to this agreement may withdraw herefrom by enacting a statute repealing the agreement. However, the withdrawal of any state shall not affect the status of any proceedings already initiated by prisoners or by state officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

ARTICLE IX

This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence or provision of this agreement is declared to be contrary to the constitution of any party state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this agreement shall be held contrary to the constitution of any state party to this agreement, the agreement shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters.

Section 315. (ORS 134.615) Definition for ORS 134.605. As used in the Agreement on Detainers, the term "appropriate court" means any court of this state that has criminal jurisdiction.

Section 316. (ORS 134.625) Enforcement of ORS 134.605 by public agencies. All courts, departments, agencies, officers and employes of this state and its political subdivisions are hereby directed to enforce the Agreement on Detainers and to cooperate with one another and with other party states in enforcing the agreement and effectuating its purposes.

Section 317. (ORS 134.635) Effect of escape from custody in another state. Escape from custody while in another state pursuant to the Agreement on Detainers is an offense against the laws of this state to the same extent and degree as an escape from the institution in which the prisoner was confined immediately prior to having been sent to another state pursuant to the provision of the Agreement on Detainers and shall be punishable in the same manner as an escape from such institution.

Section 318. (ORS 134.645) Surrender of custody under ORS 134.605. It shall be lawful and mandatory upon any official in charge of a penal or correctional institution in this state to give over the person of any inmate thereof whenever so required by the operation of the Agreement on Detainers.

Section 319. (ORS 134.655) Administrator of agreement; appointment; duties. The Governor may appoint an administrator who shall perform the duties and functions and exercise the powers conferred upon such person by Article VII of the Agreement on Detainers.

Section 320. (ORS 134.665) Notice of request for temporary custody; prisoner's rights. In order to implement paragraph (a) of Article IV of the Agreement on Detainers, and in furtherance of its purposes, the appropriate authorities having custody of the prisoner shall, promptly upon receipt of the officer's written request, notify the prisoner and the Governor in writing that a request for temporary custody has been made and such notification shall describe the source and contents of such request. The authorities having custody of the prisoner shall also advise him in writing of his rights to counsel, to make representations to the Governor within 30 days, and to contest the legality of his delivery.

ARTICLE 11. PRE-TRIAL DISCOVERY

Section 321. Applicability; scope of disclosure. (1) The provisions of sections 321 to 328 of this Act are applicable to all prosecutions in which an indictment has been found by a grand jury, or in which an information has been filed in the circuit court. In other criminal prosecutions, the provisions of sections 321 to 328 of this Act shall be applicable if the defendant serves upon the district attorney having jurisdiction of the prosecution a written request for discovery of any of the items discoverable under these provisions.

(2) As used in sections 321 to 328 of this Act, "disclose" means to afford the adverse party an opportunity to inspect or copy the material.

COMMENTARY

A. Summary

Section 321 makes the provisions of the Article applicable to all criminal prosecutions in which an indictment has been returned and filed in circuit court, or in which an information has been filed on waiver of indictment. The Article would also be applicable to informations filed by the district attorney under the proposed amendment to Amended Article VII, § 5, of the Oregon Constitution.

Section 321 and section 325(1), considered together, provide for disclosure in felony cases only after the filing of an indictment or information. The Article also applies to misdemeanor prosecutions originating in circuit court. The Article is not applicable to require discovery in the district or justice court in connection with pre-indictment procedures in felony cases.

The Article is not automatically applicable to the prosecution of municipal ordinance violations, and to misdemeanor cases in the district and justice courts. Automatic, mandatory disclosure does not appear to be warranted in these cases, because of the large number of traffic and petty offenses which may be more expeditiously processed without mandatory pre-trial procedures. However, section 321 does permit a defendant to invoke the Article by service of a written notice on the district attorney prior to trial. The service of such a notice requires disclosure both by the prosecution and by the defendant.

The term "district attorney," as used throughout the Article, includes a city attorney as prosecuting officer in the case of municipal ordinance violations, and the Attorney General in those criminal prosecutions within his jurisdiction. (See general definitions.)

The definition of "disclose" is to make it clear that the proposal does not require the district attorney or the defense to make and furnish copies of all materials for the other party. The duty to disclose is met if the information is made available for inspection or copying. Section 325 permits the court to supervise discovery to the extent necessary to ensure that it proceeds properly and expeditiously. The Article is designed to require discovery to proceed without the obtaining of routine court orders. If the parties are unable to agree as to the time and manner of inspecting and copying material, or the extent to which experts may be permitted to examine and test the disclosure material, the court may prescribe necessary terms and conditions with respect to discovery.

B. Derivation

Section 321 is derived from the ABA Standards Relating to Discovery and Procedure Before Trial, § 1.5 (Approved Draft, 1970) which provides:

> "These standards should be applied in all serious criminal cases."

C. Relationship to Existing Law

The relationship of the provisions of this Article to present Oregon law is discussed in the commentary to subsequent sections.

Section 322. Disclosure to defendant. Except as otherwise provided in sections 326 and 328 of this Act, the district attorney shall

disclose to the defendant the following material and information within his possession or control:

(1) The names and addresses of persons whom he intends to call as witnesses at the trial, together with their relevant written or recorded statements or memoranda of any oral statements of such persons.

(2) Any written or recorded statements or memoranda of any oral statements made by the defendant, or made by a codefendant if the trial is to be a joint one.

(3) Any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons which the district attorney intends to offer in evidence at the trial.

(4) Any books, papers, documents, photographs or tangible objects:

(a) Which the district attorney intends to offer in evidence at the trial; or

(b) Which were obtained from or belong to the defendant.

(5) If actually known to the district attorney, any record of prior criminal convictions of persons whom the district attorney intends to call as witnesses at the trial.

COMMENTARY

A. Summary

Section 322 requires the district attorney to disclose to the defendant all of the enumerated material and information in any case in which the provisions of the Article apply. The enumeration is of material the pre-trial disclosure of which is calculated to minimize surprise, avoid unnecessary prolonged trials and provide adequate information for informed pleas and evaluation of cases before trial. The Article does not purport to include *all* information which the district attorney may be required, as a matter of due process, to disclose prior to the submission of the case to the jury. For instance, section 322 does not include all information which must be disclosed under *Brady v. Maryland*, 373 US 83 (1963), because the information is exculpatory or may tend to mitigate punishment. Disclosure under this Article occurs as soon as practicable following the filing of charges against the defendant. The Article does not endeavor to fix the time at which exculpatory information, not specifically covered by section 322, must be disclosed. Neither does the Article eliminate the *Brady* requirement that prior demand be made for disclosure of other exculpatory evidence. See, also *Hansen v. Cupp*, 92 Adv Sh 851, — Or App — (1971), which held that the state has a duty to voluntarily disclose to defense any evidence known to the prosecution material to the issue and favorable to the accused.

Subsection (5) requires the disclosure to the defendant of prior criminal convictions known to the prosecution of witnesses whom the prosecution intends to call as witnesses. The district attorney would not be required to obtain routine record checks of prosecution witnesses, nor does this provision require the district attorney to obtain prior record data on request of the defendant.

B. Derivation

This section is generally derived from more extensive provisions of the ABA Standards, § 2.1.

Unlike the ABA draft, however, this section does not require disclosure of (1) grand jury minutes of recorded testimony, excluded under section 326; (2) Information regarding electronic surveillance; and (3) Information tending to negate guilt of the accused or tending to reduce punishment therefor, except to the extent that such information is of the type specifically subject to disclosure. Other exculpatory or mitigating information would remain subject to disclosure under *Brady v. Maryland*, supra, and *Hansen v. Cupp*, supra.

C. Relationship to Existing Law

The proposed section substantially increases the scope of discovery in Oregon in criminal cases. Discovery is presently limited to the following:

1. ORS 133.755, which includes only the defend-

ant's statements covered in subsection (2) and property obtained from or belonging to the defendant, covered in subsection (4).

2. ORS 483.646(2), permitting certified copies of the report of chemical analysis of breath, blood, urine or saliva for alcoholic content.

3. ORS 137.075(2), providing for service on the convicted person of diagnostic examination in connection with sentencing.

4. ORS 137.113, providing for service of a copy of a report of a psychiatric examination.

5. ORS 135.875, providing for notice by the defendant of intention to rely on alibi defense and service of names of witnesses on whom defendant intends to rely. The proposed Article would require notice by the state of witnesses who might be called as rebuttal witnesses. The constitutionality of ORS 135.875, to the extent that it presently requires disclosure by the defense but not by the state was challenged in *State v. Wardius,* 93 Adv Sh 147, — Or App —, 487 P2d 1380 (1971), and the Supreme Court of the United States has granted a writ of certiorari to consider the question.

6. ORS 146.560 and 432.130 permit inspection of the medical investigator's post-mortem examination report.

The section would also modify the time at which notice of prior statements of witnesses must be given. See *State v. Foster,* 242 Or 101, 407 P2d 901 (1965). For further discussion of existing law, see Ellis, "Discovery in Oregon Criminal Cases," 4 Will L J 167 (1966).

Section 323. Other disclosure to defendant; special conditions. Except as otherwise provided in sections 326 and 328 of this Act, the district attorney shall disclose to the defendant:

(1) The occurrence of a search or seizure; and

(2) Upon written request by the defendant, any relevant material or information obtained thereby, the circumstances of the search or seizure, and the circumstances of the acquisition of any specified statements from the defendant.

COMMENTARY

A. Summary

This section requires disclosure by the district attorney of the occurrence of a search and seizure relevant to a pending prosecution. Defendant may thereupon request more detailed information regarding the search or seizure. In addition, the section requires the prosecution to disclose information regarding the circumstances of the acquisition of statements from the defendant.

The purpose of the section is to require disclosure of information which may be the basis for a motion to suppress evidence based on alleged violations of the Fourth or Fifth Amendment. Present practice does not require such disclosure, and constitutional challenges are generally based on defendant's personal knowledge of the facts, or information obtained from documents relative to the issuance of a search warrant.

This section endeavors to provide an opportunity to raise Fourth and Fifth Amendment questions in the trial court. Under state law, such motions must generally be made on trial, or even pre-trial, or they are waived. However, under *Fay v. Noia,* 372 US 391 (1963), alleged deprivation of constitutional rights in state criminal proceedings may be asserted in federal habeas corpus, even though not raised in state court, unless there has been a deliberate bypass of state procedures for litigating the issue. Expanded pretrial discovery on Fourth and Fifth Amendment questions may serve to maximize the opportunity of the state trial court to rule on constitutional challenges in a timely and orderly manner.

B. Derivation

The section is based on ABA Standards, § 2.3.

C. Relationship to Existing Law

The section is new.

Section 324. Disclosure to the state. Except as otherwise provided in sections 326 and 328 of this Act, the defendant shall dis-

close to the district attorney the following material and information within his possession or control:

(1) The names and addresses of persons, including himself, whom he intends to call as witnesses at the trial, together with relevant written or recorded statements or memoranda of any oral statements of such persons other than himself.

(2) Any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons, which the defendant intends to offer in evidence at the trial.

(3) Any books, papers, documents, photographs or tangible objects which the defendant intends to offer in evidence at the trial.

COMMENTARY

A. Summary

This section provides for mandatory disclosure by the defendant to the prosecution of specified materials and information which the defendant intends to present as evidence at the trial. Subsection (1) requires the defendant to notify the district attorney if he intends to testify, but he is not required to furnish his own statement or reveal what his testimony will be. Discovery is not reciprocal in the sense that the parties elect, or elect not to, disclose information. Nevertheless, and with an important limitation, all of the evidence which the defense must disclose to the prosecution is evidence of the type which the prosecution must, for their part, disclose to the defense prior to trial. The rationale of these parallel discovery provisions was described by Chief Justice Traynor in discussing *Jones v. Superior Court,* 58 Cal 2d 56, 376 P2d 919, 22 Cal Rep 879 (1962), as follows:

"Since the defendant could not be compelled to testify or produce private documents in his possession, we recognized that ordinarily the prosecution could not require him to reveal his knowledge of the existence of possible witnesses and the existence of reports and X-rays for the purpose of preparing its case against him. Did it therefore follow that the defendant could not be required to reveal in advance the witnesses he intended to call at the trial and the evidence he intended to produce? A number of states by statute require a defendant specifically to plead certain defenses such as insanity or alibi and to reveal in advance of trial the names of the witnesses who will be called in support of such defenses. These statutes have been sustained over the objection that they violate constitutional privileges against self-incrimination, for they do not compel the defendant to reveal or produce anything, but merely regulate the procedure by which he presents his case. We found this reasoning persuasive. The trial court's order that the defendant reveal the names of witnesses he intended to call and produce reports and X-rays he intended to introduce in evidence simply required him to disclose information that he would shortly reveal in any event. He was thus required only to decide at a point earlier in time than he would ordinarily have to whether to remain silent or to disclose the information. He lost only the possible tactical advantage of taking the prosecution by surprise at the trial, an advantage that in any event would easily have gone for naught given the probability that the trial court would have granted the prosecution a continuance to prepare a rebuttal." Traynor, "Ground Lost and Found in Criminal Discovery," 39 NYUL Rev 228, 247 (1964).

B. Derivation

Enumeration of the items required to be disclosed from the defendant is adapted from Rule 16, Federal Rules of Criminal Procedure, and New Jersey Criminal Practice Rule 3:13-3(d). Both of these provisions provide for reciprocal discovery on motion of the defendant. The proposed Article makes disclosure mandatory both on the part of the prosecution and the defense, without being triggered by motion.

C. Relationship to Existing Law

Presently, the only provisions for disclosure by the defense to the district attorney are contained in: ORS 135.875, which requires notice of intent to present alibi testimony, together with the name and residence or business address of each witness upon whom the defendant intends to rely for alibi evidence; ORS 161.055(3), which requires notice of intention to rely on affirmative defenses; ORS 161.309, notice of intent to rely on mental disease or defect defense, and ORS 163.135, notice of intent to

introduce expert testimony regarding mental or emotional disturbance. None of the aforementioned statutes are intended to be affected by this draft, although the general provisions of the draft section may overlap the specific requirements of the existing statutes.

Section 325. Time of disclosure. (1) The obligations to disclose shall be performed as soon as practicable following the filing of an indictment or information in the circuit court or the filing of a complaint charging a misdemeanor or violation of a city ordinance. The court may supervise the exercise of discovery to the extent necessary to ensure that it proceeds properly and expeditiously.

(2) If, after complying with the provisions of sections 321 to 328 of this Act, a party finds, either before or during trial, additional material or information which is subject to or covered by these provisions, he must promptly notify the other party of the additional material or information.

COMMENTARY

A. Summary

Section 325 specifies the time and manner in which a discovery is to occur, and provides for disclosure of evidence which is later discovered and which is subject to the Article.

The section also permits the court to supervise discovery by rule or order, to the extent necessary to ensure compliance with the Article. The objective of the discovery Article is to provide broad bilateral discovery and it is the consensus of the Commission that the provisions of the Article should be construed to implement that objective.

B. Derivation

Subsection (1). No parallel provisions have been found in the codes of other states or model codes. Subsection (2). Similar provisions appear in Federal Rule 16, the ABA Standards, and the New York, New Jersey and Florida discovery rules.

C. Relationship to Existing Law

The provision is new.

Section 326. Property not subject to discovery. (1) The following material and information shall not be subject to discovery under sections 321 to 328 of this Act:

(a) Work product, legal research, records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of the attorneys, peace officers or their agents in connection with the investigation, prosecution or defense of a criminal action.

(b) The identity of a confidential informant where his identity is a prosecution secret and a failure to disclose will not infringe the constitutional rights of the defendant. Except as provided in section 328 of this Act, disclosure shall not be denied hereunder of the identity of witnesses to be produced at trial.

(c) Transcripts, recordings or memoranda of testimony of witnesses before the grand jury, except transcripts or recordings of statements made by the defendant.

(2) When some parts of certain material are discoverable under sections 321 to 328 of this Act, and other parts not discoverable, as much of the material shall be disclosed as is consistent with the provisions thereof.

COMMENTARY

A. Summary

Subsection (1) excludes from discovery:

(a) The work products of attorneys, peace officers or the agents of either to the extent that they contain opinions, theories or conclusions about the case. The exclusion does not exempt from discovery relevant information possessed by the attorneys or their staffs, to the extent that such evidence is otherwise subject to disclosure.

(b) The identity of a confidential informant whose sole connection with the case is the giving of information providing probable cause for an arrest or a search need not be disclosed. However, if the prosecution intends to produce the witness at trial, the identity of the witness must be disclosed, unless a protective order is issued under section 328.

(c) Nondisclosure of grand jury proceedings is provided, except for transcripts or recordings of statements made before the grand jury by the defendant. The use of the term, "recordings" is not intended to include memoranda of the defendant's testimony, such as grand jury minutes.

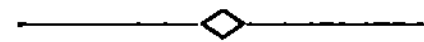
To the extent that material discoverable is intermingled with material not subject to discovery, subsection (2) permits the excision of nondiscoverable material, and disclosure of the remainder.

B. Derivation

Subsection (1) is generally derived from ABA Standards, § 2.6. However, § 2.6(c) of the ABA draft, exempting information relating to national security is not included in the proposed Article. Subsection (1)(c) is based upon the present secrecy of grand jury proceedings, as prescribed in ORS 132.220. Subsection (2) is based generally on § 4.5 of the ABA draft.

C. Relationship to Existing Law

The provision is new.



Section 327. Effect of failure to comply with discovery requirements. Upon being apprised of any breach of the duty imposed by the provisions of sections 321 to 328 of this Act, the court may order the violating party to permit inspection of the material, or grant a continuance, or refuse to permit the witness to testify, or refuse to receive in evidence the material not disclosed, or enter such other order as it considers appropriate.

COMMENTARY

A. Summary

Because the Article requires the party possessing it to disclose predominantly information which the party intends to introduce into evidence, the initial enforcement of discovery requirements will necessarily come through orders directing discovery, granting continuances, or rejecting the nondisclosed information as evidence. Should the court find that nondisclosure is wilful, the court could consider that the withholding of evidence is contumacious, and the offending party might be punished for contempt.

B. Derivation

This section is derived from ABA Standards, § 4.7.

C. Relationship to Existing Law

The provision is new.

Section 328. Protective orders. (1) Upon a showing of good cause, the court may at any time order that specified disclosures be

denied, restricted or deferred, or make such other order as is appropriate.

(2) Upon request of any party, the court may permit a showing of good cause for denial or regulation of disclosures, or portion of such showing, to be made in camera. A record shall be made of such proceedings.

(3) If the court enters an order granting relief following a showing in camera, the entire record of the showing shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal. The trial court, in its discretion, may, after trial and conviction, unseal matters previously sealed.

COMMENTARY

A. Summary

This section gives the court authority to deny, restrict, defer or otherwise limit discovery based on sufficient showing of cause. This permits the court to control or prevent possible abuses of expanded discovery privileges authorized by the Article.

Among the considerations to be taken into account by the court would be the safety of witnesses and others, or a particular danger of perjury or witness intimidation. In states allowing discovery, protective orders are usually sought by the prosecution to protect certain witnesses prior to trial.

This section provides a procedure whereby the showing of cause is made, in whole or in part, in a written statement to be inspected by the court, without disclosure to the adverse party of the facts forming the basis for the motion or the evidence sought to be protected from disclosure. Such a revelation would, of course, defeat the purpose of the protective order.

If the court grants relief based upon the showing made, the record of the showing is to be sealed and preserved in the records of the court. If the defendant is convicted, and the need for secrecy is passed, the record of the showing may be unsealed, in the court's discretion.

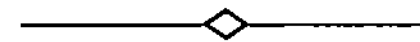
The protective order applies only to eliminate the requirement of pre-trial disclosure under the Article.

B. Derivation

The section is drawn from NYCPL, 240.20 (subdivision 5). Federal Rule 16(e) is almost identical. Florida and New Jersey rules also provide for a "protective order" under similar circumstances. The ABA Standards provide for protective orders "provided that all material and information to which a party is entitled must be disclosed in time to permit his counsel to make beneficial use thereof."

C. Relationship to Existing Law

The provision is new.



PART IV. CRIMINAL TRIAL PROVISIONS

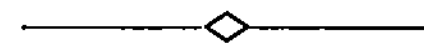
ARTICLE 12. CRIMINAL TRIALS

Section 329. Jury trial. (1) The defendant in all criminal prosecutions shall have the right to public trial by an impartial jury.

(2) The defendant may elect to waive trial by jury and consent to be tried by the judge of the court alone, provided that the election is in writing and with the consent of the trial judge.

COMMENTARY

This section codifies the requirement in Oregon Constitution, Article I, § 11, that a waiver of a jury trial be in writing and with the consent of the judge. The Constitution does not allow a waiver in "capital" cases. A capital case is one punishable by death. *State v. Charles,* 3 Or App 172, 469 P2d 792. It appears that the intent of the Oregon Constitution was to prevent a defendant from waiving a jury trial if he was accused of an offense punishable by death. With the abolition of the death penalty in 1964, the reason for the restriction on jury waivers ceased to exist.



Section 330. Challenge to the jury panel. (1) The district attorney or the defendant in a criminal action may challenge the jury panel on the ground that there has been a material departure from the requirements of the law governing selection of jurors.

(2) A challenge to the panel shall be made before the voir dire examination of the jury.

COMMENTARY

A. Summary

The section provides the district attorney or the defendant the procedural mechanism to challenge the method of selection of the jury panel in criminal cases.

B. Derivation

Subsection (1) is derived from ABA Standards on Trial by Jury, § 2.3 (Approved Draft, 1968). Subsection (2) is based in part on NYCPL, § 270.10(2).

C. Relationship to Existing Law

Historically, the Deady Code § 179 sets forth the prohibition of challenging the array in civil trials. The Oregon Legislative Assembly on October 17, 1862, passed the General Repealing Acts which, in § 2, applied the civil procedure to criminal procedure. Section 179 of the Deady Code has survived in the present form of ORS 17.115.

At common law the right to challenge the panel existed; however, the statute passed in Oregon abolished this common law right (Deady Code § 179). *State v. Fitzhugh,* 2 Or 227 (1867).

In *State v. Ju Nunn,* 53 Or 1, 97 P 96 (1908), the court explained that there were two types of challenges; the challenge to the array or panel, and the challenge to the poll of the individual jurors. The court stated that the challenge to the array is less important today and thus has been absolutely abolished in some states and limited in others.

More recently in *State v. Howell,* 237 Or 382, 388 P2d 282 (1964), the court held that a motion to stay the proceedings "until a new jury panel was chosen" is in the nature of a challenge to the panel which is not allowed in this state.

In 1968 the Supreme Court of the United States held that the federal right to a petit jury was applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Duncan v. Louisiana,* 391 US 145 (1968). The Due Process Clause protects a defendant from jurors who are actually incapable of rendering an impartial verdict and due process is denied by circumstances that create the likelihood of the appearance of bias. *Peters v. Kiff,* 11 Cr L 3157, 3160, — US — (1972).

The selection procedure for grand and petit juries that systematically excluded Blacks has been pro-

hibited by the United States Supreme Court. In *Alexander v. Louisiana,* 405 US 625 (1972), the court prohibited such selection with respect to grand jury members. In *Avery v. Georgia,* 345 US 559 (1953), the court prohibited such selection procedures with respect to petit juries.

Recently, the United States Supreme Court in *Peters v. Kiff,* supra, stated that a state cannot, consistent with due process, subject a defendant to indictment by a grand jury or trial by a petit jury that has been selected in an arbitrary and discriminatory manner contrary to federal constitutional and statutory requirements. The main holding in *Peters* is that any person, regardless of any showing of actual bias, has standing to attack the systematic exclusion of Blacks. Peters is a White and the court held that he had standing to assert that he was deprived of a fair trial because of the systematic exclusion of Blacks.

Mr. Justice White in a concurring opinion in *Peters* quoted from *Hill v. Texas,* 316 US 400, 404 (1942), the following:

> "No State is at liberty to impose upon one charged with a crime a discrimination in its trial procedure which the Constitution, and an act of Congress passed pursuant to the Constitution, alike forbid . . . it is our duty as well as the State's to see to it that throughout the procedure for bringing him to justice he shall enjoy the protection which the Constitution guarantees." (At 3161.)

The present law in Oregon, ORS 17.115, prohibits the defendant in either a civil case or a criminal case from asserting a challenge to the jury panel. The denial of the right to challenge a jury panel in a criminal case appears to be a denial of due process and, therefore, ORS 17.115 is most likely unconstitutional when applied to criminal cases.

As the court stated in *Hill,* the State must ". . . see to it that throughout the procedure for bringing him to justice he shall enjoy the protection which the Constitution guarantees . . . ." ORS 17.115 does not "see to it" that the defendant can enjoy the protection of the Constitution to a trial by fair and impartial jurors because ORS 17.115 prohibits any challenge to the jury panel.

The ABA Standards adopted a challenge to the panel that must be grounded upon an objection to the method of selection of the jury panel. However, § 2.3 does not mean that any deviation from the elaborate procedures of selection of a jury list would discharge the particular jury panel. The term "material departure" is used to prevent a rigid application of the rule. Material departure means ". . . the intentional or inadvertent failure to comply with such provisions . . ." of the statute. (Commentary to § 2.3 of ABA Standards on Trial by Jury.)

Pinkney v. United States, 380 F2d 882 (5th Cir 1967), stated that a defendant may not complain about the makeup of the panel. The objection of the defendant must be to the manner of selection of the jury panel.

In *Anderson v. Gladden,* 234 Or 614, 624, 383 P2d 986 (1963), the court held that ". . . upon proper application to the circuit court, mandamus will lie to compel performance by the officers charged with statutory duties in providing juries." *Anderson* did not mention ORS 17.115 but stated that:

> "If an accused seriously believes that his defense will be prejudiced because of the composition of the jury he, or his counsel, should seek correction before, rather than after, testing the panel by its verdict." 234 Or at 625.

In *Garner v. Alexander,* 167 Or 670, 120 P2d 238 (1941), the court held that the alleged discrimination in excluding women from the jury panel could not be reached by habeas corpus.

> "Proceedings in habeas corpus are in the nature of a collateral attack, and consequently errors or irregularities which might render a judgment voidable cannot be reached by habeas corpus: (citations omitted) . . ." 167 Or at 674.

The proposed challenge to the panel in criminal cases should clarify the procedural ambiguity concerning the existence of an improperly drawn panel. It appears somewhat inconsistent to require a defendant to assert the existence of prejudice of the panel before trial when there is a specific statute, ORS 17.115, that prohibits the challenge to the jury panel.

Section 331. ORS 136.010 is amended to read:

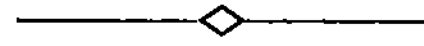
136.010. **When an issue of fact arises.** An issue of fact arises [:]

[*(1)*] upon a plea of not guilty.

[*(2) Upon a plea of a former conviction or acquittal of the same crime.*]

COMMENTARY

The amendment deletes the reference to former jeopardy. ORS 136.020 will be repealed as unnecessary. Any issue raised by a demurrer or motion to dismiss would give rise to an issue of law to be decided by the court.



Section 332. ORS 136.030 is amended to read:

136.030. **How issues are tried.** An issue of law shall be tried by **the judge of** the court and an issue of fact by a jury of the the county in which the action is triable.

COMMENTARY

The amendment is to make the section consistent with § 329.

Section 333. ORS 136.040 is amended to read:

136.040. **When presence of a defendant is necessary.** If the [*indictment*] **charge** is for a misdemeanor, the trial may be had in the absence of the defendant if he appears by **his** counsel; but if it is for a felony, he shall appear in person.

COMMENTARY

The amendment will apply to provisions of the section to any charge, whether it is by indictment, information or complaint.

Section 334. (ORS 136.050) Degree of crime for which guilty defendant can be convicted when doubt as to degree exists. When it appears that the defendant has committed a crime of which there are two or more degrees and there is a reasonable doubt as to the degree of which he is guilty, he can be convicted of the lowest of those degrees only.

Section 335. (ORS 136.060) Jointly indicted defendants; separate or joint trial. When two or more defendants are jointly indicted for a felony, any defendant requiring it shall be tried separately; but in other cases, defendants jointly indicted may be tried separately or jointly, in the discretion of the court.

Section 336. ORS 136.070 is amended to read:

136.070. **Postponement of trial.** When [*an indictment*] **a case** is at issue upon a question of fact and before the same is called for

trial, the court may, upon sufficient cause shown by the affidavit of the defendant or the statement of the district attorney, direct the trial to be postponed for a reasonable period of time . [*; and all affidavits or papers read on either side upon the application shall be first filed with the clerk.*]

COMMENTARY

The amendment applies the provisions of the section to charges brought by information or complaint, as well as by indictment.

Section 337. (ORS 136.080) Deposition of witness as condition of postponement. When an application is made for the postponement of a trial, the court may in its discretion require as a condition precedent to granting the same that the party applying therefor consent that the deposition of a witness may be taken and read on the trial of the case. Unless such consent is given, the court may refuse to allow such postponement for any cause.

Section 338. (ORS 136.090) Procedure for taking deposition. When the consent mentioned in ORS 136.080 is given, the court shall make an order appointing some proper time and place for taking the deposition of the witness, either by the judge thereof or before some suitable person to be named therein as commissioner and upon either written or oral interrogatories.

Section 339. (ORS 136.100) Filing and use of deposition. Upon the making of the order provided in ORS 136.090, the deposition shall be taken and filed in court and may be read on the trial of the case in like manner and with like effect and subject to the same objections as in civil cases.

Section 340. ORS 136.110 is amended to read:

136.110. **Commitment of defendant.** When a defendant who has [*given bail*] **been released** appears for trial, the court may in its discretion at any time after such appearance order him to be committed to actual custody to abide the judgment or further order of the court; and he shall be committed and held in custody accordingly.

COMMENTARY

The amendment conforms the section to the new provisions on Release of Defendants.

Section 341. ORS 136.120 is amended to read:

136.120. **Dismissal of accusatory instrument when prosecution is unprepared at time for trial.** If, when the [*indictment*] **case** is called for trial, the defendant appears for trial and the district attorney is not ready and does not show any sufficient cause for postponing the trial, the court shall order the [*indictment*] **accusatory instrument** to be [*discharged*] **dismissed**, unless, being of the opinion that the public interests require the [*indictment*] **accusatory instrument** to be retained for trial, [*it*] **the court** directs it to be retained.

COMMENTARY

The amendments apply the provisions of the section to charges brought by information or complaint, as well as by indictment. Also, the term, "discharged," is deleted and replaced by the more precise legal term, "dismissed." Other style changes are made.

Section 342. ORS 136.130 is amended to read:

136.130. **When discharge of accusatory instrument bars another prosecution for same crime; judgment of acquittal.** If the court orders the [*indictment*] **accusatory instrument** to be [*discharged*] **dismissed and the instrument charges a felony or Class A misdemeanor**, the order is not a bar to another action for the same crime unless the court so directs [*and;*] **.** If the court does so direct, judgment of acquittal shall be entered. **If the accusatory instrument charges an offense other than a felony or Class A misdemeanor, the order of dismissal shall be a bar to another action for the same offense.**

COMMENTARY

The section is amended to conform with other sections of the draft and to prevent the order of dismissal from barring further prosecution if the case involves a serious crime, unless the court specifically orders a judgment of acquittal. Similar statutes dealing with dismissal on grounds of delay, ORS 134.110 to 134.160, are amended accordingly.

Section 343. ORS 136.140 is amended to read:

136.140. **Proceedings after judgment of acquittal.** If, upon the [*discharge*] **dismissal** of the [*indictment*] **accusatory instrument**, the court gives judgment of acquittal, the same proceedings shall be had thereon in relation to the custody **or release** of the defendant [*, his bail or money deposited in lieu thereof*] as are prescribed in ORS 135.680.

COMMENTARY

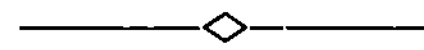
The amendments are to make the section consistent with earlier sections, and with the proposed changes in Release of Defendants.

Section 344. ORS 136.210 is amended to read:

136.210. **Formation of jury.** In criminal cases the trial jury shall consist of 12 persons unless the parties consent to a less number. It shall be formed, except as otherwise provided in ORS 136.220 to 136.250, in the same manner provided by ORS 17.105, **17.110, 17.120** to 17.135, 17.145, 17.150, and 17.160 to 17.185; provided, however, that when the full number of jurors has been called, they shall thereupon be examined as to their qualifications, first **by the court, then** by the defendant and then by the state. After they have been passed for cause, peremptory challenges, if any, shall be exercised as provided in ORS 136.230.

COMMENTARY

The section is amended to require the trial judge to first examine the jurors as to the qualifications before examination of the jurors is made by the state and defense. The purpose is to eliminate unnecessary routine questions by counsel. The reference incorporating ORS 17.115 dealing with the challenging of a jury panel is deleted. ORS 17.115 will only deal with challenges to civil trial juries because of the provisions of section 330.



Section 345. ORS 136.220 is amended to read:

136.220. **Challenge of jurors for implied bias.** A challenge for implied bias [*may be taken*] **shall be allowed** for any of the following causes and for no other:

(1) Consanguinity or affinity within the fourth degree to the person alleged to be injured by the crime charged in the [*indictment or information*] **accusatory instrument**, to the complainant or to the defendant.

(2) Standing in the relation of guardian and ward, attorney and client, **physician and patient,** master and servant, **debtor and creditor, principal and agent** or landlord and tenant with the:

(a) Defendant;

(b) Person alleged to be injured by the crime charged in the [*indictment or information*] **accusatory instrument**; or

(c) Complainant.

(3) Being a member of the family, a partner in business with or in the employment of any person referred to in paragraph (a), (b) or (c) of subsection (2) of this section or a surety or bail in the action or otherwise for the defendant.

(4) Having served on the grand jury which found the indictment or on a jury of inquest which inquired into the death of a person whose death is the subject of the indictment or information.

(5) Having been one of a jury formerly sworn in the same action, and whose verdict was set aside or which was discharged without a verdict after the cause was submitted to it.

(6) Having served as a juror in a civil action, suit or proceeding brought against the defendant for substantially the same act charged as a crime.

(7) Having served as a juror in a criminal action upon substantially the same facts, transaction or criminal eposide.

COMMENTARY

A. Summary

The section makes the grounds for implied bias the same as in ORS 17.140, and amends the statute to indicate clearly that such challenges shall be allowed by the court.

B. Derivation

The amendments to subsection (2) and subsection (7) are derived from ORS 17.140.

C. Relationship to Existing Law

Existing law (ORS 17.140) prevents a juror in a civil case from sitting on another civil case that relates to the same facts and circumstances of the first case. Criminal cases are by their nature more serious and also subject to more conflicting evidence. It appears logical and desirable that the basis of implied bias of criminal jurors be consistent with the implied bias provisions for civil trials.

State v. Stigers, 122 Or 113, 256 P2d 649 (1927), stated that the implied bias statute in criminal cases differs materially from that in civil cases because there is no subdivision in the criminal statute that applies to a juror who has served on the trial of one indicted separately for an offense growing out of the same transaction. In criminal trials where this occurs the challenge should be made on the basis of actual bias.

In *Lilley v. Gifford Phillips,* 210 Or 278, 310 P2d 337 (1957), the court held that where statutes define implied bias, the statutory grounds alone are controlling.

The ABA makes no recommendation as to the specific grounds for challenge. However, commentary to § 2.5 mentions the ALI Code of Criminal Procedure (1931). The ALI code at § 277(f) states: "The juror served on a jury which has tried another person for the offense charged in the indictment or information . . ." and is a challenge for cause.

Section 346. ORS 136.230 is amended to read:

136.230. **Peremptory challenges. (1)** If the crime charged in the [*indictment*] **accusatory instrument** is punishable with [*death or*] imprisonment in the penitentiary for life, the defendant is entitled to 12 and the state to 6 peremptory challenges, and no more. If the [*crime*] **offense** is punishable otherwise, the defendant is entitled to six and the state to three such challenges.

(2) Peremptory challenges shall be [*conducted*] **taken in writing by secret ballot** as follows:

(a) The defendant may challenge two jurors and the state may challenge one, and so alternating, the defendant exercising two challenges and the state one until the peremptory challenges are exhausted.

(b) After each challenge the panel shall be filled and the additional juror passed for cause before another peremptory challenge is exercised. Neither party shall be required to exercise a peremptory challenge unless the full number of jurors is in the jury box at the time.

(c) The refusal to challenge by either party in [*said*] order of alternation does not prevent the adverse party from exercising his

full number of challenges, and such refusal on the part of a party to exercise his challenge in proper turn concludes him as to the jurors once accepted by him. If his right of peremptory challenge is not exhausted, his further challenges shall be confined, in his proper turn, to such additional jurors as may be called.

COMMENTARY

The statute is amended to insert the term, "accusatory instrument" (indictment, information or complaint) in place of the limited term, "indictment." The section is restructured to make it easier to read and to make two other changes: It deletes an obsolete reference to the death penalty and specifically requires that peremptory challenges be taken in writing by secret ballot. The last change is consistent with the practice generally being followed in the trial courts now, and is meant to insure that the identity of the party making a peremptory challenge is not to be divulged to the jury.

Section 347. (ORS 136.240) Challenge of accepted juror. If the peremptory challenges of the moving party are not already exhausted, the court may for good cause shown permit a challenge to be taken to any juror before the jury is completed and sworn, notwithstanding the juror challenged may have been theretofore accepted.

Section 348. ORS 136.250 is amended to read:

136.250. **Taking of challenges; joinder by codefendants. (1)** All **peremptory** challenges [*, whether peremptory or for cause,*] may be taken by the state or defendant, but when several defendants are tried together, they can not sever their challenges, but **a majority** must join therein.

(2) When two or more defendants are tried together, the number of peremptory challenges prescribed in ORS 136.230 shall be doubled, but in no case shall the total number of challenges exceed 12 for the state and 24 for the defense.

COMMENTARY

A. Summary

This section provides the requirement of majority consensus for exercise of the peremptory challenges when there are two or more defendants joined in the same trial. The section further provides for 24 peremptory challenges for the defense and 12 for the state in joint murder cases. In all other joint trials the number of peremptory challenges are doubled for both the defense and the state.

B. Derivation

The amendments are derived from NYCPL, § 270.25(3).

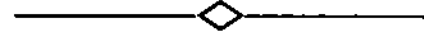
C. Relationship to Existing Law

Presently there are very few, if any, trials of co-defendants in Oregon. The general practice appears to be an automatic request by the defense for severance in any case where there are jointly indicted defendants. Therefore, the problem of joint challenges has never arisen in the appellate courts.

The section allows more peremptory challenges for jointly tried defendants but only to the extent of double the normal amount. Were each defendant to receive the same amount of peremptories as if he were separately tried, the trial of three or more defendants could be unduly delayed. However, to

limit the number of peremptory challenges as the current statute does, would hinder jointly tried defendants from obtaining sufficient challenges to insure an impartial jury for each defendant.

The requirement that a majority of the co-defendants concur in the exercise of any peremptory challenges provides for expeditious challenging and eliminates the possibility of a dissenting co-defendant tying up the challenges.



Section 349. (ORS 136.260) Selection of alternate jurors. In the trial of a person charged with a felony, the court may in its discretion, after the jury is impaneled and sworn, direct the calling of one or two additional jurors, to be known as "alternate jurors." Such jurors shall be drawn from the same source and in the same manner and shall have the same qualifications as other jurors in the case. They shall be subject to the same examination and be challenged in the same manner as other jurors. The prosecution is entitled to one, and the defendant to two, peremptory challenges in the selection of each alternate juror and, in the drawing of alternate jurors, the names of jurors excused for cause or on peremptory challenges in the selection of the jury to which such jurors shall serve as alternates shall be excluded from the names from which such drawing is made.

Section 350. (ORS 136.270) Oath, rules governing conduct and attendance of alternate jurors at trial. Alternate jurors shall take the same oath and shall be subject to the same laws, orders and rules, including any order preventing the separation of the jury during the trial, shall be seated near the other jurors in the case, with equal opportunity and facilities for seeing and hearing the proceedings and shall attend at all times upon the trial of the case in company with the other jurors.

Section 351. (ORS 136.280) Substitution of alternate for juror dying or becoming disabled; dismissal. If, before the final submission of the case, any juror dies or is unable to perform his duty because of illness or other cause which the court deems sufficient, he shall be dismissed from the case. The court shall cause to be drawn the name of an alternate juror, who shall then become a member of the jury as though he had been selected as one of the original jurors. Any alternate juror not selected to become a member of the jury shall be dismissed from the case upon its final submission to the jury.

Section 352. (ORS 136.285) Priority in trial schedule for defendants in custody. The court shall endeavor to schedule trial dates for defendants in custody before defendants who have been released

pending trial, subject however to rights of all defendants to be tried without unreasonable delay.

Section 353. ORS 136.290 is amended to read:

136.290. **Limitation on time defendant held prior to trial; release of defendant if limit exceeded.** (1) Except as provided in ORS 136.295, a defendant shall not remain in custody pending commencement of his trial more than 60 days after the time of his arrest unless the trial is continued with his express consent.

(2) If a trial is not commenced within the period required by subsection (1) of this section, the court shall release the defendant on his own recognizance, or in the custody of a third party, [*or upon such bail as the defendant can afford,*] or upon whatever additional reasonable terms and conditions the court deems just **as provided in sections 237 to 248 of this 1973 Act.**

COMMENTARY

The amendment conforms the section to the new provisions on Release of Defendants.

Section 354. ORS 136.295 is amended to read:

136.295. **Application of ORS 136.290.** (1) ORS 136.290 does not apply to persons charged with crimes which are not [*bailable*] **releaseable** offenses under [*ORS 140.020*] **section 239 of this 1973 Act** or to persons charged with conspiracy to commit murder, or charged with attempted murder [*in the first degree*] , or to prisoners serving sentences resulting from prior convictions.

(2) If the defendant is extradited from another jurisdiction, the 60-day period shall not commence until he enters the State of Oregon, provided that law enforcement authorities from the other jurisdiction and this state have conducted the extradition with all practicable speed. The original 60-day period shall not be extended more than an additional 60 days, except where delay has been caused by the defendant in opposing the extradition.

(3) Any reasonable delay resulting from examination or hearing regarding the defendant's mental condition or competency to stand trial, or resulting from other motion or appeal by the defendant, shall not be included in the 60-day period.

(4) If a victim or witness to the crime in question is unable to testify within the original 60-day period because of injuries received at the time the alleged crime was committed, the court may order an extension of not more than 60 additional days. The court, for the same reason, may order a second extension of not more than

60 days, but in no event shall the defendant be held in custody before trial for more than a total of 180 days.

(5) Any period following defendant's arrest in which he is not actually in custody shall not be included in the 60-day computation.

COMMENTARY

The amendments conform the section to the new Release of Defendants provisions.

Section 355. (ORS 136.300) Time limit on appeals to circuit court. A defendant who is in custody pending an appeal to circuit court from a judgment of a municipal, justice or district court shall have his appeal heard not more than 60 days after the defendant gives notice of appeal.

Section 356. (ORS 136.310) Function of court; effect of judicial notice of a fact. All questions of law, including the admissibility of testimony, the facts preliminary to such admission and the construction of statutes and other writings and other rules of evidence shall be decided by the court. All discussions of law shall be addressed to it. Whenever the knowledge of the court is by statute made evidence of a fact, the court shall declare such knowledge to the jury, which is bound to accept it as conclusive.

Section 357. (ORS 136.320) Function of jury; acceptance of charge on law. Although the jury may find a general verdict, which includes questions of laws as well as fact, it is bound, nevertheless, to receive as law what is laid down as such by the court; but all questions of fact, other than those mentioned in ORS 136.310, shall be decided by the jury, and all evidence thereon addressed to it.

Section 358. (ORS 136.330) Applicability of rules for conduct of civil trial. (1) ORS 17.210, 17.220 to 17.230, 17.255 and 17.305 to 17.360 apply to and regulate the conduct of the trial of criminal actions.

(2) ORS 17.505 to 17.515 apply to and regulate exceptions in criminal actions.

Section 359. (ORS 136.520) Presumption as to innocence; acquittal in doubtful cases. A defendant in a criminal action is presumed to be innocent until the contrary is proved. In case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to be acquitted.

Section 360. (ORS 136.530) Testimony shall be given orally. In a criminal action, the testimony of a witness shall be given orally in the presence of the court and jury, except in the case of a witness whose testimony is taken by deposition by order of the court in pursuance of the consent of the parties, as provided in ORS 136.080 to 136.100.

Section 361. (ORS 136.540) Confessions and admissions; corroboration. (1) A confession or admission of a defendant, whether in the course of judicial proceedings or otherwise, cannot be given in evidence against him when it was made under the influence of fear produced by threats; nor is a confession only sufficient to warrant his conviction without some other proof that the crime has been committed.

(2) Evidence of a defendant's conduct in relation to a declaration or act of another, in the presence and within the observation of the defendant, cannot be given when the defendant's conduct occurred while he was in the custody of a peace officer unless the defendant's conduct affirmatively indicated his belief in the truth of the matter stated or implied in the declaration or act of the other person.

Section 362. ORS 136.510 is amended to read:

136.510. **Applicability of law of evidence in civil actions.** The law of evidence in civil actions is also the law of evidence in criminal actions and proceedings, except as otherwise [*specially*] **specifically** provided in the statutes relating to crimes and criminal procedure.

COMMENTARY

The Commission recommends this amendment to better show that the statutory and case law of evidence in civil actions is also the law in criminal proceedings, unless there is a specific statute to the contrary regarding a certain rule of evidence.

Section 363. ORS 136.545 is amended to read:

136.545. **Statement by defendant when not advised of rights.** Evidence obtained directly or indirectly as a result of failure of a magistrate to comply with ORS 133.610 shall not be admissible [*before the grand jury or*], over the objection of the defendant, in any court.

COMMENTARY

The deleted reference to use of such evidence before the grand jury is proposed to be added to and dealt with separately in the sections covering Grand Jury.

Section 364. ORS 136.550 is amended to read:

136.550. **Testimony of accomplice; corroboration. (1)** A conviction cannot be had upon the testimony of an accomplice unless it is corroborated by other evidence that tends to connect the defendant with the commission of the crime. The corroboration is not sufficient if it merely shows the commission of the crime or the circumstances of the commission.

(2) As used in this section, an "accomplice" means a witness in a criminal action who, according to the evidence adduced in the action, is criminally liable for the conduct of the defendant under ORS 161.155 and 161.165, or, if the witness is a juvenile, has committed a delinquent act, which, if committed by an adult, would make him criminally liable for the conduct of the defendant.

COMMENTARY

A. Summary

This section proposes an amendment that would define accomplice for the purpose of corroboration at trial.

B. Derivation

The amendment is partially derived from NYCPL, § 60.22. The reference to juveniles is based on ORS 419.476(1)(a).

C. Relationship to Existing Law

There presently is some confusion and disagreement as to who is and who is not an accomplice. The generally stated reason for the requirement for corroboration of an accomplice's testimony is that an accomplice is an unreliable witness because a "confessed criminal" might be attempting to gain the conviction of an innocent man through perjured testimony in exchange for his own immunity. *State v. Coffey,* 157 Or 457, 72 P2d 35 (1937). Also cited in *State v. Smith,* 1 Or App 583, 465 P2d 247 (1970).

State v. Nice, 240 Or 343, 401 P2d 296 (1965), stated that an accomplice is a person who knowingly, voluntarily and with common intent with the principal offender unites in the commission of a crime. In *State v. Carroll,* 251 Or 197, 444 P2d 1006 (1968), the Supreme Court stated that before independent evidence of defendant's association with an admitted accomplice will furnish the corroboration necessary, it must appear that the defendant and the accomplice were together at a place and under circumstances not likely to have occurred unless there was criminal concert between them.

The Court of Appeals in *State v. Winslow,* 3 Or App 140, 472 P2d 852 (1970), explained that there was a broad and narrow definition of "accomplice." The broad definition says an accomplice is one who has participated in the commission of the offense or who, while not being present, nevertheless, in some manner aided, advised or encouraged the defendant to commit the crime. The narrow definition says an accomplice is one who can be indicted and punished under the same statute which has been invoked

against the defendant. Oregon follows the narrow rule.

Subsection (2) is proposed to eliminate the confusion and set forth the Oregon position of who is and who is not an accomplice, including juveniles who may not, themselves, be triable in adult criminal courts. The new criminal liability statutes appear to be a rational approach to the definition of who is an accomplice because if a person is criminally responsible for the conduct of another, he has participated to some degree in the offense charged and can therefore be charged with the same offense under ORS 161.150.

Section 365. ORS 136.605 is amended to read:

136.605. **Acquittal before presentation of defense.** In any criminal action the defendant may, [*before the presentation of evidence in his defense,*] **after close of the state's evidence or of all the evidence,** move the court for a judgment of acquittal. The court shall grant the motion if the evidence introduced theretofore is such as would not support a verdict against the defendant. The acquittal shall be a bar to another prosecution for the same crime. [*If the court denies the motion, the defendant may thereafter present evidence in his defense.*]

COMMENTARY

A. Summary

The amendment to ORS 136.605 allows the defense to move for an acquittal after the close of the state's case or after the close of the defense's case. The intent of the amendment is to allow the motion at either or both times during trial.

B. Derivation

The amendment is based on ABA Standards on Trial by Jury.

C. Relationship to Existing Law

Until 1957 it was the rule in Oregon that the defendant in a criminal case could not move for a judgment of acquittal until he rested his case. Presently, the defendant can move for acquittal before he presents his defense. *State v. Gardner,* 231 Or 193, 372 P2d 783 (1962).

The ABA Standards, § 4.5, recommends that the defendant be able to move for acquittal either after the state's case or after the defense's case. Also, Federal Rule of Criminal Procedure 29 allows the motions for acquittal after the state's case and after the defense's case.

Section 366. ORS 136.610 is amended to read:

136.610. **Verdict to be unanimous; exceptions.** [*(1) The jury may find either a general verdict or, where it is in doubt as to the legal effect of the facts proved, a special verdict.*]

[*(2)*] Except as otherwise provided, the verdict of a trial jury in a criminal action shall be **by concurrence of at least 10 of 12 jurors except in a verdict for murder which shall be** unanimous.

COMMENTARY

This section clarifies the verdict necessary in criminal cases as stated in the Oregon Const. Art. I, § 11. The reference to special verdicts is deleted. ORS 136.630 and 136.640, also dealing with special verdicts in criminal cases, are repealed by the draft.

Section 367. ORS 136.620 is amended to read:

136.620. **General verdict on plea of not guilty.** [*(1)*] A general verdict upon a plea of not guilty is either "guilty [,]" [*which imports a conviction of the crime charged in the indictment, or "not guilty," which imports an acquittal thereof*] **of an offense charged in the accusatory instrument, or "not guilty**."

[*(2) A general verdict upon a plea of former conviction or acquittal of the same crime is either "for the state" or "for the defendant."*]

COMMENTARY

The new language modernizes the wording of the statute and applies it equally to offenses charged by indictment, information or complaint. Also, replacing the words, "the crime," with "an offense" is meant to indicate that there will be a separate verdict for each count in a multiple count instrument. The reference to a different kind of verdict upon a plea of former jeopardy is deleted. This issue will be raised by motion instead of by plea under the Commission's proposals.

Section 368. ORS 136.650 is amended to read:

136.650. **Crimes consisting of degrees; verdict of guilt of inferior degree or attempt.** Upon [*an indictment*] **a charge** for a crime consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the [*indictment*] **accusatory instrument** and guilty of any degree inferior thereto or of an attempt to commit the crime or any such inferior degree thereof.

COMMENTARY

The amendments are consistent with those proposed in previous sections of the draft.

Section 369. ORS 136.660 is amended to read:

136.660. **Crime included in that charged; power of jury to find guilt of such offense or attempt.** In all cases, the defendant may be found guilty of any crime the commission of which is necessarily included in that with which he is charged in the [*indictment*] **accusatory instrument** or of an attempt to commit such crime.

COMMENTARY

The amendment is consistent with those proposed in previous sections of the draft.

Section 370. ORS 136.670 is amended to read:

136.670. **Conviction or acquittal of one or more of several defendants.** Upon an [*indictment*] **accusatory instrument** against several defendants, any one or more may be convicted or acquitted.

COMMENTARY

The amendment is consistent with changes made by other sections of the draft.

Section 371. ORS 136.680 is amended to read:

136.680. **Verdict as to some of several defendants; retrial of others.** Upon an [*indictment*] **accusatory instrument** against several defendants, if the jury cannot agree upon a verdict as to all, it may give a verdict as to those in regard to whom it does agree, on which a judgment shall be given accordingly [*; and*] **.** The case as to the rest of the defendants may be tried by another jury.

COMMENTARY

The amendment is consistent with changes made by other sections of the draft.

Section 372. (ORS 136.690) Reconsideration of verdict when jury makes mistake as to law. When a verdict is found in which it appears to the court that the jury has mistaken the law, the court may explain the reason for that opinion and direct the jury to reconsider its verdict; but if after such reconsideration the jury finds the same verdict, it must be received.

Section 373. ORS 136.700 is amended to read:

136.700. **Reconsideration of verdict.** If the jury finds a verdict which is [*neither*] **not** a general [*nor a special*] verdict, [*as defined in ORS 136.620 and 136.630,*] the court may, with proper instructions as to the law, direct the jury to reconsider it; and the verdict cannot be received until it is given in some form from which it can be clearly understood that the intent of the jury is [*either*] to render a general verdict [*or to find the facts specially and leave the judgment to the court*].

COMMENTARY

The amendments delete references to special verdicts.

Section 374. ORS 136.710 is amended to read:

136.710. **Acquittal; discharge of defendant.** If judgment of acquittal is given on a general [*or special*] verdict and the defendant is not detained for any other legal cause, he shall be discharged as soon as the judgment is given, except that, when the acquittal is for variance between the proof and the indictment, which may be obviated by a new indictment, the court may order his detention, to the end that a new indictment may be preferred, in the same manner and with like effect, as provided in ORS 135.540 and 135.550.

COMMENTARY

The amendment deletes reference to special verdicts.

Section 375. ORS 136.720 is amended to read:

136.720. **Proceedings after adverse general verdict.** If a general verdict against the defendant [*or a special verdict*] is given, he shall be remanded, if in custody; if he has [*given bail*] **been released**, he may be committed to await the judgment of the court upon the verdict. When committed, his [*bail*] **release agreement** is exonerated or, if he has deposited money in lieu of [*bail*] **a release agreement**, it shall be refunded to him.

COMMENTARY

The amendments make the statute consistent with the new provisions governing release of defendants and delete reference to special verdicts.

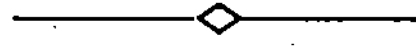
Section 376. ORS 136.810 is amended to read:

136.810. **Motion in arrest; basis and time for making.** A motion in arrest of judgment is an application on the part of the defendant that no judgment be rendered on a plea or verdict of guilty [*or on a verdict against the defendant on a plea of a former conviction or acquittal*]. It may be founded on either or both of the [*causes*] **grounds** specified in subsections (1) and (4) of ORS 135.630, and not otherwise. The motion must be made within the time allowed to file a motion for a new trial, and both such motions may be made [*together*] and heard [*and decided at once or separately,*] as the court directs.

COMMENTARY

The section contains conforming amendments and makes minor grammatical changes.

Section 377. (ORS 136.820) Effect of allowance of motion. The effect of allowing a motion in arrest of judgment is to place the defendant in the same situation in which he was before indictment was found.



Section 378. ORS 136.830 is amended to read:

136.830. **Order when evidence shows guilt; new charge.** If, from the evidence given on the trial, there is reasonable ground to believe the defendant guilty and a new [*indictment*] **accusatory instrument** can be framed upon which he may be convicted, the court shall order the defendant to be recommitted to custody or [*admitted to bail*] **released** and to answer the new [*indictment*] **accusatory instrument**, if one is found; and if the evidence shows him to be guilty of another [*crime*] **offense** than that charged in the [*indictment*] **accusatory instrument**, he shall in like manner be committed or held thereon. In neither case is the verdict a bar to another action for the same crime.

COMMENTARY

The amendment deletes reference to bail and substitutes "accusatory instrument" for "indictment." The new term embraces indictments, informations and complaints. Also, "offense" is substituted for "crime."

Section 379. ORS 136.840 is amended to read:

136.840. **Order when evidence is insufficient; acquittal.** If the evidence appears insufficient to charge the defendant with any [*crime*] **offense**, he shall, if in custody, be discharged or, if he has [*given bail*] **been released** or deposited money in lieu thereof, his [*bail*] **release agreement** is exonerated or his money shall be refunded to him; and such case, the arrest of judgment operates as an acquittal of the charge upon which the [*indictment*] **accusatory instrument** was founded.

COMMENTARY

See comment to previous section.

Section 380. ORS 136.851 is amended to read:

136.851. **Timing of proceedings on motion in arrest of judgment and motion for new trial. (1)** A motion in arrest of a judgment or a motion for a new trial, with the affidavits, if any, in support

thereof shall be filed within [*seven*] **five** days after the filing of the judgment sought to be set aside, or such further time as the court may allow.

(2) [*When the state is entitled to oppose the motion by counter-affidavits, such*] **Any** counteraffidavits shall be filed **by the state** within [*seven*] **five** days after the filing of the motion, or such further time as the court may allow.

(3) The motion shall be heard and determined by the court within [*28*] **20** days from the time of the entry of the judgment, [*and not thereafter,*] and if not [*so*] heard and determined within that time, the motion shall conclusively be [*deemed*] **considered** denied.

(4) Except as otherwise provided in this section, ORS 17.605 to 17.630 shall apply to and regulate new trials in criminal actions, except that a new trial shall not be granted on application of **the** state.

COMMENTARY

In addition to form and style changes, the section is amended to reduce the time allowed for filing the motions, responding thereto and for hearing the motions. Time for filing and responding is reduced from seven days to five. The time allowed the court for hearing and determining the motion is reduced from 28 days to 20. This should result in speeding up the method of dealing with post-trial motions. The change in this section will, in those instances in which a post-trial motion is filed, reduce the time lag between conviction and appeal, by operation of ORS 138.071.

ARTICLE 13. WITNESSES

Section 381. (ORS 139.010) Subpena defined. The process by which the attendance of a witness before a court or magistrate is required is a subpena.

Section 382. (ORS 139.020) Issuance of subpena by magistrate for witnesses at preliminary examination. A magistrate before whom an information is laid or complaint made may issue subpenas subscribed by him for witnesses within the state, either on behalf of the state or of the defendant.

Section 383. (ORS 139.030) Issuance of subpena by district attorney for witnesses before grand jury. The district attorney may issue subpenas subscribed by him for witnesses within the state in support of the prosecution or for such other witnesses as the grand

thereof shall be filed within [*seven*] **five** days after the filing of the judgment sought to be set aside, or such further time as the court may allow.

(2) [*When the state is entitled to oppose the motion by counter-affidavits, such*] **Any** counteraffidavits shall be filed **by the state** within [*seven*] **five** days after the filing of the motion, or such further time as the court may allow.

(3) The motion shall be heard and determined by the court within [*28*] **20** days from the time of the entry of the judgment, [*and not thereafter,*] and if not [*so*] heard and determined within that time, the motion shall conclusively be [*deemed*] **considered** denied.

(4) Except as otherwise provided in this section, ORS 17.605 to 17.630 shall apply to and regulate new trials in criminal actions, except that a new trial shall not be granted on application of **the** state.

COMMENTARY

In addition to form and style changes, the section is amended to reduce the time allowed for filing the motions, responding thereto and for hearing the motions. Time for filing and responding is reduced from seven days to five. The time allowed the court for hearing and determining the motion is reduced from 28 days to 20. This should result in speeding up the method of dealing with post-trial motions. The change in this section will, in those instances in which a post-trial motion is filed, reduce the time lag between conviction and appeal, by operation of ORS 138.071.

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Section 383. (ORS 139.030) Issuance of subpena by district attorney for witnesses before grand jury. The district attorney may issue subpenas subscribed by him for witnesses within the state in support of the prosecution or for such other witnesses as the grand

jury directs to appear before the grand jury upon an investigation pending before it.

Section 384. ORS 139.040 is amended to read:

139.040. **Issuance of subpena by district attorney for witnesses at trial.** The district attorney may issue subpenas subscribed by him for not to exceed [*five*] **10** witnesses within the state in support of an indictment to appear before the court at which it is to be tried.

Section 385. ORS 139.050 is amended to read:

139.050. **Issuance by clerk for witnesses for defendant.** Upon application of the defendant, the clerk of a court in which a criminal action is pending for trial shall, at the expense of the state, issue in blank, under the seal of the court, subpenas subscribed by him as clerk for not to exceed [*five*] **10** witnesses within the state; provided, however, that any defendant may have subpenas issued for any number of witnesses at his own expense without an order of the court.

Section 386. ORS 139.060 is amended to read:

139.060. **Proceeding to obtain subpenas for more than 10 witnesses.** If either party in a criminal action desires more than [*five*] **10** witnesses, as provided in ORS 139.040 and 139.050, application therefor shall be made to the court or judge thereof by motion for an order allowing the issuance of subpenas for such additional witnesses, which motion shall be supported either by the statement of the district attorney in writing or by the affidavit of the defendant. The statement or affidavit shall state the names of such witnesses, their places of residence and the facts expected to be proved by each of them. The court or judge thereof shall make an order allowing the issuance of subpenas for so many of such witnesses as appear from such statement or affidavit to be necessary and material to a fair, full and impartial trial.

COMMENTARY

The amendments to ORS 139.040 to 139.060 increase the number of allowable witnesses for each side from five to 10.

Section 387. (ORS 139.070) Forms of subpenas. Subpenas authorized by ORS 139.020 to 139.050 shall be substantially in the following form:

(1) By a magistrate:

IN THE NAME OF THE STATE OF OREGON

To A——— B———:

You are hereby commanded to appear before C. D., (adding his

name of office and place of jurisdiction), at (naming the place), on (stating the day and hour), as a witness on the examination of a criminal charge against E. F. on behalf of (the state or the defendant, as the case may be).

G. H.

Dated the ——— day of ———, 19—.

(Adding his name of office and place of jurisdiction, as in the body of the subpena.)

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(2) By the district attorney:

IN THE NAME OF THE STATE OF OREGON

To A——— B———:

You are hereby commanded to appear before (the grand jury of the County of ——— or the Circuit Court for the County of ———, as the case may be), at (naming the place), on (stating the day and hour), as a witness (before the grand jury or in a criminal action prosecuted by the State of Oregon against E. F., as the case may be).

Dated the ——— day of ———, 19—.

G. H., District Attorney.

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(3) By the clerk:

IN THE NAME OF THE STATE OF OREGON

To A——— B———:

You are hereby commanded to appear before the Circuit Court for the County of ——— at (naming the place), on (stating the day and hour), as a witness in a criminal action prosecuted by the State of Oregon against E. F. on behalf of the defendant.

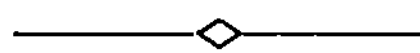
Witness my name and the seal of said court, affixed at ———, the ——— day of ———, 19—.

[L. S.] G. H., Clerk.

Section 388. (ORS 139.080) Subpenas when books, papers or documents are required. If books, papers or documents are required, a direction to the following effect shall be added to the form provided in ORS 139.070: "And you are required, also, to bring with you the following: (describing intelligibly the books, papers or documents required)."

Section 389. (ORS 139.090) By whom a subpena is served. A subpena may be served by the defendant or any other person over

18 years of age and shall be served by any sheriff or constable within his county or district, as the case may be, when delivered to him for service, either on the part of the state or of the defendant.



Section 390. (ORS 139.100) How a subpena is served; proof of service. A subpena is served by delivering a copy to the witness personally; and proof of the service is made in the same manner as in the service of a summons.

Section 391. (ORS 139.110) Certain sections applicable to criminal proceedings. The provisions of ORS 44.150, 44.180 to 44.220 and subsections (1) and (2) of ORS 44.230 apply in criminal actions, examinations and proceedings.

Section 392. (ORS 139.140) Payment of witness who is from without state or poor. Whenever any person attends any court, grand jury or committing magistrate as a witness on behalf of the state or of any person accused of a crime upon request of the district attorney or subpena, or by virtue of a recognizance for that purpose, and it appears that such person has come from any other state or territory of the United States or from any foreign country or that such person is poor, the court may, by an order entered on its minutes, direct the county treasurer of the county in which the court or grand jury is sitting to pay to such witness such sum of money as to said court seems reasonable for his expenses and witness fees; and said order, so entered, is sufficient authority for the issuance and payment of any county warrant therefor.

Section 393. (ORS 139.150) Undertaking of material witness at time of making complaint or at arraignment. A magistrate may, at the time a complaint is made or information laid before him, or a judge of the circuit court, at the time of the arraignment of a defendant in a criminal action upon indictment, may, on motion of the district attorney, require each person deemed to be a material witness on behalf of the state to give a written undertaking with sufficient sureties and in such sum as the magistrate or judge deems proper to the effect that such person will appear and testify on behalf of the state at the trial of the defendant or at the examination of the charge, as the case may be.

Section 394. (ORS 139.160) Undertaking of material witness at time of holding defendant to answer. (1) When the magistrate has reason to believe at the time of the holding the defendant to answer that any of the material witnesses examined before him on behalf of the state will not appear and testify at the court to which such defendant is held to answer unless security therefor is given, he may require such witness to enter into a written undertaking with such sureties and in such sum as he deems proper for the appearance of such witness at the court to which the defendant is held to answer.

(2) Infants and married women who are material witnesses against the defendant may in like manner be required to procure sureties for their appearance as provided in subsection (1) of this section.

Section 395. (ORS 139.170) Commitment of material witness who refuses to give undertaking. If a witness required to enter into an undertaking to appear and testify, either with or without sureties, refuses compliance with the order for that purpose, the court or magistrate making such order shall commit him to the jail of the county until he complies or is legally discharged.

Section 396. (ORS 139.180) Inability to furnish bond; compensation during detention. Any person held in the county jail or otherwise detained by the state as a witness in a criminal case for the reason that he is unable to furnish bond for his appearance before the grand jury or at the trial of any such case shall receive as compensation from the county in which the case arose $7.50 for each day, or fraction thereof, that he is so held or detained.

Section 397. (ORS 139.190) Proceedings to compel witness who may be incriminated thereby to testify. In any criminal proceeding before a court of record or in any proceeding before a grand jury, if a witness refuses to testify or produce evidence of any kind on the ground that he may be incriminated thereby, and if the district attorney moves the court to order the witness to testify or produce evidence, the court shall forthwith hold a summary hearing at which the witness may show cause why he should not be compelled to testify or produce evidence, and the court shall order the witness to testify or produce evidence regarding the subject matter under inquiry unless the court finds that to do so would be clearly contrary to the public interest. The court shall hold the summary hearing outside the presence of the jury and the public

and may require the district attorney to disclose the purpose for which he seeks the testimony or evidence. The witness shall be entitled to be represented by counsel at the summary hearing.

Section 398. (ORS 139.200) Immunity of witness compelled to testify. After complying with the order to testify or produce evidence the witness shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any fact or act concerning which, in accordance with the order, he was required to testify or produce evidence. The witness may nevertheless be prosecuted for any perjury or false swearing committed in accordance with the order and the witness shall be subject to penalty for contempt of court for failure to comply with the order.

Section 399. (ORS 139.210) Definitions. (1) "Witness," as used in ORS 139.210 to 139.260, shall include a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution or proceeding.

(2) The word "state" shall include any territory of the United States and District of Columbia.

(3) The word "summons" shall include a subpena, order or other notice requiring the appearance of a witness.

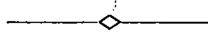
Section 400. (ORS 139.220) Where witness material to proceeding in another state is in this state. (1) If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this state certifies under the seal of such court that there is a criminal prosecution pending in such court, or that a grand jury investigation has commenced or is about to commence, that a person being within this state is a material witness in such prosecution, or grand jury investigation, and that his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which such person is, such judge shall fix a time and place for a hearing, and shall make an order directing the witness to appear at a time and place certain for the hearing.

(2) If at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or a grand jury investigation in the other state, and that the laws of the state in which the prosecution is pending, or grand jury investiga-

tion has commenced or is about to commence, (and of any other state through which the witness may be required to pass by ordinary course of travel), will give to him protection from arrest and the service of civil and criminal process, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending, or where a grand jury investigation has commenced or is about to commence at a time and place specified in the summons. In any such hearing the certificate shall be prima facie evidence of all the facts stated therein.

(3) If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, such judge may, in lieu of notification of the hearing, direct that such witness be forthwith brought before him for said hearing; and the judge at the hearing being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be prima facie proof of such desirability may, in lieu of issuing subpena or summons, order that said witness be forthwith taken into custody and delivered to an officer of the requesting state only after the tender of payment of the mileage and per diem herein provided for.

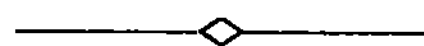
(4) If the witness, who is summoned as above provided, after being paid or tendered by some properly authorized person the sum of 10 cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and $5 for each day, that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.



Section 401. (ORS 139.230) Where witness material to proceeding in this state is in another state. (1) If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the county stating these facts and specifying the number of days the witness will be required. Said certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

(2) If the witness is summoned to attend and testify in this state he shall be tendered the sum of 10 cents a mile for each mile by

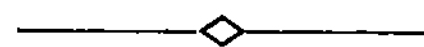
the ordinary traveled route to and from the court where the prosecution is pending and $5 for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state a longer period of time than the period mentioned in the certificate, unless otherwise ordered by the court. If such witness, after coming into this state, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a subpena issued from a court of record in this state.



Section 402. (ORS 139.240) Immunity of witness from arrest or service of process. (1) If a person comes into this state in obedience to a summons directing him to attend and testify in this state he shall not while in this state pursuant to such summons be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

(2) If a person passes through this state while going to another state in obedience to a summons to attend and testify in that state or while returning therefrom, he shall not while so passing through this state be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

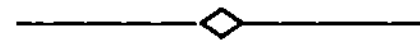
Section 403. (ORS 139.250) Construction of ORS 139.210 to 139.260. ORS 139.210 to 139.260 shall be so interpreted and construed as to effectuate their general purpose to make uniform the law of the states which enact the Uniform Act to Secure the Attendance of Witnesses from without a State in Criminal Proceedings.



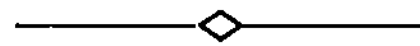
Section 404. (ORS 139.260) Short title. ORS 139.210 to 139.260 may be cited as Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings.

Section 405. (ORS 139.310) Defendant as witness. In the trial of or examination upon any indictment, complaint, information or other proceeding before any court, magistrate, jury or other tribunal against a person accused or charged with the commission of a crime, the person so charged or accused shall, at his own request, but not

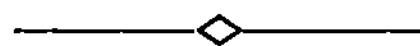
otherwise, be deemed a competent witness, the credit to be given to his testimony being left solely to the jury, under the instructions of the court, or to the discrimination of the magistrate, grand jury or other tribunal before which such testimony is given. His waiver of this right creates no presumption against him. The defendant or accused, when offering his testimony as a witness in his own behalf, gives the prosecution a right to cross-examination upon all facts to which he has testified and which tend to his conviction or acquittal.



Section 406. (ORS 139.315) Codefendant as witness. No person named in an indictment, information or complaint as a codefendant shall be deemed incompetent to testify as a witness at the trial of another defendant solely because he is so named.



Section 407. (ORS 139.320) Husband or wife as witness. In all criminal actions in which the husband is the party accused, the wife is a competent witness and when the wife is the party accused, the husband is a competent witness; but neither husband nor wife in such cases shall be compelled or allowed to testify in such cases unless by consent of both of them; provided, that in all cases of personal violence upon either by the other or of personal violence or other unlawful act committed against any minor child of either or both of the parties, the injured party, husband or wife, shall be allowed to testify against the other; provided, further, that in all criminal actions for bigamy, the husband or wife of the accused is a competent witness and shall be allowed to testify against the other without the consent of the other as to the fact of marriage.



PART V. POST-TRIAL PROVISIONS

ARTICLE 14. JUDGMENT; PAROLE AND PROBATION BY COURT

Section 408. (ORS 137.010) Duty of court to ascertain and impose punishment. (1) The statutes that define offenses impose a duty upon the court having jurisdiction to pass sentence in accordance with this section unless otherwise specifically provided by law.

(2) When a person is convicted of an offense, if the court is of the opinion that it is in the best interests of the public as well as of the defendant, the court may suspend the imposition or execution of sentence for any period of not more than five years.

(3) If the court suspends the imposition or execution of sentence, the court may also place the defendant on probation for a definite or indefinite period of not less than one nor more than five years.

(4) The power of the judge of any court to suspend execution of sentence or to grant probation to any person convicted of a crime shall continue until the person is delivered to the custody of the Corrections Division.

(5) When a person is convicted of an offense and the court does not suspend the imposition or execution of sentence or when a suspended sentence or probation is revoked, the court shall impose the following sentence:

(a) A term of imprisonment; or

(b) A fine; or

(c) Both imprisonment and a fine; or

(d) Discharge of the defendant.

(6) This section does not deprive the court of any authority conferred by law to decree a forfeiture of property, suspend or cancel a license, remove a person from office or impose any other civil penalty. An order exercising that authority may be included as part of the judgment of conviction.

Section 409. (ORS 137.015) Assessment in addition to fine or bail forfeiture; increased bail deposit to cover assessment. (1) Whenever a court imposes a fine, or orders a bail forfeiture, as a penalty for violation of a law of this state or an ordinance of a city or county except an ordinance relating to cars unlawfully left or parked, an assessment in addition to such fine, or bail forfeiture shall be collected and forwarded within 30 days of receipt of such assessments by the clerk of the court or the county treasurer to the State Treasurer to be credited to the Police Standards and Training Account established by ORS 181.690. The amount of the assessment shall be as follows:

(a) When fine or forfeiture is $5 to $14.99, $1.

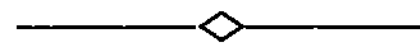
(b) When fine or forfeiture is $15 to $49.99, $2.

(c) When fine or forfeiture is $50 to $99.99, $3.

(d) When fine or forfeiture is $100 or over, $5.

(2) When any deposit of bail is made for an offense to which this section applies, the person making such deposit shall also deposit a sufficient amount to include the assessment prescribed in subsection (1) of this section.

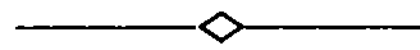
(3) If bail is forfeited the assessment prescribed in this section shall be forwarded to the State Treasurer pursuant to this section. If bail is returned, the assessment made therein shall also be returned.



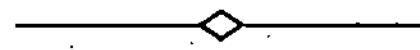
Section 410. (ORS 137.020) Time for pronouncing judgment; notice of right to appeal. (1) After a plea or verdict of guilty, or after a verdict against the defendant on a plea of former conviction or acquittal, if the judgment is not arrested or a new trial granted, the court shall appoint a time for pronouncing judgment.

(2) The time appointed shall be at least two days after the verdict, if the court intends to remain in session so long, or if not, as remote a time as can reasonably be allowed; but in no case can the judgment be given, except by the consent of the defendant, in less than six hours after the verdict.

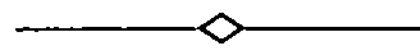
(3) At the time court pronounces judgment the defendant, if present, shall be advised of his right to appeal and of the procedure for protecting such right. If the defendant is not present, the court shall advise him in writing of his right to appeal and of the procedure for protecting such right.



Section 411. (ORS 137.030) Presence of defendant at pronouncement of judgment. For the purpose of giving judgment, if the conviction is for a felony, the defendant shall be personally present; but if it is for a misdemeanor, judgment may be given in his absence.



Section 412. (ORS 137.040) Bringing defendant in custody to pronouncement of judgment. If the defendant is in custody, the court shall direct the officer in whose custody he is to bring him before it for judgment; and the officer shall do so accordingly.

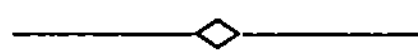


Section 413. ORS 137.050 is amended to read:

137.050. **Nonattendance at pronouncement of judgment of defendant who has been released on release agreement or security**

deposit. (1) If the defendant has [*given bail or deposited money in lieu thereof*] **been released on a release agreement or security deposit** and does not appear for judgment when his personal attendance is [*necessary*] **required by the court**, the court may [*forfeit the undertaking of bail or the money deposited*] **order a forfeiture of the security deposit as provided in section 246 of this 1973 Act.** In addition, **if the defendant fails to appear as required by the release agreement or security deposit,** the court may direct the clerk to issue a bench warrant for the defendant's arrest.

(2) At any time after the making of the order for the bench warrant, the clerk, on the application of the district attorney, shall issue such warrant, as by the order directed, whether the court is sitting or not.



Section 414. (ORS 137.060) Form of bench warrant. The bench warrant shall be substantially in the following form:

CIRCUIT (OR DISTRICT) COURT FOR THE COUNTY
OF ———, STATE OF OREGON
IN THE NAME OF THE STATE OF OREGON

To any peace officer in the State of Oregon, greeting:

A B having been on the ——— day of ———, 19—, convicted in this court of the crime of (designating it generally), you are commanded to arrest the above-named defendant forthwith and bring him before such court for judgment or, if the court has adjourned for the term, deliver him into the custody of the jailor of this county. By order of the court.

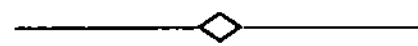
Witness my hand and seal of said circuit (or district) court, affixed at ———, in said county, this ——— day of ———, 19—.

[L. S.] C D, Clerk of the Court

Section 415. ORS 137.070 is amended to read:

137.070. **Counties to which bench warrant may issue; service.** The bench warrant mentioned in ORS 137.050 may issue to one or more counties of the state and may be served in the same manner as [*provided in ORS 135.180, in case of a bench warrant upon an indictment*] **any other warrant of arrest issued by a magistrate.**

Section 416. (ORS 137.080) Consideration of circumstances in aggravation or mitigation of punishment. After a plea or verdict of guilty, or after a verdict against the defendant on a plea of former conviction or acquittal, in a case where a discretion is conferred upon the court as to the extent of the punishment to be inflicted, the court, upon the suggestion of either party that there are circumstances which may be properly considered in aggravation or mitigation of the punishment, may, in its discretion, hear the same summarily at a specified time and upon such notice to the adverse party as it may direct.



Section 417. (ORS 137.100) Defendant as witness in relation to circumstances. If the defendant consents thereto, he may be examined as a witness in relation to the circumstances which are alleged to justify aggravation or mitigation of the punishment; but if he gives his testimony at his own request, then he must submit to be examined generally by the adverse party.

Section 418. ORS 137.090 is amended to read:

137.090. **Proof of circumstances; presentence investigation.** The circumstances which are alleged to justify aggravation or mitigation of the punishment shall be presented by the testimony of witnesses examined in open court, except that when a witness is so sick or infirm as to be unable to attend, his deposition may be taken out of court at such time and place, and upon such notice to the adverse party, and before such person authorized to take depositions, as the court directs. The court may consider the report of presentence investigation conducted by probation officers pursuant to ORS 137.530 **or any other person designated by the court**. [*A copy of such report may be made available to counsel for the defendant and the state a reasonable time before pronouncement of sentence.*]

COMMENTARY

The statute is amended to delete reference to the discretionary authority of the court to make copies of the presentence report available to counsel. The draft proposes new provisions covering disclosure of the presentence report.

Section 419. Presentence report; general principles of disclosure. The presentence report is not a public record and shall be available only to:

(1) The sentencing court for the purpose of assisting the court

in determining the proper sentence to impose and to other judges who participate in a sentencing council discussion of the defendant.

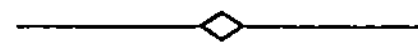
(2) The Corrections Division, Parole Board and other persons or agencies having a legitimate professional interest in the information likely to be contained therein.

(3) Appellate or review courts where relevant to an issue on which an appeal is taken or post-conviction relief sought.

(4) The district attorney, the defendant and his counsel, as provided in section 420 of this Act.

COMMENTARY

The proposed section stresses the fact that the presentence report is not a public record and states affirmatively to which persons or agencies the report shall be available. The section is based on ABA Standards Relating to Sentencing Alternatives and Procedures, § 4.3 (Approved Draft, 1968).



Section 420. Presentence report; disclosure to parties; court's authority to except parts from disclosure. (1) A copy of the presentence report shall be made available to the district attorney and defense counsel a reasonable time before the sentencing of the defendant.

(2) The court may except from disclosure parts of the presentence report which are not relevant to a proper sentence, diagnostic opinions which might seriously disrupt a program of rehabilitation if known by the defendant, or sources of information which were obtainable only on a promise of confidentiality.

(3) If parts of the presentence report are not disclosed under subsection (2) of this section, the court shall inform the parties that information has not been disclosed and shall state for the record the reasons for the court's action. The action of the court in excepting information shall be reviewable on appeal.

COMMENTARY

A. Summary

The proposed section provides for mandatory disclosure of the presentence report to respective counsel a reasonable time before sentencing. (Subsection (1)).

Although based on the premise that disclosure of the information in the presentence report is generally desirable, the draft recognizes the fact that there may be extraordinary circumstances in which the court, for one or more of the reasons specified, may consider it advisable to withhold certain parts of the report from disclosure. (Subsection (2)).

If the court does except parts of the report from disclosure, it is required to inform the parties and to state the reasons for nondisclosure for the record. The court's action would be reviewable on appeal. (Subsection (3)).

B. Derivation

The section is based on ABA Standards Relating to Sentencing Alternatives and Procedures, §§ 4.4, 4.5 (Approved Draft 1968).

C. Relationship to Existing Law

Under ORS 137.090 a copy of the presentence report "may be made available to counsel for the defendant and the state a reasonable time before pronouncement of sentence."

The question of disclosure of presentence reports

to the parties has produced much controversy. There is a division among the statutes on the point. According to the ABA commentary, none has been found which flatly forbids disclosure to the defendant. Most maintain a position of silence which has usually been interpreted as placing disclosure within the discretion of the sentencing court. There are a few statutes which specifically require disclosure or which in terms leave the issue to the court.

There have been numerous proposals that have attempted to draw an intermediate line between complete disclosure and complete secrecy.

(1) The President's Crime Commission recommended that "in the absence of compelling reasons for nondisclosure of special information, the defendant and his counsel should be permitted to examine the entire presentence report."

(2) Other proposals have often proceeded from the view that the defendant does not need the whole report, but merely the facts on which it is based. Sources of information, together with the opinion of the probation officer, can properly remain a privileged communication between the officer and the judge.

(3) The Model Penal Code has taken the view that the court should advise the defendant and his attorney of the factual contents and conclusions of any presentence or psychiatric reports. The sources of information need not be disclosed.

(4) Finally, a fourth view is expressed by an amendment once proposed to the Federal Rules of Criminal Procedure. If the defendant is represented by counsel, the court shall permit the counsel to read the presentence report, from which the sources of confidential information may be excluded. If unrepresented, the court shall communicate or have communicated to the defendant the essential facts in the report of the presentence investigation.

There have been three basic arguments made against disclosure of the presentence report to the defendant:

(1) Confidentiality. To get information, especially of an intimate sort, the social investigator must be able to give firm assurances of confidentiality. If people generally learn that supplying information will get them into court or plunge them into a neighborhood feud, they will no longer share their knowledge and impressions. Likewise social agencies would have to be closed to probation officers if the information were required to be disclosed to the defendant.

(2) Delay. The defendant will challenge everything in the report and thereby transform the sentencing process into a much more lengthy affair than it has to be. In turn this could lead to dispensing with the report altogether to avoid delay.

(3) Harmful to defendant. Disclosure would be affirmatively harmful to the rehabilitative efforts of the defendant. If complete disclosure is made, it will impede defendant's progress with psychiatrists or probation officers.

Each of the above arguments is buttressed with the argument that it is not unfair to the defendant to proceed against him in this manner. This is not an action at law but a social problem. The probation officer can be as trusted as the defense attorney to insure the accuracy of the report.

The major problem with all of the above arguments is that each is aimed at a specific evil which may be a legitimate cause for concern but does not support nondisclosure in all cases irrespective of the existence of the possibility of the evil.

Therefore, subsection (1) begins with a sense of relevance, coupled with the principle that at the very least fairness to the defendant should dictate disclosure in the absence of countervailing reasons which are applicable to his case. The simplest and fairest method of implementing this principle is to permit the parties to inspect the report. This represents the majority view of the ABA Advisory Committee that promulgated the Standards.

Subsection (1) also provides for full disclosure to the prosecuting attorney. He too is interested in the accuracy of the report and his interest will best be served by allowing him to compare it with information at his disposal.

Subsection (2) provides that in extraordinary cases the court may withhold three types of information for stated reasons:

(1) Irrelevant material. No purpose would be served if defendant were to be shown scurrilous information which was clearly irrelevant to the sentencing decision. The principle which generally supports disclosure need not be pushed to extremes if there is a chance that the information may do some positive harm.

(2) Diagnostic material. There are likewise good reasons for withholding from the defendant personally information of a diagnostic nature.

(3) Information obtainable only on a promise of confidentiality. This, too, in some cases may properly be withheld. This would not mean, however, that sources of information should routinely be promised confidentiality, merely that if the source was willing to provide information *only* if promised confidentiality, that this promise should be recognized by the court. This varies slightly from the ABA position. (§ 4.4.)

In order to avoid abuse of the above-stated exceptions the proposal would require that the court explicitly state for the record the reasons for the nondisclosure of any item of information, and that it inform the parties that a deletion has occurred.

The question of whether a defendant has a constitutional right to see a presentence report considered by a judge in the determination of his sentence was before the Oregon Supreme Court in the recent case of *Buchea v. Sullivan,* 94 Adv Sh 1693 (June 1972). The defendant had pleaded guilty to attempted burglary in a dwelling, and a presentence report was ordered. The defendant requested permission to see the report and the request was denied. The trial judge sentenced the defendant to the maximum term allowable. The defendant's argument was he had a right under the Sixth and Fourteenth Amendments to the U. S. Constitution and under Art. I, § 11, of the Oregon Constitution to see the presentence report, specifically that part relating to his prior criminal record.

In a majority opinion the Court held that there is no constitutional requirement of complete disclosure of all information used in the sentencing process. However, if the information in the presentence report can affect the defendant's sentence and it is readily identifiable, public in nature, and none of the reasons for nondisclosure can apply to it, that "constitutional fairness" requires disclosure. Therefore, it is error not to furnish a defendant with a copy of that part of a presentence report that relates to his prior criminal record. The court stated further that it did not mean by its holding that it is not good practice for a trial judge to disclose the balance of the presentence report, if, in his opinion, there are no valid reasons for its confidentiality.

Section 421. (ORS 137.120) Indeterminate sentence. (1) Each minimum period of imprisonment in the penitentiary which prior to June 14, 1939, was provided by law for the punishment of felonies, and each such minimum period of imprisonment for felonies, hereby is abolished.

(2) Whenever any person is convicted of a felony, the court shall, unless it imposes other than a sentence to serve a term of imprisonment in the custody of the Corrections Division, sentence such person to imprisonment for an indeterminate period of time, but stating and fixing in the judgment and sentence a maximum term for the crime, which shall not exceed the maximum term of imprisonment provided by law therefor; and judgment shall be given accordingly. Such a sentence shall be known as an indeterminate sentence.

(3) This section does not affect the indictment, prosecution, trial, verdict, judgment or punishment of any felony committed before June 14, 1939, and all laws now and before that date in effect relating to such a felony are continued in full force and effect as to such a felony.

Section 422. ORS 137.124 is amended to read:

ORS 137.124. **Commitment of defendant to Corrections Division; place of confinement; transfer of inmates.** (1) If the court imposes a sentence of imprisonment upon conviction of a felony, it shall not designate the [*penal or*] correctional [*institution*] **facility** in which the defendant is to be confined but shall commit the defendant to the legal and physical custody of the Corrections Division.

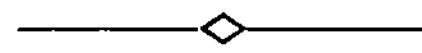
(2) After assuming custody of the convicted [*male*] person the Corrections Division may transfer inmates from one [*penal or*] cor-

rectional [*institution*] **facility** to another such [*institution*] **facility** for the purposes of diagnosis and study, rehabilitation and treatment, as best seems to fit the needs of the inmate and for the protection and welfare of the community and the inmate.

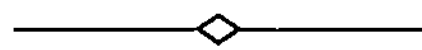
(3) If the court imposes a sentence of imprisonment upon conviction of a misdemeanor, it shall commit the defendant to the custody of the executive head of the [*penal or*] correctional [*institution*] **facility** for the imprisonment of misdemeanants designated in the judgment.

COMMENTARY

The section is amended to delete references to penal institution and replace it with correctional "facility," a term defined in the new Criminal Code. (ORS 162.135(2)). This makes the terminology in this section consistent with the substantive code definition.



Section 423. (ORS 137.130) Imprisonment when there is no county jail. Whenever there is no jail in a county, every judicial or other officer of the county who has power to order, sentence or deliver any person to the county jail may order, sentence or deliver such person to the jail of an adjoining county or, if there is no jail in any adjoining county, to the nearest county jail.



Section 424. ORS 137.140 is amended to read:

137.140. **Imprisonment when county jail is not suitable for confinement.** Whenever it appears to the court [*, at the time of giving judgment of imprisonment in the county jail,*] that there is no sufficient jail in the proper county, as provided in ORS 137.330, suitable for the [*safe*] confinement of the defendant, the court may order the [*judgment to be executed*] **confinement of the defendant** in the jail of any county in the state.

Section 425. ORS 137.170 is amended to read:

137.170. **Entry of judgment on conviction.** When judgment upon a conviction is given, the clerk shall enter the same in the journal **forthwith**, stating briefly the crime for which the conviction has been had. [*Such entry may be made at any time.*]

Section 426. (ORS 137.180) Docketing of judgment to pay fine or costs. A judgment that the defendant pay money, either as a fine

or as costs and disbursements of the action, or both, shall be docketed as a judgment in a civil action and with like effect, as provided in ORS 18.320, 18.350 and 18.400.

Section 427. (ORS 137.210) Taxation of costs against complainant. (1) If it is found by any justice or court trying the action or hearing the proceeding that the prosecution is malicious or without probable cause, that fact shall be entered upon record in the action or proceeding by the justice or court.

(2) Upon making the entry prescribed in subsection (1) of this section, the justice or court shall immediately render judgment against the complainant for the costs and disbursements of the action or proceeding.

(3) As used in this section "complainant" means every person who voluntarily appears before any magistrate or grand jury to prosecute any person in a criminal action, either for a misdemeanor or felony.

Section 428. (ORS 137.220) Clerk to prepare trial court file. In every criminal proceeding, the clerk shall attach together and file in his office, in the order of their filing, all the original papers filed in the court, whether before or after judgment, including but not limited to the indictment and other pleadings, demurrers, motions, affidavits, stipulations, orders, the judgment and the notice of appeal and undertaking on appeal, if any.

Section 429. ORS 137.225 is amended to read:

137.225. **Order setting aside conviction; prerequisites; limitations.** (1) Every defendant convicted of a Class C felony or a crime punishable as either a felony or a misdemeanor in the discretion of the court, or misdemeanor, including a violation of a municipal ordinance for which a jail sentence may be imposed, at any time after the lapse of three years from the date of pronouncement of judgment, if he has fully complied with and performed the sentence of the court, and is not under charge of commission of any crime, may move the court wherein such conviction was entered for an entry of an order setting aside such conviction. A copy of the motion shall be served upon the office of the prosecuting attorney who prosecuted the crime and opportunity be given to contest the motion. Upon hearing the motion the court may require the filing of such affidavits and may require the taking of such proofs as it deems proper. If the court determines that the circumstances and

behavior of the applicant from the date of conviction to the date of the hearing on the motion warrant setting aside the conviction, it shall enter an appropriate order. Upon the entry of such an order, the applicant for purposes of the law shall be deemed not to have been previously convicted and the court shall issue an order sealing the record of conviction and other official records in the case, including the records of arrest resulting in the criminal proceeding. **The clerk of the court shall forward a certified copy of the order to such agencies as directed by the court. A certified copy must be sent to the Corrections Division when the person has been in the custody of the Corrections Division.** Upon entry of such an order, such conviction, arrest or other proceeding shall be deemed not to have occurred, and the applicant may answer accordingly any questions relating to their occurrence.

(2) The provisions of subsection (1) do not apply to:

(a) A state or municipal traffic offense; or

(b) A person convicted of more than one offense, excluding motor vehicle violations, whether the second or additional convictions occurred in the same action in which the conviction as to which relief is sought occurred or in another action; or

(c) A person who previously had a conviction set aside pursuant to this section.

(3) The provisions of subsection (1) apply to convictions which occurred before, as well as those which occurred after, September 9, 1971.

COMMENTARY

The amendment provides for copy of the order under this statute to be sent to the Corrections Division, in those cases in which that agency would have a need to be informed of the court's action, and to such other agencies as the court may direct.

Section 430. (ORS 137.230) Definitions for ORS 137.230 to 137.260. As used in ORS 137.230 to 137.260, "conviction" or "convicted" means an adjudication of guilt upon a verdict or finding entered in a criminal proceeding in a court of competent jurisdiction.

Section 431. ORS 137.240 is amended to read:

137.240. **Effect of felony conviction on civil and political rights; restoration of civil rights; exceptions.** (1) Conviction of a felony:

(a) Suspends all the civil and political rights of the person so convicted.

(b) Forfeits all public offices and all private trusts, authority or power during the term or duration of any imprisonment.

(2) However, a person convicted of a felony may lawfully exercise all civil rights during any period of parole or probation or upon final discharge from imprisonment.

(3) The provisions of subsections (1) and (2) of this section are not intended to render a person convicted of a felony incapable of:

(a) Making a will; or

(b) **Making a** power of attorney; or

(c) [*incapable of*] Making and acknowledging a sale or conveyance of property [.] ; **or**

(d) Appearing and commencing, maintaining or defending a proceeding for child custody or dissolution of marriage; or

(e) Appearing and maintaining or defending any other cause of action while imprisoned or on release, if the action was started before the person's conviction.

(4) Nothing in this section prevents a person convicted of a felony and imprisoned as a penalty therefor from entering into a civil contract of marriage during the period of imprisonment if in the judgment of the Administrator of the Corrections Division the marriage would contribute to the person's rehabilitation and the administrator consents to the marriage.

COMMENTARY

The amendments to ORS 137.240, the so-called "civil death" statute, are similar to those proposed by the Oregon State Bar Committee on Detention and Correction (1972 Report); however, paragraphs (d) and (e) of subsection (3) are not the same.

ORS 137.240 is amended to allow an inmate of a penal or correctional institution to sue or defend a civil cause of action in person. Also, subsection (4) contains an amendment that was proposed by House Bill 1164 (1971) allowing the marriage of an inmate if the Administrator of the Corrections Division consents and the marriage would contribute to the inmate's rehabilitation.

Under the proposed amendments, the convicted person could *begin* a suit or proceeding for child custody or dissolution of marriage, after his conviction, as well as maintain or defend the proceeding. (Subsection (3)(d)). However, with respect to other causes of action he would be permitted to maintain or defend a cause of action that was initiated prior to his conviction. (Subsection (3)(e)).

ORS 44.230 and 44.240 also are amended to allow prisoners who are plaintiffs or defendants to personally appear in court.

If the statute were amended as suggested above, an inmate would be able to maintain a valid cause of action or defend himself personally in court even though he is serving a sentence of incarceration. This would aid in the rehabilitation of Oregon inmates because they would no longer be shut off completely from society. Directly related to rehabilitation is the proposed new subsection (4) of ORS 137.240 which would allow a prisoner to enter into marriage subject to the approval of the Administrator of the Corrections Division.

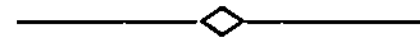
Section 432. ORS 137.250 is amended to read:

137.250. **Restoration of political rights; effect of parole or probation revocation and commitment on civil and political rights.** (1) The political rights of a person convicted of a felony shall be restored to him automatically upon final discharge from probation, parole or imprisonment.

(2) Revocation of parole or probation and commitment to the [*penitentiary or correctional institution*] **Corrections Division and placement in a correctional facility** suspends civil and political rights.

COMMENTARY

This section contains conforming amendments.



Section 433. (ORS 137.260) Political rights restored to persons convicted of felony before August 9, 1961, and subsequently discharged. Any person convicted of a felony prior to August 9, 1961, and subsequently discharged from probation, parole or imprisonment prior to or after August 9, 1961, is hereby restored to his political rights.

Section 434. (ORS 137.270) Effect of felony conviction on property of defendant. No conviction of any person for crime works any forfeiture of any property, except in cases where the same is expressly provided by law; but in all cases of the commission or attempt to commit a felony, the state has a lien, from the time of such commission or attempt, upon all the property of the defendant for the purpose of satisfying any judgment which may be given against him for any fine on account thereof and for the costs and disbursements in the proceedings against him for such crime; provided, however, such lien shall not attach to such property as against a purchaser or incumbrancer in good faith, for value, whose interest in the property was acquired before the docketing of the judgment against the defendant.

Section 435. (ORS 137.310) Authorizing execution of judgment; detention of defendant. (1) When a judgment has been pronounced, a certified copy of the entry thereof upon the journal shall be forthwith furnished by the clerk to the officer whose duty it is to execute the judgment; and no other warrant or authority is necessary to justify or require its execution.

(2) The defendant may be arrested and detained in any county in the state by any peace officer and held for the authorities from the county to which the execution is directed. Time spent by the defendant in such detention shall be credited towards the term specified in the judgment.

Section 436. (ORS 137.320) Delivery of defendant when committed to Corrections Division. (1) When the judgment includes commitment to the legal and physical custody of the Corrections Division, the sheriff shall deliver the defendant, together with a copy of the entry of judgment and a statement signed by the sheriff of the number of days the defendant was imprisoned prior to his delivery, to the superintendent of the penal or correctional institution to which the defendant is initially assigned pursuant to ORS 137.124. Time spent in custody by the defendant after his arrest and before his delivery to the Corrections Division shall be credited towards the term of the sentence.

(2) When the judgment is imprisonment in the county jail or a fine and that the defendant be imprisoned until it is paid, the judgment shall be executed by the sheriff of the county.

Section 437. (ORS 137.330) Where judgment of imprisonment in county jail is executed. (1) Except as provided in ORS 137.130 and 137.140, a judgment of imprisonment in the county jail shall be executed by confinement in the jail of the county where the judgment is given, except that when the place of trial has been changed, the confinement shall take place in the jail of the county where the action was commenced.

(2) The jailor of any county jail to which a prisoner is ordered, sentenced or delivered pursuant to ORS 137.130 or 137.140 shall receive and keep such prisoner in the same manner as if he had been ordered, sentenced or delivered to him by an officer or court of his own county; but the county in which the prisoner would be imprisoned except for the provisions of ORS 137.130 or 137.140 shall pay all the expenses of keeping and maintaining him in said jail.

Section 438. (ORS 137.350) Woman officer to accompany woman or girl to place of confinement. If any woman or girl charged with a crime is sentenced to any place of confinement, she shall be accompanied to such place by a woman officer who shall be appointed and compensated in the same manner as provided in ORS 133.780.

Section 439. (ORS 137.360) Duty of judge and sheriff to appoint woman officer to accompany woman ordered to institution. (1) Whenever an order has been made by any court of this state for the confinement of any female within any of the penal, reformatory or eleemosynary institutions of this state and by reason thereof it be-

comes the duty of any judge to appoint any person to accompany the female to such institution, the judge shall appoint a woman for that purpose.

(2) Whenever under the laws of this state it becomes the duty of the sheriff of any county to convey any female to any of the penal, reformatory or eleemosynary institutions of this state, the sheriff shall cause such person to be accompanied by a female attendant to the place of confinement.

Section 440. (ORS 137.370) Commencement of term of imprisonment in state penal or correctional institution; voluntary absence. (1) Except as provided in subsection (2) of this section, when a person is sentenced to imprisonment in the penitentiary or the correctional institution, his term of confinement therein commences from the day of his delivery at the penitentiary or correctional institution to the proper officer thereof.

(2) The time that a person sentenced to imprisonment in the penitentiary or the correctional institution is confined after arrest and prior to his delivery thereat is considered part of his sentence actually served in the penitentiary or the correctional institution. When a judgment of conviction is vacated and a new sentence is thereafter imposed upon the defendant for the same crime, the period of detention and imprisonment theretofore served shall be deducted from the maximum term, and from the minimum, if any, of the new sentence.

(3) Except in the case of a person enrolled in a work release program established under ORS 144.420, no time during which a person sentenced to imprisonment in the penitentiary or the correctional institution is voluntarily absent from the penitentiary or correctional institution can be counted as a part of the term for which such person was sentenced.

Section 441. (ORS 137.375) Release of prisoners whose terms expire on legal holidays. (1) When the date of release from imprisonment of any inmate in the county or city jail falls on Saturday, Sunday or a legal holiday, such person shall be released on the preceding day unless the inmate is serving a mandatory minimum sentence specifically limited to weekends in which case he shall only be released at the time fixed in the sentence.

(2) When the date of release from imprisonment of any inmate in an adult correctional facility under the jurisdiction of the Corrections Division falls on Saturday, Sunday or a legal holiday, the inmate shall be released on the first day preceding the date of release which is not a Saturday, Sunday or legal holiday.

Section 442. ORS 137.380 is amended to read:

137.380. **Treatment and employment of prisoners.** A judgment of [*imprisonment in the penitentiary or the Oregon State Correctional Institution*] **commitment to the Corrections Division** need only specify the duration of confinement. Thereafter the manner of the confinement and the treatment and employment of a person [*sentenced to imprisonment in any penal, correctional or reformatory institution*] shall be regulated and governed by whatever law is then in force prescribing the discipline , [*of such institution and the*] treatment and employment of persons [*sentenced to confinement therein*] **committed.**

COMMENTARY

This section conforms the statutes to other changes proposed by the draft and eliminates obsolete references to sentences of imprisonment.

Section 443. (ORS 137.390) Commencement and termination of term of imprisonment in the county jail; treatment of prisoners therein. The commencement and termination of a sentence of imprisonment in the county jail is to be ascertained by the rule prescribed in ORS 137.370, and the manner of such confinement and the treatment of persons so sentenced shall be governed by whatever law may be in force prescribing the discipline of county jails.

Section 444. (ORS 137.440) Return of officer executing judgment; annexation to trial court file. When a judgment in a criminal action has been executed, the sheriff or officer executing it shall return to the clerk the warrant or copy of the entry or judgment upon which he acted, with a statement of his doings indorsed thereon, and the clerk shall file the same and annex it to the trial court file, as defined in ORS 19.005.

Section 445. ORS 137.450 is amended to read:

137.450. **Enforcement of money judgment in criminal action.** A judgment against the defendant in a criminal action or the [*private prosecutor*] **complainant**, so far as it requires the payment of a fine or costs and disbursements of the action, or both, may be enforced as a judgment in a civil action.

Section 446. ORS 137.520 is amended to read:

137.520. **Power of committing magistrate to parole and arrange for employment of persons confined in county jail.** (1) The committing magistrate may establish rules and regulations under which any prisoner who is confined in any county jail for any period under six months may be allowed to go upon parole outside the county jail, but to remain while on parole in the legal custody and under the control of the court, and subject to being taken back into confinement at the discretion of the court.

(2) If such a prisoner prior to sentence for any crime or offense has been regularly employed, the court **, at the time of sentencing,** may, by order, direct the sheriff of the county to arrange for such prisoner to continue his employment in the county or contiguous to the county where imprisoned, so far as possible. If such prisoner had no regular employment the court **, at the time of sentencing,** may, by order, authorize the sheriff to obtain gainful employment for him at prevailing rate of wage for such work and at fair and reasonable hours per day or week. **After sentence, or after a prisoner has been confined to a county jail as a condition of probation, the sheriff of the county may grant the prisoner the privilege of leaving secure custody during necessary and reasonable hours for the purpose of:**

(a) Working in the county or contiguous to the county where imprisoned at gainful employment that has been approved by the sheriff for such a purpose.

(b) Obtaining in the state additional education, including but not limited to vocational, technical and general education.

(3) Between the hours or periods when the prisoner is not employed he shall be confined in jail unless the court, by order, **or the sheriff,** otherwise directs.

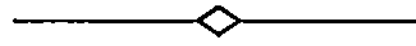
(4) The net earnings of such prisoner shall be payable to the sheriff. From such net earnings the sheriff, to the extent ordered by the court, may pay for such prisoner's board, both inside and outside of jail, and personal expenses and the support of such prisoner's lawful dependents, if any, and, if sufficient funds are available after making the foregoing payments, pay in whole or in part the preexisting debts of such prisoner. Any balance shall be retained until such prisoner has been discharged, whereupon it shall be paid to him.

(5) The committing magistrate may parole to the [*State Board of Parole and Probation*] **Corrections Division** any person sentenced to be confined in the county jail for a period of six months or more.

COMMENTARY

The amendments to subsections (2) and (3), taken from House Bill 1608 (1971 Regular Session), would allow county sheriffs to temporarily release persons for work or educational purposes after sentencing or confinement. The amendment to subsection (5) is recommended by the Corrections Division.

Section 447. (ORS 137.530) Investigation and report of probation officers. Probation officers, when directed by the court, shall fully investigate and report to the court in writing on the circumstances of the offense, criminal record, social history and present condition and environment of any defendant; and unless the court directs otherwise in individual cases, no defendant shall be placed on probation until the report of such investigation has been presented to and considered by the court. Whenever desirable, and facilities exist therefor, such investigation shall include physical and mental examinations of such defendants.



Section 448. (ORS 137.540) Determination and modification of conditions of probation. The court shall determine, and may at any time modify, the conditions of probation, which may include, as well as any others, that the probationer shall:

(1) Avoid injurious or vicious habits.

(2) Avoid places or persons of disreputable or harmful character.

(3) Report to the probation officer as directed by the court or probation officer.

(4) Permit the probation officer to visit him at his place of abode or elsewhere.

(5) Answer all reasonable inquiries of the probation officer.

(6) Work faithfully at suitable employment.

(7) Remain within a specified area.

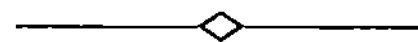
(8) Pay his fine, if any, in one or several sums.

(9) Be confined to the county jail for a period not to exceed one year or one-half of the maximum period of confinement that could be imposed for the offense for which the defendant is convicted, whichever is the lesser.

(10) Make reparation or restitution to the aggrieved party for the damage or loss caused by offense, in an amount to be determined by the court.

(11) Support his dependents.

(12) Remain under the supervision and control of the Corrections Division.

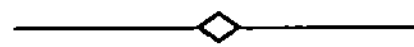


Section 449. (ORS 137.550) Period of probation; discharge from probation; proceedings in case of violation of conditions. (1) Subject to the limitations in ORS 137.010:

(a) The period of probation shall be such as the court determines and may, in the discretion of the court, be continued or extended.

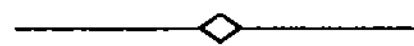
(b) The court may at any time discharge a person from probation.

(2) At any time during the probation period, the court may issue a warrant and cause a defendant to be arrested for violating any of the conditions of probation. Any probation officer, police officer or other officer with power of arrest may arrest a probationer without a warrant, and a statement by the probation officer setting forth that the probationer has, in his judgment, violated the conditions of probation is sufficient warrant for the detention of the probationer in the county jail, house of detention or local prison, when designated in such statement, until the probationer can be brought before the court. The probation officer shall forthwith report such arrest or detention to the court and submit to the court a report showing in what manner the probationer has violated his probation. Thereupon the court, after summary hearing, may revoke the probation and suspension of sentence and cause the sentence imposed to be executed or, if no sentence has been imposed, impose any sentence which originally could have been imposed. A defendant who has been previously confined in the county jail as a condition of probation pursuant to ORS 137.540 shall be given credit for all time thus served in any order or judgment of confinement resulting from revocation of his probation. In the case of any defendant whose sentence has been suspended but who is not on probation, the court may issue a warrant and cause the defendant to be arrested and brought before the court at any time within the maximum period for which the defendant might originally have been sentenced. Thereupon the court, after summary hearing, may revoke the suspension of sentence and cause the sentence imposed to be executed.



Section 450. ORS 137.560 is amended to read:

137.560. **Copies of certain orders to be sent to Corrections Division Administrator.** Within 10 days following the issuing of any order of suspension of imposition or execution of sentence or of probation of any person convicted of a crime, or of the continuation, extension, modification or revocation of any such order, or of the discharge of such person, or the recommendation by the court to the Governor of the pardon of such person, the judge issuing such an order shall send a copy of the same to the [*Director of Parole and Probation*] **Corrections Division Administrator.**



Section 451. ORS 137.570 is amended to read:

137.570. **Authority to transfer probationer from one agency to another; procedure.** A court may transfer a person on probation under its jurisdiction from the supervision of one probation [*officer*] **agency** to that of another probation [*officer*] **agency**. Whenever a

person placed on probation resides in or is to remove to a locality outside the jurisdiction of the court which placed such person on probation, such court may transfer such person to a probation officer appointed to serve for the locality in which such person resides or to which he is to remove:

(1) If such probation officer sends to the court desiring to make such transfer a written statement that he will exercise supervision over such person.

(2) If the statement is approved in writing by the judge of the court to which such probation officer is attached.

Section 452. ORS 137.580 is amended to read:

137.580. **Effect of transfer of probationer from one agency to another.** Whenever the transfer mentioned in ORS 137.570 is made, the court making it shall send to the probation [*officer*] **agency** to whose supervision the probationer is transferred a copy of all the records of such court as to the offense, criminal record and social history of the probationer. The probation [*officer*] **agency** shall report concerning the conduct and progress of the probationer to the court that placed him on probation. Probation officers **or agencies** shall have, with respect to persons transferred to their supervision from any other jurisdiction, all the powers and be subject to all the duties now imposed by law upon them in regard to probationers received on probation from courts in their own jurisdiction.

Section 453. ORS 137.590 is amended to read:

137.590. **Appointment of probation officers and assistants; chief probation officer.** The judge or judges of any court of criminal jurisdiction, including municipal courts, may appoint, and at pleasure remove, such men and women probation officers and clerical assistants as may be necessary. Probation officers appointed by the court shall be selected because of definite qualifications as to character, personality, ability and training. In courts where more than one probation officer is appointed, one shall be designated chief probation officer and shall have general supervision of the probation work of probation officers appointed by and under the direction of the court. Appointments shall be in writing and entered on the records of the court. [*A copy of each order of appointment shall be filed in the office of the State Board of Parole and Probation. No probation officer or clerical assistant appointed by the court under this section shall receive any compensation from the state, any county or any municipality.*]

COMMENTARY

This statute authorizes the court to appoint probation officers to work under the direction of the court. The amendment, recommended by the Corrections Division, deletes the requirement of filing

a copy of each order of appointment with the State Board of Parole and Probation. The amendment also removes the restriction against paying such officers out of public funds.

Section 454. (ORS 137.610) Performance by Corrections Division staff of duties of probation officers appointed by judge. The judge or judges of any court of criminal jurisdiction, including municipal courts, may request at any time the staff of the Corrections Division to perform any of the duties which might be required of a probation officer appointed by the court pursuant to ORS 137.590. All such requests for services of the staff shall be made upon the Administrator of the Corrections Division, who shall order the prompt performance of any such requested service whenever members of the staff are available for such duty.

Section 455. ORS 137.620 is amended to read:

137.620. **Powers of probation officers; oath of office; bond; audit of accounts.** Probation officers **of the Corrections Division and those appointed by the court** shall have the powers of peace officers in the execution of their duties, but shall not be active members of the regular police force. Each probation officer **appointed by the court**, before entering on the duties of his office, shall take an oath of office [*, to be administered by the court making the appointment*]. Each probation officer who collects or has custody of money shall execute a bond in a penal sum to be fixed by the court, with sufficient sureties approved thereby, conditioned for the honest accounting of all money received by him as probation officer. The accounts of all probation officers shall be subject to audit at any time by the proper fiscal authorities.

COMMENTARY

The amendments accomplish several things: First, the oath of office requirement is confined to probation officers appointed by the court, leaving this type of detail to the Corrections Division for its own officers. Second, the oath for other probation officers need not be administered by the court itself. Third, the distinction between Corrections Division probation officers and those appointed by the court is clarified.

Section 456. (ORS 137.630) Duties of probation officers. The duties of probation officers shall be:

(1) To make such investigations and reports under ORS 137.530 as are required by the judge of any court having jurisdiction within the county, city or judicial district for which the officer is appointed to serve.

(2) To receive under supervision any person placed on probation by any court in the jurisdiction area for which such officers are appointed to serve.

(3) To collect from persons under their supervision such payments as are ordered by the courts for which they serve, and to disburse the money so received under the direction of such courts.

(4) To give each person under their supervision a statement of the conditions of probation and to instruct him regarding them; to keep informed concerning the conduct and condition of such persons by visiting, requiring reports and otherwise; to use all suitable methods, not inconsistent with the condition of probation, to aid and encourage such persons and to effect improvement in their conduct and condition.

(5) To keep detailed records of the work done and accurate and complete accounts of all money collected and disbursed and to give and obtain receipts therefor; and to make such reports to the courts and to the Corrections Division as such courts require.

SUPPLEMENTARY COMMENTARY

ORS 137.990 is repealed by this draft.

Subsection (1) of the statute refers to ORS 137.110 which is also repealed. Subsection (2) appears to be a needless penalty provision relating to ORS 137.360, dealing with the appointment of a woman officer to accompany a woman ordered to a state institution.

ORS 137.072 and 137.075 are repealed as requested by the Corrections Division. The Commission was persuaded by the fact that the diagnostic examination contemplated by those statutes was not workable with the existing facilities, and that it is not desirable to send persons who have not been convicted to maximum security institutions for examination.

ARTICLE 15. APPEALS AND POST-CONVICTION RELIEF

Appeals

Section 457. (ORS 138.005) Definitions for ORS 138.010 to 138.300. As used in ORS 138.010 to 138.300, unless the context requires otherwise, the terms defined in ORS 19.005 have the meanings set forth in ORS 19.005.

Section 458. (ORS 138.010) Mode of review; abolition of writs of error and certiorari. Writs of error and of certiorari in criminal actions are abolished. The only mode of reviewing a judgment or order in a criminal action is that prescribed by ORS 138.010 to 138.300.

Section 459. (ORS 138.020) Who may appeal. Either the state or the defendant may as a matter of right appeal from a judgment in a criminal action in the cases prescribed in ORS 138.010 to 138.300, and not otherwise.

Section 460. (ORS 138.030) Parties designated "appellant" and "respondent"; title of action. The party appealing is known as the appellant and the adverse party as the respondent; but the title of the action is not changed in consequence of the appeal.

Section 461. (ORS 138.040) Appeal by defendant generally; reviewable matters; time limit. The defendant may appeal to the Court of Appeals from a judgment on a conviction in a circuit court; and upon an appeal, any decision of the court in an intermediate order or proceeding may be reviewed. A judgment suspending imposition or execution of sentence or placing a defendant on probation shall be deemed a judgment on a conviction and shall not be subject to appeal after expiration of the time specified in ORS 138.071 except as may be provided in ORS 138.050 and 138.510 to 138.680.

Section 462. (ORS 138.050) Appeal from sentence on plea of guilty where fine or punishment is excessive. A defendant who has plead guilty may take an appeal from a judgment on conviction where it imposes an excessive fine or excessive, cruel or unusual punishment. If the judgment of conviction is in the circuit court, the appeal shall be taken to the Court of Appeals; if it is in the district court, justice of the peace court or municipal court or city recorder's court, the appeal shall be taken to the circuit court of the county in which such court is located. On such appeal, the appellate court shall only consider the question whether an excessive fine or excessive, cruel or unusual punishment not proportionate to the offense has been imposed. If in the judgment of the appellate court the fine imposed is excessive or the punishment imposed is excessive, unusual or cruel and not proportionate to the offense, it shall direct the court from which the appeal is taken to impose the punishment which should be administered.

Section 463. ORS 138.060 is amended to read:

138.060. **Appeal by state.** The state may take an appeal **from the circuit court** to the Court of Appeals from:

(1) An order made prior to trial dismissing **or setting aside** the [*indictment*] **accusatory instrument**;

(2) To receive under supervision any person placed on probation by any court in the jurisdiction area for which such officers are appointed to serve.

(3) To collect from persons under their supervision such payments as are ordered by the courts for which they serve, and to disburse the money so received under the direction of such courts.

(4) To give each person under their supervision a statement of the conditions of probation and to instruct him regarding them; to keep informed concerning the conduct and condition of such persons by visiting, requiring reports and otherwise; to use all suitable methods, not inconsistent with the condition of probation, to aid and encourage such persons and to effect improvement in their conduct and condition.

(5) To keep detailed records of the work done and accurate and complete accounts of all money collected and disbursed and to give and obtain receipts therefor; and to make such reports to the courts and to the Corrections Division as such courts require.

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ORS 137.990 is repealed by this draft.

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Section 463. ORS 138.060 is amended to read:

138.060 **Appeal by state.** The state may take an appeal **from the circuit court** to the Court of Appeals from:

(1) An order made prior to trial dismissing **or setting aside** the [*indictment*] **accusatory instrument**;

[*(2) An order sustaining a plea of former conviction or acquittal;*]

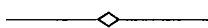
[*(3)*] **(2)** An order arresting the judgment; [*or*]

[*(4)*] **(3)** An order made prior to trial suppressing evidence ; **or**

(4) An order made prior to trial for the return or restoration of things seized.

COMMENTARY

This section is amended to: (1) Remove any implication that the state may appeal to the Court of Appeals from any court other than circuit court; (2) Clearly indicate that an order setting aside an indictment is considered the same as an order dismissing an indictment (or other accusatory instrument) for purposes of appeal; (3) Delete the reference to an order sustaining a plea of former conviction or acquittal (former jeopardy will be raised by a motion to dismiss under the proposed code and an order granting such motion would therefore be appealable under subsection (1) of ORS 138.060); (4) Provide for an appeal by the state from an order granting a motion for the return or restoration of things seized under the proposed new provisions on search and seizure.

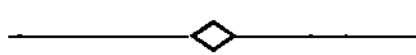


Section 464. (ORS 138.071) Time within which appeal must be taken. (1) Except as provided in subsection (2) of this section, the notice of appeal shall be served and filed at any time after verdict, but not later than 30 days after the judgment or order appealed from was given or made.

(2) If a motion for new trial or motion in arrest of judgment is served and filed the notice of appeal shall be served and filed within 30 days from the earlier of the following dates:

(a) The date of entry of the order disposing of the motion; or

(b) The date on which the motion is deemed denied, as provided in ORS 136.851.



Section 465. (ORS 138.081) Service and filing of notice of appeal. (1) An appeal shall be taken by causing a notice of appeal in the form prescribed by ORS 19.029 to be served:

(a)(A) On the district attorney for the county in which the judgment is entered, when the defendant appeals, or if the appeal is under ORS 221.360 on the plaintiff's attorney; or

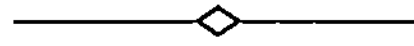
(B) On the attorney of record for the defendant, or if the defendant has no attorney of record, on the defendant, when the state appeals; and

(b) On the trial court reporter if a transcript is required in connection with the appeal; and

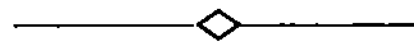
(c) On the clerk of the trial court.

(2) The original of the notice with proof of service indorsed

thereon or affixed thereto shall be filed with the clerk of the court to which the appeal is made.

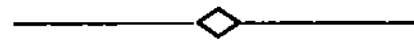


Section 466. (ORS 138.090) Signature to notice of appeal. When the state takes an appeal, the notice of appeal shall be signed by the district attorney for the county. When the defendant takes an appeal, the notice of appeal shall be signed by him or an attorney of the court for him.



Section 467. (ORS 138.110) Service of notice of appeal on defendant or his attorney by publication in certain cases. If, after due diligence, the service cannot be made as directed in subparagraph (B) of paragraph (a) of subsection (1) of ORS 138.081, the court or judge thereof from which the appeal is sought to be taken, upon proof thereof, may make an order for the publication of the notice of appeal in such newspaper and for such time as the court or judge deems proper.

Section 468. (ORS 138.120) When appeal is perfected in case of service of notice of appeal by publication. At the expiration of the time appointed for the publication, on filing an affidavit thereof with the clerk, the appeal becomes perfected.



Section 469. (ORS 138.135) Defendant's appeal or petition for review as stay of sentence. (1) A sentence of confinement shall be stayed if an appeal is taken and the defendant elects not to commence service of the sentence or is admitted to bail. If a defendant is not admitted to bail and elects not to commence service of the sentence pending appeal, he shall be held in custody at the institution designated in the judgment without execution of sentence, except as provided in ORS 138.145.

(2) A sentence to pay a fine or a fine and costs, if an appeal is taken, may be stayed by the circuit court, the Court of Appeals, or by the Supreme Court upon such terms as the court deems proper. The court may require the defendant, pending appeal, to deposit the whole or any part of the fine and costs with the clerk of the circuit court, or to give bond for the payment thereof, or to submit to an examination of assets, and it may make any appropriate order to restrain the defendant from dissipating his assets.

(3) If a petition for review by the Supreme Court is filed, any

stay shall remain in effect pending a final disposition of the cause, unless otherwise ordered by the Supreme Court.

Section 470. ORS 138.145 is amended to read:

138.145. **Temporary retention at place of original custody of defendant under sentence of imprisonment.** If the [*place of*] confinement designated by the court is the [*Oregon State Penitentiary or the Oregon State Correctional Institution*] **custody of the Corrections Division**, the defendant shall be retained in the place of his original custody for a period of at least 48 hours prior to being taken to the designated institution, unless the defendant elects to be taken to such institution without delay or is [*admitted to bail*] **released** pending appeal. The court shall order retention of the defendant at the place of original custody or restoration thereto, if required for preparation of an appeal, at such times and for such periods as may be deemed necessary by the court.

COMMENTARY

The section contains conforming amendments to make it consistent with the new release provisions.

Section 471. ORS 138.160 is amended to read:

138.160. **Appeal by state as stay of judgment or order; release.** An appeal taken by the state stays the effect of the judgment or order in favor of the defendant, so that his [*bail or money deposited in lieu thereof*] **release agreement and, if applicable, the security for release,** is held for the appearance and surrender of the defendant until the final determination of the appeal and the proceedings consequent thereon, if any; but if the defendant is in custody, he may [*, in the discretion of the court, be admitted to bail,*] **be released by the court subject to sections 236 to 248 of this 1973 Act,** pending the appeal [*, on his own undertaking*].

COMMENTARY

This section contains conforming amendments.

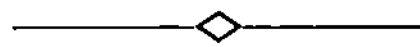
Section 472. (ORS 138.185) Transmission of record to Court of Appeals; when court acquires jurisdiction; dismissals; powers of trial court. (1) In an appeal to the Court of Appeals, when the notice of appeal is filed, or when the appeal is perfected upon publication of notice as provided in ORS 138.120, the record in the trial court shall

be prepared and transmitted to the State Court Administrator, at Salem, in the manner and within the time prescribed in ORS 19.029 and 19.078 to 19.098.

(2) The provisions of ORS 19.033 and 19.170 and, if the defendant is the appellant, the provisions of subsection (3) of ORS 19.130 shall apply to appeals to the Court of Appeals.

Section 473. (ORS 138.210) Necessity of appearance of appellant. If the appellant fails to appear in the appellate court, judgment of affirmance shall be given as a matter of course; but the defendant need not personally appear in the appellate court.

Section 474. (ORS 138.220) Scope of review. Upon an appeal, the judgment or order appealed from can be reviewed only as to questions of law appearing upon the record.



Section 475. (ORS 138.230) Rulings in discretion of court and technical defects as grounds for reversal. After hearing the appeal, the court shall give judgment, without regard to the decision of questions which were in the discretion of the court below or to technical errors, defects or exceptions which do not affect the substantial rights of the parties.

Section 476. (ORS 138.240) Judgments appellate court may give. The appellate court may reverse, affirm or modify the judgment or order appealed from and shall, if necessary or proper, order a new trial.

Section 477. ORS 138.250 is amended to read:

138.250. **New trial to be in court below; reversal without new trial.** When a new trial is ordered, it shall be directed to be had in the court below; and if a judgment against a defendant is reversed without ordering a new trial, the appellate court shall direct, if he is in custody, that he be discharged therefrom, or if he has been [*admitted to bail*] **released**, that his [*bail*] **release agreement** be exonerated, or if [*money*] **a security release** has been [*deposited instead of bail*] **entered into**, that [*it*] **the security** be refunded to the defendant **or his sureties**.

COMMENTARY

The section contains conforming amendments.

Section 478. (ORS 138.260) Entry of judgment in journal; transmission to court below. When the judgment of the appellate court is given, it shall be entered in its journal, and a certified copy of the entry shall be forthwith remitted to the clerk of the court below.

Section 479. (ORS 138.270) Proceedings in court below; enforcement of judgment; new trial. (1) Upon the receipt of the certified copy of the entry of judgment mentioned in ORS 138.260, the clerk shall enter the same in the journal of the court below and thereafter the judgment shall be enforced without any further proceedings, unless the appellate court so directs, as a judgment of the court below.

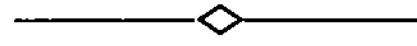
(2) If by the judgment of the appellate court a new trial is ordered from the entry of the judgment in the court below, the action is to be deemed pending and for trial in such court, according to the directions of the appellate court.

Section 480. (ORS 138.280) Retention of transcript in appellate court; transmission of copy of judgment to trial court. The transcript transmitted to the appellate court shall there remain of record and shall not be remitted to the court below. After entry thereof, a cerified copy of the judgment of the appellate court shall be transmitted to, and filed in, the trial court.

Section 481. (ORS 138.290) Termination of appellate jurisdiction; orders giving effect to judgment. After the certified copy of the judgment has been remitted, as provided in ORS 138.260, the appellate court has no further jurisdiction of the appeal or of the proceedings thereon; and all orders which may be necessary to carry the judgment into effect shall be made by the court to which the certified copy is remitted.

Section 482. (ORS 138.300) County's liability for costs on appeal in criminal action. Upon final reversal of the judgment of the lower court in a criminal action, the county shall be liable for costs on appeal to the Court of Appeals and on review by the Supreme Court and with like effect as in the case of natural persons; and such costs shall be paid in the first instance by the county from which the appeal is taken.

Section 483. (ORS 138.480) Appointment of Public Defender to represent prisoner in proceeding before appellate court. The Supreme Court or the Court of Appeals may, in its discretion, at the request of an individual who is deprived of his liberty by a judgment, is without means to retain an attorney and is without the aid of an attorney, direct the Public Defender to represent the individual in a proceeding before it to test the validity of that judgment.

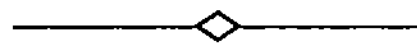


Section 484. (ORS 138.490) Compensation of original attorney for services in subsequent proceeding brought by Public Defender. (1) When an attorney has been appointed by a court or magistrate other than the Supreme Court or Court of Appeals under ORS 135.320, 419.498 and 426.100 and the case later is taken to a court, by the Public Defender, on an appeal or on a post-conviction proceeding, and that attorney previously appointed is consulted or joined by the Public Defender under paragraph (d) of subsection (1) of ORS 151.240, the circuit court from which or to which the case is taken:

(a) May order that the attorney be paid a sum that will reasonably compensate the attorney for his services to the extent that those services have not been compensated pursuant to an earlier order for payment in the case; and

(b) May order that the attorney be reimbursed for expenses incurred in connection with the consultation or joinder.

(2) The county from which the case is taken shall pay the attorney the sum ordered to be paid under this section.



Section 485. (ORS 138.500) Appointment of counsel and furnishing of transcript for appellant without funds; fee. (1) If a defendant in a criminal action or a petitioner in a proceeding pursuant to ORS 138.510 to 138.680 wishes to appeal from an appealable adverse final order or judgment of a circuit court and if such person is without funds to employ counsel for the appeal, he may request the circuit court from which the appeal is or would be taken to appoint counsel to represent him on such appeal. The request shall be in writing and shall be made within the time during which an appeal may be taken or, if the notice of appeal has been filed, at any time thereafter. The request shall include a brief statement of the assets, liabilities and income in the previous year of such person. Upon receiving such a request, the circuit court, if it finds that petitioner or defendant is without funds to employ counsel for an appeal, shall appoint counsel to represent petitioner or defendant on the appeal. The circuit court, in its discretion, may appoint counsel who represented petitioner or defendant in the circuit court in the case, or if

the Public Defender is able to serve, it may appoint the Public Defender as counsel on appeal.

(2) Whenever a defendant in a criminal action or a petitioner in a proceeding pursuant to ORS 138.510 to 138.680 has filed a notice of appeal from an appealable adverse final order or judgment of a circuit court and such person is without funds to pay for a transcript, or portion thereof, necessary to present adequately his case upon appeal, such person may request the circuit court to order such transcript, or portion thereof, furnished to him. The request shall be in writing and shall include a brief statement of the assets, liabilities and income in the previous year of such person. Upon receiving such request, the circuit court shall order furnished to such person such portion of the transcript as may be material to the decision on appeal, if the circuit court finds that such transcript or portion thereof is necessary and that such person is unable to pay for it. The cost of such transcript shall be in the amount prescribed in ORS 21.470 and paid for as provided in subsection (3) of this section.

(3) After determination of the appeal the Court of Appeals shall allow the cost of the transcript furnished pursuant to subsection (2) of this section, the cost of briefs and any other expenses of appellant which were necessary to appellate review. The Court of Appeals may also determine and allow a reasonable fee for counsel appointed under this section. A verified statement of such costs and expenses, including petition for allowance of attorney's fees, shall be filed within 20 days or such further time as may be allowed by the court from the time an opinion is rendered or, if no opinion is handed down, then within 20 days from the giving of a decision by the court. On any review by the Supreme Court of the judgment of the Court of Appeals a person for whom counsel has been appointed shall by similar procedure recover the cost of briefs and any other expense of the review, including a reasonable attorney fee. The cost, expenses and fee so allowed by the Supreme Court and by the Court of Appeals shall be paid by:

(a) The county in which the final order or judgment appealed from was rendered, if the appeal is taken to review directly an order or judgment in a criminal action; or

(b) The county in which the conviction complained of was rendered, if the appeal is taken to review the judgment in a proceeding pursuant to ORS 138.510 to 138.680.

(4) The provisions of this section shall apply in favor of the defendant in a criminal action or the petitioner in a proceeding pursuant to ORS 138.510 to 138.680 when such person is respondent in an appeal taken by the state in a criminal action or by the defendant in a proceeding pursuant to ORS 138.510 to 138.680.

(5) If appointed counsel on appeal is the Public Defender established by ORS 151.280, the appellate court may determine a reasonable fee for his services and may order the county to pay an amount equal to one-half of such fee.

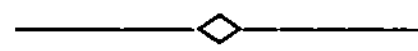
Post-conviction Relief

Section 486. (ORS 138.510) Convicted person may file petition for relief. (1) Except as otherwise provided in ORS 138.540, any person convicted of a crime under the laws of this state may file a petition for post-conviction relief pursuant to ORS 138.510 to 138.680.

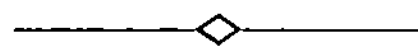
(2) A petition pursuant to ORS 138.510 to 138.680 may be filed without limit in time.

(3) The remedy created by ORS 138.510 to 138.680 is available to persons convicted before May 26, 1959.

(4) In any post-conviction proceeding pending in the courts of this state on May 26, 1959, the person seeking relief in such proceedings shall be allowed to amend his action and seek relief under ORS 138.510 to 138.680. If such person does not choose to amend his action in this manner, the law existing prior to May 26, 1959, shall govern his case.



Section 487. (ORS 138.520) Relief which court may grant. The relief which a court may grant or order under ORS 138.510 to 138.680 shall include release, new trial, modification of sentence, and such other relief as may be proper and just. The court may also make supplementary orders to the relief granted, concerning such matters as rearraignment, retrial, custody and bail.



Section 488. (ORS 138.530) When relief must be granted; executive clemency or pardon powers and original jurisdiction of Supreme Court in habeas corpus not affected. (1) Post-conviction relief pursuant to ORS 138.510 to 138.680 shall be granted by the court when one or more of the following grounds is established by the petitioner:

(a) A substantial denial in the proceedings resulting in petitioner's conviction, or in the appellate review thereof, of petitioner's rights under the Constitution of the United States, or under the Constitution of the State of Oregon, or both, and which denial rendered the conviction void.

(b) Lack of jurisdiction of the court to impose the judgment rendered upon petitioner's conviction.

(c) Sentence in excess of, or otherwise not in accordance with, the sentence authorized by law for the crime of which petitioner was convicted; or unconstitutionality of such sentence.

(d) Unconstitutionality of the statute making criminal the acts for which petitioner was convicted.

(2) Whenever a person petitions for relief under ORS 138.510 to 138.680, ORS 138.510 to 138.680 shall not be construed to deny relief where such relief would have been available prior to May 26, 1959, under the writ of habeas corpus, nor shall it be construed to affect any powers of executive clemency or pardon provided by law.

(3) ORS 138.510 to 138.680 shall not be construed to limit the original jurisdiction of the Supreme Court in habeas corpus as provided in the Constitution of this state.

Section 489. (ORS 138.540) Petition for relief as exclusive remedy for challenging conviction; when petition may not be filed; abolition or availability of other remedies. (1) Except as otherwise provided in ORS 138.510 to 138.680, a petition pursuant to ORS 138.510 to 138.680 shall be the exclusive means, after judgment rendered upon a conviction for a crime, for challenging the lawfulness of such judgment or the proceedings upon which it is based. The remedy created by ORS 138.510 to 138.680 does not replace or supersede the motion for new trial, the motion in arrest of judgment or direct appellate review of the sentence or conviction, and a petition for relief under ORS 138.510 to 138.680 shall not be filed while such motions or appellate review remain available. With the exception of habeas corpus, all common law post-conviction remedies, including the motion to correct the record, coram nobis, the motion for relief in the nature of coram nobis and the motion to vacate the judgment, are abolished in criminal cases.

(2) When a person restrained by virtue of a judgment upon a conviction of crime asserts the illegality of his restraint upon grounds other than the unlawfulness of such judgment or the proceedings upon which it is based or in the appellate review thereof, relief shall not be available under ORS 138.510 to 138.680 but shall be sought by habeas corpus or other remedies, if any, as otherwise provided by law. As used in this subsection, such other grounds include but are not limited to unlawful revocation of parole or conditional pardon or completed service of the sentence imposed.

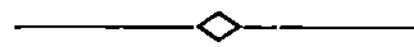
Section 490. (ORS 138.550) Availability of relief as affected by prior judicial proceedings. The effect of prior judicial proceedings concerning the conviction of petitioner which is challenged in his petition shall be as specified in this section and not otherwise:

(1) The failure of petitioner to have sought appellate review of his conviction, or to have raised matters alleged in his petition at his trial, shall not affect the availability of relief under ORS 138.510 to 138.680. But no proceeding under ORS 138.510 to 138.680 shall be pursued while direct appellate review of his conviction, a motion for new trial, or a motion in arrest of judgment remains available.

(2) When the petitioner sought and obtained direct appellate review of his conviction and sentence, no ground for relief may be asserted by petitioner in a petition for relief under ORS 138.510 to 138.680 unless such ground was not asserted and could not reasonably have been asserted in the direct appellate review proceeding. If petitioner was not represented by counsel in the direct appellate review proceeding, due to his lack of funds to retain such counsel and the failure of the court to appoint counsel for that proceeding, any ground for relief under ORS 138.510 to 138.680 which was not specifically decided by the appellate court may be asserted in the first petition for relief under ORS 138.510 to 138.680, unless otherwise provided in this section.

(3) All grounds for relief claimed by petitioner in a petition pursuant to ORS 138.510 to 138.680 must be asserted in his original or amended petition, and any grounds not so asserted are deemed waived unless the court on hearing a subsequent petition finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition. However, any prior petition or amended petition which was withdrawn prior to the entry of judgment by leave of the court, as provided in ORS 138.610, shall have no effect on petitioner's right to bring a subsequent petition.

(4) Except as otherwise provided in this subsection, no ground for relief under ORS 138.510 to 138.680 claimed by petitioner may be asserted when such ground has been asserted in any post-conviction proceeding prior to May 26, 1959, and relief was denied by the court, or when such ground could reasonably have been asserted in the prior proceeding. However, if petitioner was not represented by counsel in such prior proceeding, any ground for relief under ORS 138.510 to 138.680 which was not specifically decided in the prior proceedings may be raised in the first petition for relief pursuant to ORS 138.510 to 138.680. Petitioner's assertion, in a post-conviction proceeding prior to May 26, 1959, of a ground for relief under ORS 138.510 to 138.680, and the decision of the court in such proceeding adverse to the petitioner, shall not prevent the assertion of the same ground in the first petition pursuant to ORS 138.510 to 138.680 if the prior adverse decision was on the ground that no remedy heretofore existing allowed relief upon the grounds alleged, or if the decision rested upon the inability of the petitioner to allege and prove matters contradicting the record of the trial which resulted in his conviction and sentence.



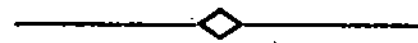
Section 491. (ORS 138.560) Procedure upon filing petition for relief; venue and transfer of proceedings. (1) A proceeding for post-conviction relief pursuant to ORS 138.510 to 138.680 shall be commenced by filing a petition and two copies thereof with the clerk of the circuit court for the county in which the petitioner is imprisoned or, if the petitioner is not imprisoned, with the clerk of the circuit

court for the county in which his conviction and sentence was rendered. The clerk of the court in which the petition is filed shall docket the petition and bring it promptly to the attention of such court. A copy of the petition need not be served by petitioner on the defendant, but, in lieu thereof, the clerk of the court in which the petition is filed shall immediately forward by registered mail a copy of the petition to the Attorney General or other attorney for the defendant named in ORS 138.570.

(2) For the purposes of ORS 138.510 to 138.680, a person released on parole or conditional pardon shall be deemed to be imprisoned in the institution from which he is so released.

(3) Except when petitioner's conviction was for a misdemeanor, the release of the petitioner from imprisonment during the pendency of proceedings instituted by him pursuant to ORS 138.510 to 138.680 shall not cause the proceedings to become moot. Such release of petitioner shall not change the venue of the proceedings out of the circuit court in which they were commenced and shall not affect the power of such court to transfer the proceedings as provided in subsection (4) of this section.

(4) Whenever petitioner is imprisoned in the Oregon State Penitentiary or the Oregon State Correctional Institution and the circuit court for Marion County finds that the hearing upon the petition can be more expeditiously conducted in the county in which the petitioner was convicted and sentenced, the circuit court for Marion County upon its own motion or the motion of a party may order the petitioner's case to be transferred to the circuit court for the county in which petitioner's conviction and sentence were rendered. Such an order shall not be reviewable by any court of this state.



Section 492. (ORS 138.570) Defendant and counsel for defendant. If the petitioner is imprisoned, the petition shall name as defendant the official charged with the confinement of petitioner. If the petitioner is not imprisoned, the defendant shall be the State of Oregon. Whenever the defendant is the Superintendent of the Oregon State Penitentiary or of the Oregon State Correctional Institution, the Attorney General shall act as his attorney in the proceedings. Whenever the defendant is some other official charged with the confinement of petitioner, the district attorney of the county wherein the petitioner is imprisoned shall be the attorney for the defendant. Whenever petitioner is not imprisoned, counsel for the State of Oregon as defendant shall be the district attorney of the county in which petitioner's conviction and sentence were rendered. Whenever the petitioner is released from imprisonment during the pendency of any proceedings pursuant to ORS 138.510 to 138.680, the State of Oregon shall be substituted as defendant. Upon

such substitution, counsel for the original defendant shall continue to serve as counsel for the substituted defendant.

Section 493. (ORS 138.580) Petition. The petition shall be verified by the petitioner. Facts within the personal knowledge of the petitioner and the authenticity of all documents and exhibits included in or attached to the petition must be sworn to affirmatively as true and correct. The Supreme Court, by rule, may prescribe the form of such verification. The petition shall identify the proceedings in which petitioner was convicted and any appellate proceedings thereon, give the date of entry of judgment and sentence complained of and identify any previous post-conviction proceedings that the petitioner has undertaken to secure a post-conviction remedy, whether under ORS 138.510 to 138.680 or otherwise, and the disposition thereof. The petition shall set forth specifically the grounds upon which relief is claimed, and shall state clearly the relief desired. All facts within the personal knowledge of the petitioner shall be set forth separately from the other allegations of fact and shall be verified as heretofore provided in this section. Affidavits, records or other documentary evidence supporting the allegations of the petition shall be attached to the petition, or the petition shall state why they are not attached. Argument, citations and discussion of authorities shall be omitted from the petition but may be submitted in a separate memorandum of law.

Section 494. (ORS 138.590) Petitioner may proceed as poor person. (1) Any petitioner who is unable to pay the expenses of a proceeding pursuant to ORS 138.510 to 138.680 or to employ counsel for such a proceeding may proceed as a poor person pursuant to this section upon order of the circuit court in which the petition is filed.

(2) If the petitioner wishes to proceed as a poor person, he shall file with his petition an affidavit stating that he is unable to pay the expenses of a proceeding pursuant to ORS 138.510 to 138.680 or to employ counsel for such a proceeding. The affidavit shall contain a brief statement of petitioner's assets and liabilities and his income during the previous year. If the circuit court is satisfied that petitioner is unable to pay such expenses or to employ counsel, it shall order that petitioner proceed as a poor person. However, when the circuit court for Marion County orders petitioner's case transferred to another circuit court as provided in subsection (4) of ORS 138.560, the matter of petitioner's proceeding as a poor person shall be determined by the latter court.

(3) In the order to proceed as a poor person, the circuit court shall appoint counsel to represent petitioner. When the petitioner is held in the custody of either the Superintendent of the Oregon

State Penitentiary or of the Oregon State Correctional Institution, and the Public Defender authorized by ORS 137.205, 138.480 to 138.500, 138.590 and 151.210 to 151.290 is able to serve, the circuit court shall appoint the Public Defender as counsel to represent petitioner. Counsel so appointed shall represent petitioner throughout the proceedings in the circuit court.

(4) If counsel appointed by the circuit court determines that the petition as filed by petitioner is defective, either in form or in substance, or both, he may move to amend the petition with 15 days following his appointment, or within such further period as the court may allow. Such amendment shall be permitted as of right at any time during this period. If appointed counsel believes that the original petition cannot be construed to state a ground for relief under ORS 138.510 to 138.680, and cannot be amended to state such a ground, he shall, in lieu of moving to amend the petition, inform the petitioner and notify the circuit court of his belief by filing an affidavit stating his belief and his reasons therefor with the clerk of the circuit court. This affidavit shall not constitute a ground for denying the petition prior to a hearing upon its sufficiency, but the circuit court may consider such affidavit in deciding upon the sufficiency of the petition at the hearing.

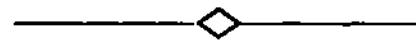
(5) When a petitioner has been ordered to proceed as a poor person, the expenses which are necessary for the proceedings upon his petition in the circuit court and the award to appointed counsel for petitioner as provided in this subsection shall be a charge against and shall be paid by the county in which petitioner's conviction and sentence were rendered. At the conclusion of proceedings on a petition pursuant to ORS 138.510 to 138.680, the circuit court shall determine the amount of expenses of petitioner in the circuit court. The circuit court may also determine a reasonable fee for the services of appointed counsel in the proceedings in the circuit court. The expenses and fee determined by the circuit court shall be certified to and shall be ordered to be paid by the county in which petitioner's conviction and sentence were rendered and shall be paid by such county.

(6) When the Public Defender established by ORS 151.280 is the appointed counsel no fee for his services shall be ordered by the court or paid by the county.

(7) When petitioner has been ordered to proceed as a poor person, all court fees in the circuit court are waived.

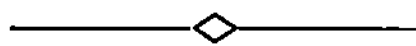
Section 495. (ORS 138.600) Filing fee and undertaking not required. Notwithstanding any other fees provided by law, there shall be no filing fee or undertaking required in any court for a proceeding pursuant to ORS 138.510 to 138.680.

Section 496. (ORS 138.610) Pleadings. Within 30 days after the docketing of the petition, or within any further time the court may fix, the defendant shall respond by demurrer, answer or motion. No further pleadings shall be filed except as the court may order. The court may grant leave, at any time prior to entry of judgment, to withdraw the petition. The court may make appropriate orders as to the amendment of the petition or any other pleading, or as to the filing of further pleadings, or as to extending the time of the filing of any pleading other than the original petition.



Section 497. (ORS 138.620) Hearing. (1) After the response of the defendant to the petition, the court shall proceed to a hearing on the issues raised. If the defendant's response is by demurrer or motion raising solely issues of law, the circuit court need not order that petitioner be present at such hearing, so long as petitioner is represented at the hearing by counsel. At the hearing upon issues raised by any other response, the circuit court shall order that petitioner be present.

(2) If the petition states a ground for relief, the court shall decide the issues raised and may receive proof by affidavits, depositions, oral testimony or other competent evidence. The burden of proof of facts alleged in the petition shall be upon the petitioner to establish such facts by a preponderance of the evidence.



Section 498. (ORS 138.630) Evidence of events occurring at trial of petitioner. In a proceeding pursuant to ORS 138.510 to 138.680, events occurring at the trial of petitioner may be shown by a duly authenticated transcript, record or portion thereof. If such transcript or record cannot be produced, the affidavit of the judge who presided at the trial setting forth the facts occurring at the trial shall be admissible in evidence when relevant. When necessary to establish any ground for relief specified in ORS 138.530, the petitioner may allege and prove matters in contradiction of the record of his trial. When the record is so contradicted, the defendant may introduce in evidence any evidence which was admitted in evidence at the trial to support the contradicted matter and may call witnesses whose testimony at such trial supported the contradicted matter. Whenever such evidence or such witnesses cannot be produced by defendant for any reason which is sufficient in the opinion of the court, such parts of the duly authenticated record of the trial as support the contradicted matter may be introduced in evidence by the defendant. A duly authenticated record of the testimony of any witness at the trial may be introduced in evidence to impeach the credibility of any testimony by the same witness in the hearing upon the petition.

Section 499. (ORS 138.640) Judgment. After deciding the issues raised in the proceeding, the court shall deny the petition or enter an order granting the appropriate relief. The court may also make orders as provided in ORS 138.520. The order making final disposition of the petition shall state clearly the grounds upon which the cause was determined, and whether a state or federal question, or both, was presented and decided. This order shall constitute a final judgment for purposes of appellate review and for purposes of res judicata.

Section 500. (ORS 138.650) Appeal. Either the petitioner or the defendant may appeal to the Court of Appeals within 30 days after the entry of final judgment on a petition pursuant to ORS 138.510 to 138.680. The manner of taking the appeal and the scope of review by the Court of Appeals and the Supreme Court shall be the same as that provided by law for appeals in criminal actions, except that the trial court may provide that the transcript contain only such evidence as may be material to the decision of the appeal.

Section 501. (ORS 138.660) Dismissal of appeal. In reviewing the judgment of the circuit court in a proceeding pursuant to ORS 138.510 to 138.680, the Court of Appeals on its own motion or on motion of respondent and upon receipt of the trial court file and transcript, if any, may dismiss the appeal without oral argument or submission of briefs if it finds that no substantial question of law is presented by the appeal. A dismissal of the appeal under this section shall constitute a decision upon the merits of the appeal.

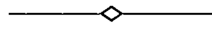
Section 502. (ORS 138.670) Admissibility, at new trial, of testimony of witness at first trial. In the event that a new trial is ordered as the relief granted in a proceeding pursuant to ORS 138.-510 to 138.680, a properly authenticated transcript of testimony in the first trial may be introduced in evidence to supply the testimony of any witness at the first trial who has since died or who cannot be produced at the new trial for other sufficient cause. Such transcript shall not be admissible in any other respect, except that the transcript of testimony of a witness at the first trial may be used at the new trial to impeach the testimony at the new trial by the same witness.

Section 503. (ORS 138.680) Short title. ORS 138.510 to 138.680 may be cited as the Post-Conviction Hearing Act.

ARTICLE 16. BOARD OF PAROLE; WORK RELEASE; EXECUTIVE CLEMENCY

Executive Clemency

Section 504. (ORS 143.010) Granting reprieves, commutations and pardons generally; remission of penalties and forfeitures. Upon such conditions and with such restrictions and limitations as he thinks proper, the Governor may grant reprieves, commutations and pardons, after convictions, for all crimes and may remit, after judgment therefor, all penalties and forfeitures.

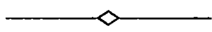


Section 505. ORS 143.040 is amended to read:

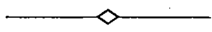
143.040. **Notice of intention to apply for pardon, commutation or remission; proof of service.** At least 20 days before an application for a pardon, commutation or remission is made to the Governor, written notice of the intention to apply therefor, signed by the person applying, and stating briefly the grounds of the application, shall be served upon the district attorney of the county where the conviction was had and upon the [*Director*] **Board** of Parole [*and Probation*] **and the Corrections Division Administrator**. Proof by affidavit of the service shall be presented to the Governor.

COMMENTARY

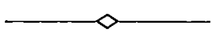
The statute as amended would require notice of intention to apply for a pardon, commutation or remission to be served upon the Corrections Division, as well as the Parole Board. This would ensure that both agencies, either of which might have an interest in the petition, would be duly advised.



Section 506. (ORS 143.050) Communication to legislature by Governor. The Governor shall communicate to the Legislative Assembly at its next regular session thereafter each case of reprieve, commutation or pardon, with the reason for granting the same, stating the name of the applicant, the crime of which he was convicted, the sentence and its date, and the date of the commutation, pardon or reprieve. He shall communicate a like statement of particulars in relation to each case of remission of a penalty or forfeiture, with the amount remitted.



Section 507. (ORS 143.060) Filing of papers by Governor. When the Governor grants a reprieve, commutation or pardon or remits a fine or forfeiture, he shall within 10 days thereafter file all the papers presented to him in relation thereto in the office of the Secretary of State, by whom they shall be kept as public records, open to public inspection.



Board of Parole

Section 508. ORS 144.005 is amended to read:

144.005. **State Board of Parole; term of office; compensation; Administrator of Corrections Division as member.** (1) A State Board of Parole [*and Probation*] of three members hereby is created.

(2) Members of the board shall be appointed by the Governor and serve for a term of four years. If there is a vacancy for any cause, the Governor shall make an appointment to become immediately effective for the unexpired term. The Governor at any time may remove any member for inefficiency, neglect of duty or malfeasance in office.

(3) Each member shall devote his entire time to the performance of the duties imposed on the board and shall not engage in any partisan political activity.

(4) The members shall receive a salary set by the Governor. In addition, all members may receive actual and necessary travel and other expenses incurred in the performance of their official duties within limits as provided by law or under ORS 292.220 and 292.230.

(5) The Administrator of the Corrections Division shall serve as an ex officio non-voting member of the board.

COMMENTARY

The Parole Board does not have any probation functions. The Corrections Division recommends and the Commission concurs that this statute and other statutes in this chapter be amended to delete the reference to probation.

Section 509. ORS 144.015 is amended to read:

144.015. **Confirmation by Senate.** The appointment of a member of the State Board of Parole [*and Probation*] is subject to confirmation by the Senate as provided in ORS 171.570. If an appointment is made in the interim between legislative sessions, the Senate shall act through the Committee on Executive Appointments under ORS 171.560.

Section 510. ORS 144.025 is amended to read:

144.025. **Chairman; quorum.** (1) The State Board of Parole [*and Probation*] shall select one of its members as chairman, for such terms and with duties and powers necessary for the performance of the function of such office as the board determines.

(2) A majority of the members of the board constitutes a quorum for the transaction of business.

Section 511. ORS 144.040 is amended to read:

144.040. **Power of board to determine parole violations.** The State Board of Parole [*and Probation*] shall determine whether violation of conditions of parole [*, conditional pardon, probation or other conditional release*] exists in specific cases.

COMMENTARY

The amendments delete the reference to probation in the title of the Parole Board and eliminate reference to "conditional pardon, probation or other conditional release" which are not considered by the Board.

Section 512. ORS 144.050 is amended to read:

144.050. **Power of board to parole inmates.** Subject to applicable laws, the State Board of Parole [*and Probation*] may authorize any inmate, who is confined in any county jail for a period of six months or more or committed to the legal and physical custody of the Corrections Division, to go upon parole subject to being arrested and detained as provided in ORS 144.350. The state board may establish rules and regulations applicable to parole.

Section 513. ORS 144.060 is amended to read:

144.060. **Acceptance of funds, grants or donations; contracts with Federal Government and others.** The Corrections Division, with the written consent of the Governor, shall:

(1) Accept from the United States of America, or any of its agencies, such funds, equipment and supplies as may be made available to this state to carry out any of the functions of the division and shall enter into such contracts and agreements with the United States, or any of its agencies, as may be necessary, proper and convenient, not contrary to the laws of this state.

(2) Enter into an agreement with the county court or board of county commissioners of any county, or with the governing officials of any municipality of this state for the payment by the county or municipality of all or any part of the cost of the performance by the [*board*] **Corrections Division or Board of Parole** of any parole or probation services [,] **or** of the supervision of any parole or probation case arising within the county or municipality [*or of the maintenance therein of work camps as authorized by subsection (1) of ORS 144.506*].

(3) Accept any grant or donation of land or any gift of money or other valuable thing made to the state to carry out any of the functions of the division.

COMMENTARY

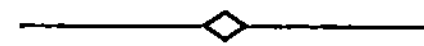
The amendments insert the correct references for the Corrections Division and the Parole Board, and delete an obsolete reference to work camps.

Section 514. ORS 144.075 is amended to read:

144.075. **Expenses of returning violators of parole, conditional pardon or commutation to penitentiary, how paid.** Any expense incurred by the state for returning to the [*state penitentiary*] **Corrections Division** any parole violator or violator of a conditional commutation or conditional pardon shall be paid out of the biennial appropriations made for the payment of the state's portion of the expenses incident to [*the*] **such** transportation [*of convicts to the penitentiary*].

COMMENTARY

The amendments bring the statute up to date.



Parole Process

Section 515. ORS 144.210 is amended to read:

144.210. **Statement and information about inmate and his crime from judge, district attorney and others.** After a person convicted of a felony is committed to the legal and physical custody of the Corrections Division, the State Board of Parole [*and Probation*] shall obtain from the sentencing judge, the district attorney and the sheriff or arresting agency a statement of all the facts concerning such convicted person's crime and any other information which they may have concerning the convicted person. The sentencing judge, the district attorney, the sheriff and the arresting agency shall give the board such information and indicate to the board what, in their judgment, should be the duration of such convicted person's confinement. All such statements and information shall be made available to the Corrections Division.

Section 516. ORS 144.220 is amended to read:

144.220. **Bringing information about inmates before board.** Within six months after the admission to the state penitentiary of a convicted person, and from time to time, the State Board of Parole [*and Probation*] shall cause to be brought before it all information regarding such convicted person.

Section 517. ORS 144.226 is amended to read:

144.226. **Examination by psychiatrist of persons sentenced to an indeterminate term; report thereon.** (1) Any person sentenced under ORS 161.725 and 161.735 as a dangerous offender shall at

least every two years be given a complete physical, mental and psychiatric examination by a psychiatrist appointed by the Superintendent of the Oregon State Hospital. Within 60 days after the examination, the examining psychiatrist shall file a written report of his findings and conclusions relative to the examination with the Administrator of the Corrections Division and Chairman of the State Board of Parole [*and Probation*].

(2) The examining psychiatrist shall include in his report a statement as to whether or not in his opinion the convicted person has any mental or emotional disturbance or deficiency or condition predisposing him to the commission of any crime to a degree rendering the examined person a menace to the health or safety of others. The report shall also contain any other information which the examining psychiatrist believes will aid the State Board of Parole [*and Probation*] in determining whether the examined person is eligible for parole or release. The report shall also state the progress or changes in the condition of the examined person as well as any recommendations for treatment. A certified copy of the report shall be sent to the convicted person, to his attorney and to the executive officer of the penal or correctional institution in which the convicted person is confined.

Section 518. ORS 144.228 is amended to read:

144.228. **Periodic review by board of persons sentenced to indeterminate term.** (1) Within six months after conviction and at least once every two years thereafter during the term of any person sentenced under ORS 161.725 and 161.735 as a dangerous offender, the State Board of Parole [*and Probation*] shall cause to be brought before it and consider all information regarding such person. The information shall include the written report of the examining psychiatrist which shall contain all the facts necessary to assist the State Board of Parole [*and Probation*] in making its determination. The report of the examining psychiatrist shall be made within two months of the date of its consideration.

(2) In addition to the report of the examining psychiatrist, the board shall also consider a written report to be made by the executive officer of the penal or correctional institution in which the person has been confined. The executive officer's report shall contain:

(a) A detailed account of the person's conduct while confined, all infractions of rules and discipline, all punishment meted out to the person and the circumstances connected therewith, as well as the extent to which the person has responded to the efforts made in the institution to improve his mental and moral condition.

(b) A statement as to the person's present attitude towards society, towards the judge who sentenced him, towards the district

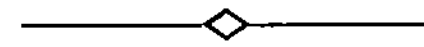
attorney who prosecuted him, towards the policeman who arrested him and towards his previous criminal career.

(c) The industrial record of the person while in or under the supervision of the institution, showing the average number of hours per day that he has been employed, the nature of his occupations and a recommendation as to the kind of work, if any, he is best fitted to perform and at which he is most likely to succeed when he leaves the institution in which he has been confined.

Section 519. (ORS 144.240) Standards for parole. No prisoner in the state penitentiary shall be paroled unless it is the opinion of the board that, within a reasonable probability, the prisoner will, after parole, remain outside the institution without violating the law and that such release is not incompatible with the welfare of society.

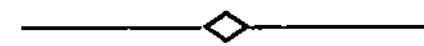
Section 520. ORS 144.250 is amended to read:

144.250. **Factors considered by board in granting parole.** Good conduct and efficient performance of duties assigned in the state penitentiary will be factors considered by the State Board of Parole [*and Probation*] in granting parole.



Section 521. ORS 144.260 is amended to read:

144.260. **Chairman to inform judge, district attorney and others of prospective release on parole of inmate.** Prior to the release on parole from the state penitentiary or correctional institution of any convicted person, the Chairman of the State Board of Parole [*and Probation*] shall inform the sentencing judge, district attorney, sheriff or arresting agency of the prospective date of release and of any special conditions thereof. All such information shall be made available to the Corrections Division.



Section 522. ORS 144.270 is amended to read:

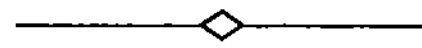
144.270. **Conditions of parole shall be in writing; delivery of copy thereof to parolee.** The State Board of Parole [*and Probation*], in releasing a person on parole, shall specify in writing the conditions of his parole and a copy of such conditions shall be given to the person paroled.

Termination of Parole

Section 523. ORS 144.310 is amended to read:

144.310. **Final discharge of parolee.** When any paroled prisoner has performed the obligations of his parole for such time as satisfies

the State Board of Parole [*and Probation*] that his final release is not incompatible with his welfare and that of society, the board may make a final order of discharge and issue to the paroled prisoner a certificate of discharge; but no such order of discharge shall be made in the case of a person convicted of murder in the first degree and in no other case within a period of less than one year after the date of release on parole, except that when the period of the sentence imposed by the court expires at an earlier date, a final order of discharge shall be made and a certificate of discharge issued to the paroled prisoner not later than the date of expiration of the sentence.



Section 524. ORS 144.330 is amended to read:

144.330. **Written order by board to take violator of parole or conditional pardon into custody.** Whenever the State Board of Parole [*and Probation*] finds that a prisoner has violated the conditions of his [*conditional pardon,*] parole [*or probation*], or whenever the board has been advised in writing by the Governor that the prisoner has violated the terms of a conditional pardon, the written order of the board is sufficient warrant for any law enforcement officer to take into custody such person. All sheriffs, police, constables, parole and probation officers, prison officials and other peace officers shall execute such order.

Section 525. ORS 144.340 is amended to read:

144.340. **Power to retake and return violators of parole.** The Corrections Division, in accordance with the rules and regulations or directions of the State Board of Parole [*and Probation*] or the Governor, as the case may be, may cause to have retaken and returned persons to the institution, whether in or out of the state, whenever they have violated the conditions of their parole [*, probation, conditional pardon or other conditional release*].

Section 526. (ORS 144.350) Order for arrest and detention of violator of parole, conditional pardon or probation. The Corrections Division may order the arrest and detention of any person then under the supervision or control of the division upon being informed and having reasonable grounds to believe that such person has violated the conditions of his parole, probation, conditional pardon or other conditional release from custody.

Section 527. ORS 144.360 is amended to read:

144.360. **Effect of order for arrest and detention of violator of parole, conditional pardon or probation.** Any order issued by the [*Director of Parole and Probation*] **Corrections Division** as authorized by ORS 144.350 constitutes full authority for the arrest and detention of the violator, and all the laws applicable to warrants of arrest shall apply to such orders.

COMMENTARY

The statute is amended to be consistent with ORS 144.350.

Section 528. ORS 144.370 is amended to read:

144.370. **Investigation following order for arrest and detention; revocation of parole, conditional pardon or probation or release.** Upon issuing an order for the arrest and detention of any person under the provisions of ORS 144.350, the [*Director of Parole and Probation*] **Corrections Division** shall proceed immediately to investigate for the purposes of ascertaining whether or not the terms of the parole, probation or conditional pardon have been violated. Within 15 days after the issuance of any such order, the detained person's parole, probation or conditional pardon shall either be revoked as provided by law or such person shall be released from detention.

COMMENTARY

The amendment is to make the statute consistent with ORS 144.350.

Section 529. ORS 144.374 is amended to read:

144.374. **Deputization of persons in other states to act in returning Oregon parole violators.** (1) The Administrator of the Corrections Division may deputize, in writing, any person regularly employed by another state, to act as an officer and agent of this state for the return of any person who has violated the conditions of his parole, [*probation,*] conditional pardon or other conditional release.

(2) Any person deputized pursuant to subsection (1) of this section shall have the same powers with respect to the return of any person who has violated the conditions of his parole, [*probation,*] conditional pardon or other conditional release from custody as any peace officer of this state.

(3) Any person deputized pursuant to subsection (1) of this section shall carry formal evidence of his deputization and shall produce the same on demand.

Section 530. (ORS 144.376) Contracts for sharing expense with other states of cooperative returns of parole violators. The Corrections Division, with the approval of the Director of the Department of General Services, may enter into contracts with similar officials of any state, for the purpose of sharing an equitable portion of the cost of effecting the return of any person who has violated the conditions of his parole, probation, conditional pardon or other conditional release.

Section 531. (ORS 144.380) After revocation of parole, conditional pardon or probation violator is fugitive from justice. After the cancellation or revocation of the parole, probation or conditional pardon of any convicted person, and until his return to custody, he shall be considered a fugitive from justice.

Section 532. (ORS 144.390) After revocation, time elapsed while on parole does not diminish term of sentence. A prisoner recommitted for violation of parole, conditional pardon or probation shall serve out his sentence, and the time during which he was out on parole is not a part thereof.

Section 533. ORS 144.400 is amended to read:

144.400. **Power of board to parole violator again and without recommitment.** The State Board of Parole [*and Probation*] may parole a violator of parole, conditional pardon or probation. The board may by order duly entered of record, without first returning a parole violator to the Oregon State Penitentiary, cancel a revocation of a parole previously issued by it and by such order restore the parolee to his former parole status.

Work Release Program

Section 534. ORS 144.410 is amended to read:

144.410. **Definitions for ORS 144.410 to 144.525.** As used in ORS 144.410 to 144.525, unless the context requires otherwise:

(1) "Administrator" means the Administrator of the Corrections Division.

(2) "Division" means the Corrections Division.

(3) "Penal and correctional institutions" means the Oregon State Penitentiary, [*and*] the Oregon State Correctional Institution, **the Oregon Women's Correctional Center, their satellites, and community centers.**

COMMENTARY

The definition of "penal and correctional institutions" is amended to include the other types of facilities that are used by the Corrections Division in administering the work release program.

Section 535. ORS 144.420 is amended to read:

144.420. **Corrections Division to administer work release program; purposes of release.** (1) The Corrections Division shall establish and administer a work release program under which a person sentenced to a term of imprisonment in a penal or correctional institution may be [*granted the privilege of leaving secure custody*] **authorized to leave assigned quarters** during necessary and reasonable hours, for the purpose of:

(a) Working in this state at gainful private employment that has been approved by the division [*for such purpose*].

(b) Obtaining in this state additional education, including but not limited to vocational, technical and general education.

(2) The work release program may also include, under the rules developed by the Corrections Division [*and approved by the board*], temporary leave [*for the purpose of seeking employment*] **for purposes consistent with good rehabilitation practices.**

(3) The Corrections Division is responsible for the quartering and supervision of persons enrolled in the work release program.

COMMENTARY

The amendments update the statute, delete the reference to "secure custody," delete an obsolete reference to the Board of Control and permit temporary leave of a person in custody for purposes that are consistent with good rehabilitation practices.

Section 536. ORS 144.430 is amended to read:

144.430. **Duties of division in administering program.** (1) The division shall administer the work release program by means of such staff organization and personnel as the administrator considers necessary. In addition to other duties, the division shall:

(a) Locate employment for qualified applicants;

(b) Effect placement of persons under the work release program;

(c) Collect, account for and make disbursements from earnings of persons under the work release program; [*and*]

(d) Generally promote public understanding and acceptance of the work release program [.] ; **and**

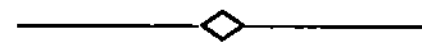
(e) Establish and maintain community centers.

(2) [*All state agencies shall cooperate with the division in carrying out this section to such extent as is consistent with their other lawful duties.*] **The Corrections Division may enter into agreements with other public or private agencies for providing services relating to work release programs.**

(3) In carrying out the provisions of this section, the Corrections Division may enter into agreements with the Vocational Rehabilitation Division to provide such services as determined by the Corrections Division and as the Vocational Rehabilitaton Division is authorized to provide under ORS 344.511 to 344.550.

COMMENTARY

The new paragraph (e) in subsection (1) authorizes the Corrections Division to set up and maintain community centers as part of the work release program. This amendment and the one proposed in subsection (2) allowing the division to enter into agreements with other agencies were requested by the Corrections Division. The existing language in subsection (2) is deleted as unnecessary.



Section 537. ORS 144.440 is amended to read:

144.440. **Recommendation by sentencing court.** When a person is sentenced to [*a term of imprisonment in the penitentiary or the correctional institution*] **the custody of the Corrections Division,** the court may recommend to the Administrator of the Corrections Division that the person so sentenced be granted the option of serving the sentence by enrollment in the work release program established under ORS 144.420.

COMMENTARY

The amendment makes the language of the section consistent with the sentencing statutes.

Section 538. ORS 144.450 is amended to read:

144.450. **Approval or rejection of recommendations; rules for program; specific conditions; Administrative Procedures Act not applicable.** (1) The administrator shall approve or reject each recommendation under ORS 144.440 or 421.170 for enrollment in the work release program. No person may be enrolled without the consent of the person in writing. Rejection by the administrator of

a recommendation does not preclude submission under ORS 421.170 of subsequent recommendations regarding enrollment of the same person.

(2) |*Subject to the approval of the board,*| The administrator shall promulgate rules for carrying out ORS 144.410 to 144.525 and 421.170.

(3) In approving a recommendation and enrolling a person in the work release program, the administrator may prescribe any specific conditions that he finds appropriate to assure compliance by the person with the general procedures and objectives of the work release program.

(4) ORS 183.310 to 183.510 does not apply to actions taken or rules promulgated under this section.

COMMENTARY

The amendment in subsection (2) deletes an obsolete reference to the Board of Control.

Section 539. ORS 144.460 is amended to read:

144.460. **Contracts for quartering of enrollees.** |*(1)*| The division may contract with the governing bodies of political subdivisions in this state, with the Federal Government and with any private agencies approved by the division for the quartering in suitable local facilities of persons enrolled in work release programs. Each such facility must satisfy standards established by the division to assure adequate supervision and custody of persons quartered therein.

[*(2) The division may not enroll any person in the work release program unless the division has determined that suitable facilities for quartering the person are available in the locality where the person has employment or the offer of employment.*|

COMMENTARY

The Commission, as suggested by the Corrections Division, recommends that subsection (2) be deleted to remove the restriction on enrolling persons in the work release program unless suitable facilities for quartering the person are available in the locality where employment is found.

Section 540. ORS 144.470 is amended to read:

144.470. **Disposition of enrollee's earnings under program.** (1) Each person enrolled in the work release program shall promptly surrender to the division all his earnings as he receives them, other

than amounts involuntarily withheld by his employer. The division shall:

(a) Deduct from his earnings an amount determined to be the cost of quartering, feeding and clothing the person;

(b) Allow the person a sufficient amount of money from his earnings to cover incidental expenses arising out of his employment;

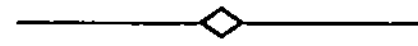
(c) Make provision for payment of the person's debts and fines incurred prior to his enrollment in the program, as directed by the sentencing court; and

(d) Cause to be paid, to the person's dependents, such part of any balance of the person's earnings remaining after deductions under paragraphs (a) to (c) of this subsection as are necessary for the support of such dependents.

(2) Any balance of a person's earnings remaining after all deductions have been made under this section shall be:

(a) Paid to the person upon his release [*from secure custody*] under ORS 144.515; or

(b) Credited to his account in the penal or correctional institution if he is returned under ORS 144.500.



Section 541. (ORS 144.480) Protections and benefits for enrollees. (1) Persons enrolled in a work release program are entitled to the protection and benefits of ORS 653.265, 653.305 and 653.310 to 653.545 and ORS chapters 651, 652, 654, 656, 659 and 660 to the same extent as other employes of their employer. Compensation paid under ORS chapter 656 that is not expended on medical services shall be treated in the same manner as the person's earnings are treated under ORS 144.470.

(2) Persons enrolled in a work release program are not entitled to benefits:

(a) Under ORS 655.505 to 655.550 arising out of any employment during their enrollment if they are eligible for benefits under ORS chapter 656 pursuant to subsection (1) of this section; or

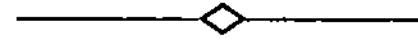
(b) Under ORS chapter 657 during their enrollment.

Section 542. (ORS 144.490) Status of enrollees. (1) A person enrolled in the work release program is not an agent, employe or servant of a penal or correctional institution, the division or this state:

(a) While working in employment under the program, or seeking such employment; or

(b) While going to such employment from the place where he is quartered, or while returning therefrom.

(2) For purposes of chapter 463, Oregon Laws 1963, a person enrolled in the work release program established under ORS 144.420 is considered to be an inmate of a penitentiary or correctional institution.



Section 543. (ORS 144.500) Effect of violation or unexcused absence by enrollee. (1) If a person enrolled in the work release program violates any law, or any rule or specific condition applicable to him under ORS 144.450, the division may immediately terminate that person's enrollment in the work release program and transfer him to a penal or correctional institution for the remainder of his sentence.

(2) Absence, without a reason that is acceptable to the administrator, of a person enrolled in a work release program from his place of employment or his designated quarters, at any time contrary to the rules or specific conditions applicable to him under ORS 144.450:

(a) Immediately terminates his enrollment in the work release program.

(b) Constitutes an escape from a correctional facility under ORS 162.155.

Section 544. ORS 144.515 is amended to read:

144.515. **Release terminates enrollment; continued employment to be sought.** A person's enrollment in the work release program terminates upon his release from [*secure custody*] **confinement** pursuant to law. To the extent possible, the division shall cooperate with employers in making possible the continued employment of persons released.

COMMENTARY

The amendment is consistent with changes made in other statutes in this chapter regarding "secure custody." A person enrolled in work release may be technically "confined" although not in secure custody in the sense of being locked up.

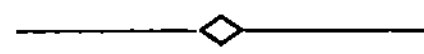
Section 545. (ORS 144.522) Revolving fund. (1) The Corrections Division may request in writing the Executive Department to, and when so requested the Executive Department shall, draw a warrant on the amount available under section 6 or 7, chapter 678, Oregon Laws 1969, in favor of the division for use by the division as a revolving fund. The warrant or warrants drawn to establish

or increase the revolving fund, rather than to reimburse it, shall not exceed the aggregate sum of $12,000. The revolving fund shall be deposited with the State Treasurer to be held in a special account against which the division may draw checks.

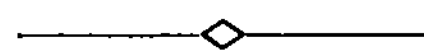
(2) The revolving fund may be used by the division for the purpose of making loans to any inmate enrolled in the work release program under ORS 144.410 to 144.525, at a rate of interest prescribed by the Corrections Division, to pay costs of necessary clothing, tools, transportation and other items from the time of his initial enrollment to the time he receives sufficient income to repay the loan. A loan from the revolving fund shall be made only when other resources available to the enrollee to pay the costs described in this subsection are inadequate.

(3) The Corrections Division shall enforce repayment of loans under this section by any lawful means. However, the Administrator of the Corrections Division may proceed under ORS 293.235 to 293.245 to write off uncollectible debts arising out of such loans.

(4) All repayments of loans from the revolving fund shall be credited to the fund. Interest earnings realized upon any loan from the revolving fund shall be credited to the fund.



Section 546. (ORS 144.525) Custody of enrollee earnings deducted or otherwise retained by division. The Administrator of the Corrections Division shall deposit in a trust account with the State Treasurer, as they are received, moneys surrendered to the division under ORS 144.470. The State Treasurer shall not credit moneys in the trust account to any state fund for governmental purposes. Disbursements from the trust account for purposes authorized by ORS 144.470 may be made by the administrator by checks or orders drawn upon the State Treasurer. The administrator is accountable for the proper handling of the trust account.



Out-of-State Supervision

Section 547. (ORS 144.610) Out-of-state supervision of parolees; contract with other states. The Governor of this state may execute a compact on behalf of the State of Oregon with any of the United States joining therein in the form substantially as follows:

A compact entered into by and among the contracting states signatory hereto with the consent of the Congress of the United States of America granted by an Act entitled, "An Act Granting the Consent of Congress to any Two or More States to Enter into Agree-

ments or Compacts for Cooperative Effort and Mutual Assistance in the Prevention of Crime and for Other Purposes."

The contracting states agree:

(1) That the judicial and administrative authorities of a state party to this compact (herein called "sending state") may permit any person convicted of an offense within such state and placed on probation or released on parole to reside in any other state party to this compact (herein called "receiving state") while on a probation or parole, if:

(a) Such person is in fact a resident of, or has his family residing within, the receiving state and can obtain employment there;

(b) Though not a resident of the receiving state and not having his family residing there, the receiving state consents to such person being sent there.

Before granting such permission, opportunity shall be granted to the receiving state to investigate the home and prospective employment of such person.

A resident of the receiving state, within the meaning of this section, is one who has been an actual inhabitant of such state continuously for more than one year prior to his coming to the sending state and has not resided within the sending state more than six continuous months immediately preceding the commission of the offense for which he has been convicted.

(2) That each receiving state shall assume the duties of visitation of and supervision over probationers or parolees of any sending state and in the exercise of those duties will be governed by the same standards that prevail for its own probationers and parolees.

(3) That duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any person on probation or parole. For that purpose no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are hereby expressly waived on the part of states party hereto as to such persons. The decision of the sending state to retake a person on probation or parole shall be conclusive upon, and not reviewable within, the receiving state; provided, however, that if at the time when a state seeks to retake a probationer or parolee there is pending against him within the receiving state any criminal charge or if he is suspected of having committed within such state a criminal offense, he shall not be retaken without the consent of the receiving state until discharged from prosecution or from imprisonment for such offense.

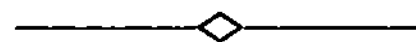
(4) That the duly accredited officers of the sending state will be permitted to transport prisoners being retaken through any and all states party to this compact without interference.

(5) That the Governor of each state may designate an officer who, acting jointly with like officers of other contracting states, if

and when appointed, shall promulgate such rules and regulations as may be deemed necessary to more effectively carry out the terms of this compact.

(6) That this compact shall become operative immediately upon its execution by any state as between it and any other state so executing. When executed it shall have the full force and effect of law within such state, the form of execution to be in accordance with the laws of the executing state.

(7) That this compact shall continue in force and remain binding upon each executing state until renounced by it. The duties and obligations hereunder of a renouncing state shall continue as to parolees or probationers residing therein at the time of withdrawal until retaken or finally discharged by the sending state. Renunciation of this compact shall be by the same authority which executed it by sending six months' notice in writing of its intention to withdraw from the compact to the other states party hereto.



Section 548. (ORS 144.620) Short title. ORS 144.610 may be cited as the Uniform Act for Out-of-State Supervision.

Related Provisions

Section 549. ORS 144.710 is amended to read:

144.710. **Cooperation of public officials with State Board of Parole and Corrections Division.** All public officials shall cooperate with the State Board of Parole and [*Probation*] **Corrections Division**, and give to the board **or division**, its officers and employes such information as may be necessary to enable [*it*] **them** to perform [*its*] **their** functions.

COMMENTARY

The amendments delete reference to probation in the title of the State Board of Parole and specifically include the Corrections Division in the statute.

Section 550. (ORS 144.720) Judge's power to suspend execution of sentence or grant probation prior to commitment unaffected. Nothing in this chapter shall be construed as impairing or restricting the power given by law to the judge of any court to suspend execution of sentence or to grant probation to any person who is convicted of a crime before such person is committed to serve the sentence for the crime.

ARTICLE 17. PUBLIC DEFENDERS

County Public Defenders

Section 551. ORS 151.010 is amended to read:

151.010. **Office of county public defender created by county; appointment; termination of office.** (1) The board of county commissioners of any county may [*create an office of county public defender and may appoint a county public defender as provided in ORS 151.010 to 151.090.*] **provide county public defender services by:**

(a) Contract with an attorney or group of attorneys; or

(b) Creation of an office of county public defender and appointment of a county public defender as provided in ORS 151.010 to 151.090.

[*(2) If the county intends to appoint a county public defender, the circuit court shall recommend at least three persons qualified to serve as such, and the board of county commissioners shall appoint one of those recommended.*]

[*(3)*] **(2)** The board of county commissioners may at any time terminate the office of the county public defender.

[*(4)*] **(3)** As used in ORS 151.010 to 151.090, "Board of county commissioners" includes county court.

COMMENTARY

The amendments are intended to give the counties more control and more authority should the office of regional public defender be created in the future. A contract system for providing public defender services is specifically authorized by the amendments. The authority for drawing the contract and making the appointment is granted exclusively to the board of county commissioners.

Section 552. (ORS 151.020) Status of county public defender and staff as county employes. The county public defender, his deputies and investigators, and other employes of the county public defender shall not be subject to civil service laws or be classified as county employes for purposes of the county retirement plan, unless the board of county commissioners specifically determines by order that they shall participate in the retirement plan.

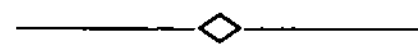
Section 553. (ORS 151.030) Private practice by defender or deputy prohibited in certain cases. Any county public defender and ~~any deputy county public defender receiving a salary in excess of $13,000 per year shall not engage in a private practice of law.~~

Section 554. (ORS 151.040) Term; qualification; employment by prosecution prohibited. (1) The term of office of the county defender is four years, subject to the provisions of subsection (3) of ORS 151.010, and subject to removal from office for cause by the board of county commissioners.

(2) The county public defender shall be an active member of the Oregon State Bar in good standing.

(3) The county public defender shall take an oath of office to support the Constitution of the United States and the Constitution of the State of Oregon.

(4) The county public defender and his deputies shall not be employed in any capacity by the district attorney or other public prosecutor.



Section 555. (ORS 151.050) Defender's staff; duties; office expenses paid by county. (1) Subject to limitations otherwise prescribed by law, when it is necessary to enable the public defender to perform his duties, the county public defender may, with the approval of the board of county commissioners:

(a) Employ one or more attorneys as deputies to exercise such powers, authority and duties of the public defender as he may assign to them;

(b) Employ other individuals, including expert investigators, expert witnesses and interpreters;

(c) Hire professional staff, assistance and clerical staff; and

(d) Do all those acts necessary and proper for the faithful performance of his duties.

(2) The county shall pay all necessary and proper expenses of the office of county public defender, including wages and salaries, in accordance with the county budget laws. This in no way restricts the county from contracting with or entering into agreements with other counties or subdivisions of the state, or with the State of Oregon, or with the United States Government or its agencies for payment of these expenses by agreement or contract as provided in ORS 151.090.

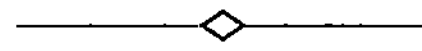
Section 556. (ORS 151.060) Appointment to represent indigents by circuit and district courts; authority for appointment by federal and municipal courts. (1) The circuit or district court of the county for which he is county public defender shall have the power to appoint the county public defender in any proceeding in which, under ORS 133.625 or otherwise, the court has the power to appoint counsel to represent an indigent. A federal or municipal court may

appoint the county public defender for a proceeding before it pursuant to an agreement under ORS 151.090.

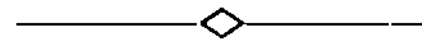
(2) The county public defender may act as an attorney for an indigent at any stage of any criminal or other proceeding before any state or federal court or magistrate before which the county public defender or his designated deputy is admitted to practice.

(3) The county public defender may act only in any county for which he is county public defender or in a county in which occurs any stage, including judicial review, of a proceeding begun in a county for which he is public defender.

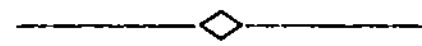
(4) Nothing in ORS 151.010 to 151.090 shall limit the power of any court to appoint counsel to represent an indigent as otherwise provided by law.



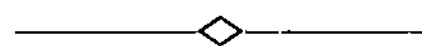
Section 557. (ORS 151.070) Gifts and grants. Any county having a public defender may accept gifts, grants, donations, requests or devises to aid and promote the work of the county public defender, and the county public defender may cooperate with nonprofit organizations and government agencies that render legal aid within the county to persons without means to retain an attorney.



Section 558. (ORS 151.080) Register of proceedings. The office of public defender shall maintain a register in which shall be kept a memorandum of each proceeding in which the county public defender serves in his official capacity, and the right to custody of the register shall pass to the county public defender's successor.



Section 559. (ORS 151.090) Interagency agreements relating to services of defender. The provisions of ORS 190.003 to 190.110 shall apply to the powers granted counties by ORS 151.010 to 151.090. The county commissioners of a county with a public defender may also enter into a contract or agreement with the United States Government or any agency of the United States Government for provision of services by the county public defender, and the county may accept payment from the United States Government or agency for such services pursuant to such an agreement or contract.



State Public Defender

Section 560. (ORS 151.210) Definitions for ORS 151.220 to 151.280. As used in ORS 151.220 to 151.280, unless the context requires otherwise:

(1) "Committee" means the Public Defender Committee appointed under ORS 151.270.

(2) "Defender" means the Public Defender appointed under ORS 151.280.

Section 561. (ORS 151.220) Public Defender; term; qualifications; deputies. (1) The defender's term is four years, and he may be reappointed. The office of defender becomes vacant upon the conditions prescribed in ORS 236.010, upon the committee's finding of any of the causes enumerated in subsections (1) to (3) of ORS 241.425, or upon the defender's failure to comply with subsection (2) of this section.

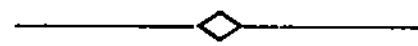
(2) The defender shall be an active member of the Oregon State Bar.

(3) To qualify for office the individual appointed defender shall file with the Secretary of State his signed oath of office to the effect that he will support the Constitution of the United States and the Constitution of Oregon, and that he will faithfully and honestly demean himself in his office.

(4) The defender and his deputies shall be members of the exempt service established by ORS 240.200. One secretary for the defender shall be a member of the unclassified service.

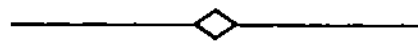
(5) The defender, and any of his deputies who receive a salary of $10,000 per year or more, shall not engage in the private practice of law.

(6) The defender and his deputies shall not be employed in any capacity by a district attorney or other public prosecutor.



Section 562. (ORS 151.230) Salary and expenses. (1) The defender shall receive such annual salary as is provided by law. The defender shall receive the minimum salary unless such salary is or has been altered by the Public Defender Committee in the manner prescribed in ORS 292.855.

(2) The defender shall be paid by the state in the same manner as other state officers are paid. Such salary shall be the full compensation to the defender for all his services, except for the allowance of his expense as a state officer.



Section 563. (ORS 151.240) Administrative powers of defender. (1) When it is necessary to enable the defender to perform his duties, the defender may:

(a) Employ deputies with the power and authority of the defender.

(b) Employ other individuals, including expert investigators, witnesses and interpreters.

(c) Contract for the purchase of materials or other services.

(d) Consult with and, in appropriate cases, join in the defense, any attorney who had previously represented the individual in a case which resulted in a conviction under consideration in the proceeding where the defender represents the individual. Any compensation paid such attorney for services rendered under this paragraph shall be paid solely as provided by ORS 138.490.

(e) Make or assist in making any study, survey or report upon the need for, use of and availability of legal aid to indigent persons in the State of Oregon, and accept payment therefor.

(2) Subject to the express approval of the committee, the defender may accept gifts, grants or services from, or contract with nonprofit organizations, educational institutions and other state or federal agencies; in rendering legal aid to persons without means to retain an attorney and in studying, surveying and reporting on the need, use and availability of such aid in the State of Oregon.

(3) Payment for materials and services procured under this section shall be made in the same manner as other state expenses are paid.

Section 564. (ORS 151.250) When defender may render services. (1) In accordance with subsections (2) to (4) of this section and the determinations of the committee under subsection (2) or (7) of ORS 151.280, the defender may act as attorney at any stage of a proceeding before any court, including the Supreme Court, for an individual who is being deprived of his liberty in the custody of the Superintendent of the Oregon State Penitentiary or of the Oregon Correctional Institution, and the proceeding is other than:

(a) A habeas corpus proceeding;

(b) A proceeding for which counsel is appointed under ORS 133.625, 135.320, 419.498 or 426.100; or

(c) A proceeding for contempt of court, criminal or civil.

(2) The defender may act only at the request of the individual described in subsection (1) of this section, or, if no such request is made, at the request of the court or magistrate.

(3) The individual on whose behalf the defender is requested to act shall submit to the defender, in the form prescribed by the committee, an affidavit of his financial circumstances.

(4) At the request of the defender or an individual who seeks the defender's aid, the court or magistrate before whom a proceeding is pending or to whom an application for relief has been made, shall finally determine whether the individual is eligible under this section for the defender's aid.

Section 565. (ORS 151.260) Register of proceedings. The defender shall keep a register in which he shall make a note of each proceeding in which he serves in his official capacity. The right to custody of the register passes to the defender's successor in office, and the defender shall deliver the register to his successor in office.

Section 566. (ORS 151.270) Public Defender Committee; appointment; expenses; term. (1) The Supreme Court shall appoint a Public Defender Committee of not fewer than five individuals, who, in the opinion of the court, are qualified by training or experience to perform the functions of the committee. A majority of the committee is a quorum for the transaction of business.

(2) Each member is entitled to compensation and expenses as provided in ORS 292.495.

(3) Each member's term is four years and he may be reappointed.

Section 567. (ORS 151.280) Duties of committee. The committee shall:

(1) Appoint a Public Defender;

(2) Determine policies and procedures for the performance of the defender's functions;

(3) Determine standards of eligibility for the defender and his deputies;

(4) Approve the original estimate sheet in connection with the budget for the defender's office and generally be responsible for supervision of the expenditures made for the defender's office;

(5) Prescribe a form of oath of financial circumstances for use under subsection (3) of ORS 151.250;

(6) Prescribe a formula of apportionment of expenses under ORS 137.205; and

(7) Where the defender is unable to perform fully his authorized functions, determine the nature and extent of the services he shall render.

Section 568. (ORS 151.290) Public Defender's Account. There hereby is established in the General Fund of the State Treasury an account to be known as the Public Defender's Account. All moneys received by the Public Defender shall be paid into the State Treasury and credited to the Public Defender's Account. All moneys in the Public Defender's Account hereby are appropriated continuously for and, subject to approval by the Public Defender Committee, shall be used by the Public Defender in carrying out the purposes of ORS 137.205, 138.480 to 138.500, 138.590 and 151.210 to 151.290.

PART VI. MISCELLANEOUS PROVISIONS

ARTICLE 18. MISCELLANEOUS PROVISIONS

Section 569. ORS 10.110 is amended to read:

10.110. **Preparation of preliminary jury list.** [*(1) The county court of each county which has a population of less than 300,000 and in which the judicial jurisdiction, authority, powers, functions and duties of the county court have not been transferred to the circuit court shall at its first term of each year, or in case of an omission or neglect so to do then at any following term, make a list of the most competent of the permanent citizens of the county by selecting names by lot from the latest tax roll and registration books, or either, denominated a preliminary jury list. From the preliminary jury list the names of those persons known not to be qualified by law to serve as jurors shall be deleted. The remaining names shall constitute the jury list. The names of those persons deleted from the preliminary jury list shall be placed on a separate list, denominated rejected prospective jurors, and opposite each name the reason for removing the name shall be set forth.*]

[(2)] The county clerk of each county [*which has a population of less than 300,000 and in which the judicial jurisdiction, authority, powers, functions and duties of the county court have been transferred to the circuit court*] shall, at the first term of each year of the circuit court for the county, or in case of an omission or neglect so to do then at any following term, make a list of the most competent of the permanent citizens of the county by selecting names by lot from the latest [*tax roll and*] **voter** registration [*books, or either,*] **lists or any other source which will furnish a fair cross-section of the county wherein the court convenes**, denominated a preliminary jury list. From the preliminary jury list the names of those persons known not to be qualified by law to serve as jurors shall be deleted. The remaining names shall constitute the jury list. The names of those persons deleted from the preliminary jury list shall be placed on a separate list, denominated rejected prospective jurors, and opposite each name the reason for removing the name shall be set forth.

COMMENTARY

A. Summary

The amendments to ORS 10.110 are necessary because the criminal trial sections of the Code incorporate by reference the general provisions relating to jury lists. The distinction in the state between counties based on population is deleted and the county clerk in each county would have the responsibility for preparing the jury list. ORS 10.120 is repealed.

This section eliminates the language in ORS 10.110 that refers to tax rolls as a source of jury members and places in the authority to use voter registration lists and any other list that will furnish a fair cross-section of the county.

B. Derivation

The amendments are derived, in part, from ABA Standards on Trial by Jury § 2.1.

C. Relationship to Existing Law

The current practice in Oregon appears to be that the court clerk will use the voter registration lists as the source for the preliminary jury list. Currently, ORS 10.110 merely refers to registration books. This is taken to mean voter registration lists. The

amendment will clarify this interpretation by specifically allowing the use of voter registration lists.

State v. Anderson, 92 Adv Sh 1290, — Or App — (1971), upheld the use of voter lists to prepare the preliminary jury list in Multnomah County. The court held that the use of voter lists did not deny the blacks the equal protection of the laws. Those who freely chose not to register to vote, whatever their race, sex or national background, or for whatever reason they may have for not registering, are not a cognizable group subjected to systematic exclusion.

The section also provides for the use of any other lists that will fulfill the criterion of producing a representative cross-section of the community. This is an ABA recommendation as well as a federal recommendation. The Jury Selection and Service Act of 1968 (28 USC 1862) set as a policy that no person or class of persons be excluded from service on juries because of race, color, religion, sex, national origin or economic status.

The use of voter lists fulfills the requirement of a fair cross-section of the community. The use of city directories, telephone directories, membership lists of associations and organizations of all kinds are among the sources of federal jury lists. 26 FRD 409 (1961).

ORS 10.130 allows the person preparing the jury list to select those persons known or believed to be qualified to serve as jurors. Since it is possible that a qualified juror is not registered to vote (registration to vote is not a qualification for jury duty), the amendment to ORS 10.110 combined with the authority in ORS 10.130 allows the person making up the jury list to use other lists in addition to voter registration lists. The use of supplemental lists will enable the county to provide the best cross-section of the county citizens for jury duty.

ORS 10.080 places a limitation on the preparation of the jury list. This statute prohibits any person from suggesting or requesting that a person named be placed on the jury list. Therefore, the compilation of the jury list must come from another list prepared for a purpose other than as a source for jurors.

The use of tax lists, in the absence of racial considerations, is not prima facie unconstitutional, even though it necessarily excludes non-property owners. *Roach v. Mauldin*, 391 F2d 907 (5th Cir 1968). However, if a jury is selected from tax rolls which are maintained on a segregated basis, such procedure is unconstitutional. *Jones v. Smith*, 420 F2d 774 (5th Cir 1969).

The use of tax rolls is not prohibited by the new language because there is a provision for use of any other source that will give a good cross-section of the community. The reliance on tax lists in areas of the state where there are large numbers of non-property owners may, however, result in exclusion of many potentially qualified jurors. Thus, the statute proposed discourages the use of tax lists as the main source of the jury lists but allows the use of tax lists as a supplemental source.

The United States Supreme Court in *Turner v. Fouche*, 396 US 346 (1970), held that there was no rational basis for the requirement that school board members be freeholders. The Court further held that non-freeholders have a federal constitutional right to be considered for public service without the burden of individiously discriminatory disqualifications.

Clark v. Ellenbogen, 319 F Supp 623 (W.D.Pa 1970) *aff'd* 402 US 935, was a decision of a three judge federal panel that stated that the reasoning of *Turner* applies to juries. If the Pennsylvania statute limits jurors to taxpayers assessed as owners of real property, the statute is unconstitutional. The panel upheld the Pennsylvania statute because it refers to anyone taxed and that included sales and income taxes. Those who do not pay any taxes at all are too small in number to be considered a class.

Section 570. ORS 10.135 is amended to read:

10.135. **Jurors to be from different portions of county; number of names on list.** The names entered upon the jury list shall be , **as far as practicable,** selected from the different portions of the county in proportion to the number of names of qualified jurors appearing on the [*assessment roll and*] **latest voter** registration [*, as far as practicable*] **list and any other source authorized by ORS 10.110.** The jury list shall:

(1) For counties having a population of less than 10,000, contain the name of at least 250 persons [*if there is that number of*

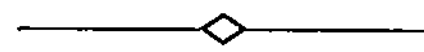
names of qualified jurors on the assessment roll or the registration books,] and not more than 1,250 persons.

(2) For counties having a population of 10,000 but less than 25,000 contain the names of at least 500 persons but not more than 1,500 persons.

(3) For counties having a population of 25,000 or more, contain the names of at least 1,500 persons but not more than 5,000 persons.

COMMENTARY

ORS 10.135 is amended to conform to the amendments to ORS 10.110 and to delete surplus language.



Section 571. ORS 10.300 is amended to read:

10.300. **Methods of drawing additional jurors to augment panel or jury list.** (1) Whenever the number of jurors required does not attend a term of the court, or when the jurors have served the full time required of jurors and have been discharged, the court has power to order an additional number of jurors drawn from the jury list to fill up the regular panel, in the same manner as the original panel is required to be drawn. These jurors shall be summoned and required to attend as jurors, in the same manner and with like effect as if drawn on the original panel.

(2) Whenever the regular panel becomes exhausted, or whenever, in the opinion of the court, the regular panel **is likely to** become exhausted, and except as provided in subsection (4) of this section or except where jurors are to be drawn from the reserve panel authorized by ORS 10.220, the court shall order an additional number of jurors drawn from the jury list by the sheriff in the presence of the court, and the jurors so drawn shall be summoned, unless relieved by the court, and required to attend at such times as the court may order.

(3) Whenever the jury list becames exhausted, or whenever, in the opinion of the court, such list is likely to become exhausted, the court may by an order stating the reasons, and duly entered, direct the sheriff to summon forthwith from the body of the county persons whose names are upon the [*tax roll or registration books*] **latest voter registration list and any other source authorized by ORS 10.110** and who have the qualifications of jurors, to serve in the court.

(4) In judicial districts having less than 400,000 inhabitants, according to the latest federal decennial census, the trial judge, upon mutual agreement of the attorneys for the parties to the cause and without ordering an additional number of jurors drawn from the jury list to fill up the regular panel as provided in subsection (1) or (2) of this section, shall make the order mentioned in subsection (3)

of this section and direct the sheriff to summon forthwith from the body of the county persons whose names are upon the [*tax roll or registration books*] **latest voter registration list and any other source authorized by ORS 10.110** and who have the qualifications of jurors, to serve in the court.

COMMENTARY

ORS 10.300 is amended to conform the language to the amendments to ORS 10.110.

Section 572. ORS 17.115 is amended to read:

17.115. **Challenges, definition and kinds. Except in criminal cases,** no challenge shall be made or allowed to the panel. A challenge [*is an objection*] to a particular juror [*, and*] may be either peremptory or for cause.

COMMENTARY

This section amends ORS 17.115 to make clear the scope of this statute is limited to civil trials and to remove language that might imply that a challenge is only an objection to a particular juror. Under the proposed draft a challenge could be to a particular juror, either peremptory or for cause, or a challenge to the entire panel. (See Article 12).

Section 573. ORS 22.020 is amended to read:

22.020. **Deposit of money, checks or federal or municipal obligations, in lieu of bail, security release or bond.** In any cause, action, proceeding or matter before any court, board or commission in this state or upon appeal from any action of any such court, board or commission, where bond , **security deposit** or bail of any character is required or permitted for any purpose, it is lawful for the party required or permitted to furnish such **security,** bail or bond to deposit, in lieu thereof, in the manner provided in ORS 22.020 to 22.070, money, a certified check or checks on any state or national bank within this country payable to the officer with whom such check is filed, satisfactory municipal bonds negotiable by delivery, or obligations of the United States Government negotiable by delivery, equal in amount to the amount of the bond , **security deposit** or bail so required or permitted.

Section 574. ORS 22.030 is amended to read:

22.030. **Officers with whom deposit is made; duplicate receipts.** (1) Any party desiring to avail himself of the provisions of ORS 22.020 to 22.070 shall, except as provided in subsection (2) of this

section, make or cause to be made, with the treasurer of the county or city within which the bond or bail is to be furnished, or, in any case, with the State Treasurer, the deposit authorized by ORS 22.020. The treasurer, upon tender, must accept such money or securities and deliver to the depositor a duplicate receipt reciting the fact of such deposit; provided, that in case a bond , **security deposit** or bail is required after the office hours of any such treasurer with whom it is desired to make the deposit, the deposit may be made with the chief clerk of such court, board or commission or with the sheriff of the county or the deputy in charge of the county jail or the sheriff's office, who shall accept the same, giving duplicate receipts therefor, and cause such money or securities to be delivered to the proper treasurer within 48 hours thereafter.

(2) In any criminal case or in any proceeding in any court the deposit may be made with the court or clerk thereof, with the same effect and result as though made with such treasurer, and it shall not be necessary for the money or securities to be delivered to the treasurer.

Section 575. ORS 22.040 is amended to read:

22.040. **Filing duplicate receipt.** The filing of one of such duplicate receipts with the court, board or commission with which such bond , **security deposit** or bail is required or permitted to be filed shall have the same effect as the furnishing of such bond , **security deposit** or bail and shall be taken and accepted by the court, board or commission or by the chief clerk in lieu of such bond, **security deposit** or bail.

Section 576. ORS 22.050 is amended to read:

22.050. **Discharge or forfeiture of bond, security release or bail; garnishment.** If the bond , **security release** or bail is discharged, an order to that effect shall be entered upon the records of the court, board or commission with a statement of the amount to be returned to the person making the deposit. Upon presentation to him of a copy of such order, duly certified by the clerk of the court, board or commission making the same, the treasurer shall pay to the person named therein or to his order the amount specified or shall return the securities, as the case may be. If the bond , **security deposit** or bail is forfeited, an order to that effect shall be entered upon the records of the court, board or commission, and upon presentation to him of a copy of such order, certified by the chief clerk of the court, board or commission making the same, the treasurer shall make such disposition of the money or securities as the order shall provide. In case the money or securities are in the hands of the clerk of the court, board or commission at the time the bond , **security deposit**

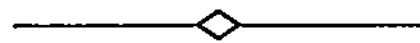
or bail is declared discharged or forfeited, the clerk shall make the same disposition of the money or securities as the treasurer would be required to make in similar circumstances. Whenever the order of the court, board or commission requires or contemplates the same, the treasurer or clerk shall indorse to the proper party any certified check deposited with him as security. Money or securities deposited under ORS 22.020 to 22.070 shall not be subject to garnishment.

Section 577. ORS 30.550 is amended to read:

30.550. **Action for damages; arrest of defendant.** If judgment is given upon the right of and in favor of the person alleged in the complaint to be entitled to the office or franchise, he may afterwards maintain an action to recover the damages which he has sustained by reason of the premises. In such action the defendant may be arrested and held to bail in the same manner and with like effect as in other **civil** actions where the defendant is subject to arrest.

COMMENTARY

This amendment is made to make a clear reference to the civil bail procedures contained in ORS chapter 29 and avoid any reference or use of the Release of Defendant procedures proposed in the Criminal Procedure Code.



Section 578. ORS 33.070 is amended to read:

33.070. **Warrant of arrest; custody of person arrested.** In a warrant of arrest issued for a contempt, the court or judicial officer shall direct whether the person charged may be [*let to bail*] **released** or be detained in custody [*without bail*], and if he may be [*bailed*] **released**, the amount of [*bail*] **security** required. Upon executing the warrant of arrest, the sheriff must keep the person in actual custody, bring him before the court or judicial officer, and detain him until [*an order*] **a release decision** is made in the premises, unless the person arrested [*gives bail*] **deposits security**.

Section 579. ORS 33.080 is amended to read:

33.080. **Security; how given.** The defendant shall be discharged from the arrest upon executing and delivering to the sheriff, at any time before the return day of the warrant, [*an undertaking, with two sufficient sureties*] **a security release or a release agreement as provided in sections 237 to 248 of this 1973 Act**, to the effect that the defendant will appear on the return day, and abide the order or judgment of the court or officer thereupon, or pay, as may be directed, the sum specified in the warrant.

Section 580. ORS 33.090 is amended to read:

33.090. **Return of warrant; investigation of charge.** The sheriff shall return the warrant of arrest, and the [*undertaking*] **security deposit**, if any, given him by the defendant, by the return day specified. When the defendant has been brought up or appeared, the court or judicial officer shall proceed to investigate the charge by examining the defendant, and witnesses for or against him, for which an adjournment may be had from time to time, if necessary.

COMMENTARY

The amendment to ORS 33.090 conforms the language to the amendment to ORS 33.070.

Section 581. ORS 34.410 is amended to read:

34.410. **Criminal offense by person having custody.** If the person having such party in his custody is brought before the court or judge as for a criminal offense, he shall be examined, committed, [*bailed*] **released** or discharged by the court or judge in like manner as in other criminal cases of like nature.

Section 582. ORS 34.720 is amended to read:

34.720. **Imprisonment after discharge.** No person who has been finally discharged upon a proceeding by habeas corpus shall again be imprisoned, restrained or kept in custody for the same cause; but it is not to be deemed the same cause if:

(1) He has been discharged from a commitment on a criminal charge, and afterwards is committed for the same offense by the legal order or process of the court wherein he is bound by [*recognizance or undertaking to appear*] **a release agreement or has deposited security**, or in which he is indicted or convicted for the same offense; or,

(2) After a judgment of discharge for a defect of evidence or for a material defect in the commitment, in a criminal case, the party again is arrested on sufficient evidence, and committed by legal process for the same offense; or,

(3) In a civil action or suit, the party has been discharged for illegality in the judgment, decree or process, and afterwards is imprisoned for the same cause of action or suit; or,

(4) In a civil action or suit, he has been discharged from commitment on a writ of arrest, and afterwards is committed on execution, in the same action or suit, or on a writ of arrest in another action or suit, after the dismissal of the first one.

Section 583. ORS 44.230 is amended to read:

44.230. **Order for deposition or production of prisoner.** (1) If the witness is a prisoner confined in a prison within this state, an order for his examination in the prison upon deposition, or for his temporary removal and production before a court or officer for the purpose of being orally examined, may be made as follows:

(a) By the court or judge in which the action, suit or proceeding is pending, unless it is a court of a justice of the peace.

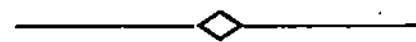
(b) By any judge of a court of record when the action, suit or proceeding is pending in a justice's court, or when the witness' deposition, affidavit or oral examination is required before a judge or other person out of court.

(2) The order shall only be made upon the affidavit of the party desiring it, or someone on his behalf, showing the nature of the action, suit or proceeding, the testimony expected from the witness and its materiality.

(3) If the witness is imprisoned in the county where the action, suit or proceeding is pending, and for a cause other than a sentence for a felony, **or if he is a party plaintiff or defendant,** his production may be required; in all other cases, his examination shall be taken by deposition.

COMMENTARY

See commentary to ORS 137.240 for discussion of amendments to ORS 44.230 and 44.240.



Section 584. ORS 44.240 is amended to read:

44.240. **Production of witness confined in state correctional institution.** (1) Whenever a court or judge makes an order for the temporary removal and production of a witness who is confined in a state [*penal or*] correctional institution within this state before a court or officer for the purpose of being orally examined, the superintendent of the institution shall deliver, at the institution, the witness to the sheriff of the county in which the court or judge making the order is located.

(2) The sheriff shall give his signed receipt upon delivery to him of the witness under subsection (1) of this section, and shall be responsible for the custody of the witness until he returns the witness to the institution. Upon the return of the witness to the institution by the sheriff, the superintendent shall give his signed receipt therefor to the sheriff.

(3) At the time of the delivery of the witness to the sheriff under subsection (1) of this section, or at any time while the witness is in the custody of the sheriff as provided in subsection (2) of this section, the superintendent may deliver to the sheriff a list of

persons who may communicate with the witness or with whom the witness may communicate. Except as otherwise required by law, upon receipt of the list and while the witness is in his custody, the sheriff shall permit communication only between the witness and those persons designated by the list.

(4) The institution shall not be liable for any expense incurred in connection with the witness while the witness is in the custody of the sheriff as provided in subsection (2) of this section. **If the witness is a party plaintiff, the sheriff shall recover costs of his care from the plaintiff, and shall have a lien upon any judgment for the plaintiff.**

Section 585. ORS 51.070 is amended to read:

51.070. **Crimes "triable" in justice's court.** A crime is triable in a justice's court when by the provisions of [*ORS 131.210 to 131.240 and 131.310 to 131.390*] **sections 10 to 16 of this 1973 Act,** an action may be commenced therefor in the county where such court is held.

Section 586. ORS 156.010 is amended to read:

156.010. **Criminal procedure statutes govern generally.** A criminal action in a justice's court is commenced and proceeded in to final determination, and the judgment therein enforced, in the manner provided in the criminal procedure statutes, except as otherwise [*specially*] **specifically** provided by statute.

Section 587. ORS 156.030 is amended to read:

156.030. **Form and sufficiency of complaint.** The **form of the** complaint **and the sufficiency thereof** shall be [*deemed an indictment within the meaning of ORS 132.510 to 132.570, 132.590, 132.610 to 132.690, 132.710 and 132.720, which sections prescribe what is sufficient to be stated in such pleading and the form of stating it*] **as provided in sections 90 and 91 of this 1973 Act.**

Section 588. ORS 156.100 is amended to read:

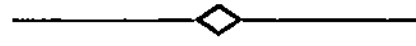
156.100. **Change of place of trial.** Change of place of trial in criminal actions in justices' courts is in all manners and respects governed as [*change of place of trial in civil actions in such courts, as provided in ORS 52.530 to 52.550*] **provided in sections 14 to 25 of this 1973 Act.**

COMMENTARY

The grounds for change of venue and the procedures followed will be the same as for any other court under the amended statute.

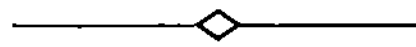
Section 589. ORS 156.110 is amended to read:

156.110. **Trial by court or jury.** Upon a plea [*other than a plea*] of **not** guilty, if the defendant does not then demand a trial by jury, the justice shall proceed to try the issue.



Section 590. ORS 156.210 is amended to red:

156.210. **Judgment on plea of conviction.** When the defendant pleads guilty , **no contest,** or is convicted, either by the justice or the jury, the justice shall give judgment thereon for such punishment as may be prescribed by law for the crime.



Section 591. ORS 156.220 is amended to read:

156.220. **Form of entry of judgment of conviction.** When a judgment of conviction is given, either upon a plea of guilty , **no contest,** or upon a trial, the justice shall enter the same in the docket substantially as follows:

JUSTICE'S COURT FOR THE
DISTRICT OF ————

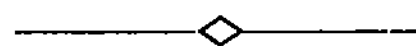
State of Oregon, County of ————

State of Oregon v. A. B., (day of the month and year)

The above-named A. B. having been brought before me, C. D., a justice of the peace for the district in the county and state aforesaid, in a criminal action for the crime of (briefly designate the crime), having thereupon pleaded ("not guilty," **"no contest,"** or as the case may be), and having been tried by (me or a jury, as the case may be) and upon such trial convicted, I have adjudged that he (be imprisoned in the jail of this county for —— days and that he pay the costs of the action, taxed at $——— or that he pay a fine of $——— and such costs and be imprisoned in such jail until such fine and costs are paid, not exceeding —— days, as the case may be).

C. D., Justice of the Peace

If the defendant has pleaded guilty **or no contest**, instead of using the words commencing "having thereupon pleaded" and ending "upon such trial convicted," the entry shall state as follows: "and having been thereof duly convicted upon a plea of guilty ," **or "having been thereof duly convicted upon a plea of no contest."**



Section 592. ORS 156.410 is amended to read:

156.410. **When defendant may be released before trial.** At any time before the commencement of the trial, the justice shall [*admit the defendant to bail, if he requires it, and take bail of him accordingly*] **release the defendant under the procedures set forth in sections 237 to 248 of this 1973 Act**.

COMMENTARY

The general provisions covering pre-trial release of criminal defendants as set forth in Article 8 will apply equally to justice courts. ORS 156.320, 156.420 and 156.430 would be repealed. The provisions of sections 237 to 248 relating to release of defendants would govern with respect to security deposit, form of undertaking, forfeiture and arrest for non-appearance.

Section 593. ORS 156.440 is amended to read:

156.440. **Commitment of defendant if not released.** If the defendant [*does not give bail*] **is not released from custody as provided in sections 237 to 248 of this 1973 Act** when brought before the justice upon the warrant of arrest, he shall be continued in the custody of the officer or, if the court is held in the vicinity of the county jail, committed to jail, to answer the action, as the justice may direct.

Section 594. ORS 156.620 is amended to read:

156.620. **Challenge of jurors.** In criminal actions in district courts, each party may take challenges for cause and three peremptory challenges, and no more. [*When there are two or more plaintiffs or defendants, each must join in the challenge or it cannot be taken.*] The manner in which challenges may be taken shall be the same as provided for in the circuit court.

COMMENTARY

ORS 136.250 would be amended to provide that jointly tried defendants must join in a peremptory challenge. If there are more than two, then a majority of the defendants would be required to agree on the challenge. Also, the number of peremptory challenges will double when two or more defendants are joined.

Section 595. ORS 157.050 is amended to read:

157.050. **Appeal as stay of proceedings; release on appeal.** An allowance of an appeal does not stay the proceedings on the judgment unless the defendant [*gives an undertaking of bail on appeal, as provided in ORS 140.100*] **makes a release agreement or a security release deposit as provided in sections 236 to 248 of this 1973 Act**.

Section 596. ORS 161.255 is amended to read:

161.255. **Use of physical force by private person making citizen's arrest.** (1) Except as provided in subsection (2) of this section, a private person acting on his own account is justified in using physical force upon another person when and to the extent that he reasonably believes it necessary to make an arrest or to prevent the escape from custody of an arrested person whom he [*reasonably believes has committed a felony and who in fact has committed a felony*] **has arrested under the provisions of section 114 of this 1973 Act.**

(2) A private person acting under the circumstances prescribed in subsection (1) of this section is justified in using deadly physical force only when he reasonably believes it necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force.

COMMENTARY

The amendment proposed by this section, combined with section 114, would allow a private citizen to use reasonable physical force to arrest a person for any crime (felony or misdemeanor) committed in his presence if he has reasonable cause to believe the arrested person committed the crime. The suggested changes will allow the citizen to arrest only for crimes committed in his presence, but, on the other hand, would allow him to use reasonable physical force to arrest for a misdemeanor. The use of deadly physical force would continue to be limited to self-defense or defense of third persons.

Section 597. ORS 161.465 is amended to read:

161.465. **Duration of conspiracy.** For the purpose of application of [*ORS 131.110*] **section 6 of this 1973 Act**:

(1) Conspiracy is a continuing course of conduct which terminates when the crime or crimes which are its object are completed or the agreement that they be committed is abandoned by the defendant and by those with whom he conspired.

(2) Abandonment is presumed if neither the defendant nor anyone with whom he conspired does any overt act in pursuance of the conspiracy during the applicable period of limitation.

(3) If an individual abandons the agreement, the conspiracy is terminated as to him only if and when he advises those with whom he conspired of his abandonment or he informs the law enforcement authorities of the existence of the conspiracy and of his participation therein.

Section 598. ORS 161.735 is amended to read:

161.735. **Procedure for determining whether offender dangerous.** (1) Whenever, in the opinion of the court, there is reason to believe that the defendant falls within ORS 161.725, the court shall order

a presentence investigation and a psychiatric examination. The court may appoint one or more qualified psychiatrists to examine the defendant or may order that he be taken by the sheriff to a state hospital designated by the Mental Health Division for the examination.

(2) When the examination is conducted at a state hospital the superintendent shall notify the sheriff upon completion of the examination, and the sheriff shall return the defendant to the county in which he was convicted. The defendant shall remain in the custody of the sheriff subject to further order of the court. All costs connected with the examination shall be paid by the county in which the defendant was convicted.

(3) The psychiatric examination shall be completed within 30 days, subject to additional extensions not exceeding 30 days on order of the court. The psychiatrist shall file with the court a written report of his findings and conclusions, including an evaluation of whether the defendant is suffering from a severe personality disorder indicating a propensity toward criminal activity.

(4) [*The immunities granted under ORS 137.075 are applicable to the psychiatric examination made under this section*] **No statement made by a defendant under this section or ORS 137.124, 137.320, 423.020 or 423.090 shall be used against him in any civil proceeding or in any other criminal proceeding.**

(5) Upon receipt of the psychiatric examination and presentence reports the court shall set a time for a presentence hearing, unless the district attorney and the defendant waive the hearing. At the presentence hearing the district attorney and the defendant may examine the psychiatrist who filed the report regarding the defendant.

(6) If, after considering the presentence report, the psychiatric report and the evidence in the case or on the presentence hearing, the court finds that the defendant comes within ORS 161.725, the court may sentence the defendant as a dangerous offender.

(7) In determining whether a defendant has been previously convicted of a felony, the court shall consider as prima facie evidence of the previous conviction:

(a) A copy of the judicial record of the conviction which copy is authenticated under ORS 43.110 or 43.120;

(b) A copy of the fingerprints of the subject of that conviction which copy is authenticated under ORS 43.330; and

(c) Testimony that the fingerprints of the subject of that conviction are those of the defendant.

(8) Subsection (7) of this section does not prohibit proof of the previous conviction by any other procedure.

Section 599. ORS 162.135 is amended to read:

162.135. **Definitions for ORS 162.135 to 162.205.** As used in ORS 162.135 to 162.205, unless the context requires otherwise:

(1) "Contraband" means any article or thing which a person confined in a correctional facility, juvenile training school or state hospital is prohibited by statute, rule, regulation or order from obtaining or possessing, and whose use would endanger the safety or security of such institution or any person therein.

(2) "Correctional facility" means any place used for the confinement of persons charged with or convicted of a crime or otherwise confined under a court order. "Correctional facility" does not include a juvenile training school, and applies to a state hospital only as to persons detained therein charged with or convicted of a crime, or detained therein after acquittal of a crime by reason of mental disease or defect under ORS 161.295 to 161.380.

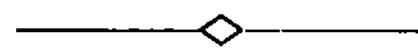
(3) "Custody" means the imposition of actual or constructive restraint by a peace officer pursuant to an arrest or court order, but does not include detention in a correctional facility, juvenile training school or a state hospital.

(4) "Escape" means the unlawful departure, including failure to return to custody after temporary leave granted for a specific purpose or limited period, of a person from custody or a correctional facility **but does not include failure to comply with provisions of a conditional release in section 240 of this 1973 Act.**

(5) "Juvenile training school" means the MacLaren School for Boys, Hillcrest School of Oregon and any other school established by law for similar purposes, and includes the other camps and programs maintained under ORS chapter 420.

(6) "State hospital" means the Oregon State Hospital, F. H. Dammasch State Hospital, Columbia Park Hospital and Training Center, Eastern Oregon Hospital and Training Center, Fairview Hospital and Training Center and any other hospital established by law for similar purposes.

(7) "Unauthorized departure" means the unauthorized departure of a person confined by court order in a juvenile training school or a state hospital that, because of the nature of the court order, is not a correctional facility as defined in subsection (2) of this section.



Section 600. ORS 162.195 is amended to read:

162.195. **Failure to appear in the second degree.** (1) A person commits the crime of [*bail jumping*] **failure to appear** in the second degree if, having by court order been released from custody or a correctional facility upon [*bail or his own recognizance*] **a release agreement or security release** upon the condition that he will subsequently appear personally in connection with a charge against

him of having committed a misdemeanor or violation, he intentionally fails to appear as required.

(2) [*Bail jumping*] **Failure to appear** in the second degree is a Class A misdemeanor.

Section 601. ORS 162.205 is amended to read:

162.205. **Failure to appear in the first degree.** (1) A person commits the crime of [*bail jumping*] **failure to appear** in the first degree if, having by court order been released from custody or a correctional facility upon [*bail or his own recognizance*] **a release agreement or security release** upon the condition that he will subsequently appear personally in connection with a charge against him of having committed a felony, he intentionally fails to appear as required.

(2) [*Bail jumping*] **Failure to appear** in the first degree is a Class C felony.

COMMENTARY TO SECTIONS 600 AND 601

The amendments to ORS 162.195 and 162.205 provide the criminal sanctions that would be imposed if a defendant intentionally fails to appear after having been released by the court under the provisions of Article 8.

Section 602. ORS 167.860 is amended to read:

167.860. **Specific acts as cruelty to animals; veterinarian's certificate.** (1) As used in this section, "animal" means any mammal, bird, reptile or amphibian.

(2) Any person who overdrives, overloads, drives when overloaded, overworks, tortures, torments, deprives of necessary sustenance, cruelly beats, mutilates or cruelly kills, or causes or procures such cruel treatment of any animal, or who, having the charge of or custody of any animal as owner, or otherwise, inflicts cruelty upon the animal, shall, upon conviction, be punished for every such offense by imprisonment in the county jail not exceeding 60 days, or by a fine not exceeding $100, or both.

(3) Every owner or person having the charge or custody of any animal, who cruelly drives or works the animal when unfit for labor, or cruelly abandons the animal, or carries or causes the animal to be carried in or upon any vehicle or otherwise, in a cruel, inhuman manner, or knowingly or wilfully authorizes or permits the animal to be subjected to torture, suffering, or cruelty of any kind, shall be punished for each and every offense in the manner provided in subsection (2) of this section.

(4) Except in the case of an emergency, every owner or person having the charge or custody of any animal, who deprives such

animal of necessary and adequate food and drink for more than 36 hours, shall be punished for each and every offense in the manner provided in subsection (2) of this section.

(5) If there is reasonable cause to believe that subsection (4) of this section is being violated, after [*complying with ORS 141.070*] **obtaining a search warrant in the manner authorized by law**, a peace officer may enter the premises where the animal is being held, provide food and water and impound such animal. If after reasonable search the owner or person having custody of such animal cannot be found and notified of the impoundment, such notice shall be conspicuously posted on such premises and within 72 hours after the impoundment such notice shall be sent by certified mail to the address, if any, at which the animal was impounded.

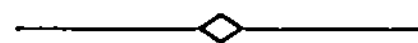
(6) The dehorning of cattle or the docking of horses or sheep, or any other practice of good livestock husbandry, is not a violation of this section.

(7) A certification by a licensed Oregon veterinarian that the subject animal was examined immediately following the time of the charge and found to be in good condition shall be a defense to any charge made under subsection (4) of this section or any charge that the animal was deprived of necessary sustenance or cruelly driven or worked when unfit for labor.

(8) The provisions of this section shall not apply to the treatment of animals in transit by a common carrier.

COMMENTARY

ORS 141.070 would be repealed, and the general provisions relating to the issuance of search warrants under Article 5 would apply.



Section 603. ORS 341.300 is amended to read:

341.300. **Traffic control.** (1) The board may adopt such regulations as it considers necessary to provide for the policing, control and regulations of traffic and parking of vehicles on property under the jurisdiction of the board. Such regulations may provide for the registration of vehicles, the designation and posting of parking areas, and the assessment and collection of reasonable fees and charges for parking and shall be filed in accordance with the provisions of ORS 183.010 to 183.040.

(2) The regulations adopted pursuant to subsection (1) of this section may be enforced administratively under procedures adopted by the board. Administrative and disciplinary sanctions may be imposed upon students, faculty, and staff for violation of the regulations. The board may establish hearing procedures for the determination of controversies in connection with imposition of fines or penalties.

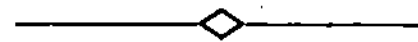
(3) Upon agreement between the board and a city or county in which all or part of the community college campus is located, proceedings to enforce regulations adopted pursuant to subsection (1) of this section shall be brought in the name of the city or county enforcing the regulation in the district, justice or municipal court in the county in which the violation occurred. The fines, penalties and costs recovered shall be paid to the clerk of the court involved in accordance with the agreement between the board and the city or county with which the agreement is made.

(4) The regulations adopted pursuant to subsection (1) of this section may also be enforced by the impoundment of vehicles, and a reasonable fee may be enacted for the cost of impoundment and storage, if any, prior to the release of the vehicles to their owners.

(5) Every peace officer acting within the jurisdictional authority of a governmental unit of the place where the violation occurs shall enforce the regulations adopted by the board under subsection (1) of this section if an agreement has been entered into pursuant to subsection (3) of this section. The board, for the purpose of enforcing its regulations governing traffic control, may appoint peace officers who shall have the same authority as other peace officers as defined in [*ORS 133.170*] **section 89 of this 1973 Act**.

(6) Issuance of traffic citations to enforce the regulations adopted by the board under subsection (1) of this section shall conform to the requirements of ORS 484.150 to 484.220. However, in proceedings brought to enforce parking regulations, it shall be sufficient to charge the defendant by an unsworn written notice in accordance with the provisions of ORS 221.340.

(7) Violation of any regulation adopted by the board pursuant to subsection (1) of this section enforced pursuant to subsection (3) of this section is a misdemeanor.



Section 604. ORS 352.360 is amended to read:

352.360. **Traffic control on properties under state board; enforcement; fee use.** (1) The State Board of Higher Education may enact such regulations as it shall deem convenient or necessary to provide for the policing, control and regulation of traffic and parking of vehicles on the property of any institution under the jurisdiction of the board. Such regulations may provide for the registration of vehicles, the designation of parking areas, and the assessment and collection of reasonable fees and charges for parking, and shall be filed in accordance with the provisions of ORS 183.310 to 183.500.

(2) Except as otherwise provided in subsection (3) of this section, the regulations enacted pursuant to subsection (1) of this section shall be enforced administratively under procedures adopted

by the board for each institution under its jurisdiction. Administrative and disciplinary sanctions may be imposed upon students, faculty and staff for violation of the regulations, including but not limited to, a reasonable monetary penalty which may be deducted from student deposits, and faculty or staff salaries or other funds in the possession of the institution. The board shall provide opportunity for hearing for the determination of controversies in connection with imposition of fines or penalties. The board may prescribe procedures for such hearings despite the provisions of ORS 183.415, 183.450, 183.460 and 183.470. The powers granted to the board by this section are supplemental to the existing powers of the board with respect to the government of activities of students, faculty and staff and the control and management of property under its jurisdiction.

(3) Proceedings to enforce regulations pursuant to subsection (1) of this section pertaining to the University of Oregon Medical and Dental Schools shall be brought in the name of the board in the district or justice court in the county in which the violation occurred. The fines, penalties and costs recovered shall be paid to the clerk of the court involved, who, after first deducting the court costs in such proceedings at the rate prescribed by law, shall pay the remainder of the fine or penalty to the State Board of Higher Education.

(4) The regulations enacted pursuant to subsection (1) of this section may also be enforced by the impoundment of vehicles, and a reasonable fee may be enacted for the cost of impoundment and storage, if any, prior to the release of the vehicles to their owners.

(5) All fees and charges for parking privileges and violations are hereby continuously appropriated to the State Board of Higher Education to be used to defray the costs of maintenance and operation of parking facilities and for the purpose of acquiring and constructing additional parking facilities for motor vehicles at the various institutions, department or activities under the control of the board, and may also be credited to the Higher Education Bond Sinking Fund provided for in ORS 351.460.

(6) Every peace officer may enforce the regulations made by the board under subsection (1) of this section. The board, for the purpose of enforcing its rules and regulations governing traffic control, may appoint peace officers who shall have the same authority as other peace officers as defined in [*ORS 133.170*] **section 89 of this 1973 Act**.

(7) The State Board of Higher Education and any municipal corporation or any department, agency or political subdivision of this state may enter into agreements or contracts with each other for the purpose of providing a uniform system of enforcement of the rules and regulations of the board enacted pursuant to subsection (1) of this section.

(8) In proceedings brought to enforce regulations enacted pur-

suant to subsection (1) of this section, it shall be sufficient to charge the defendant by an unsworn written notice in accordance with the provisions of ORS 221.340.

Section 605. ORS 426.080 is amended to read:

426.080. **Execution and return of warrant of detention.** The officer serving the warrant of detention and the citation provided for by ORS 426.090 shall, immediately after service thereof, make a return upon the original warrant showing the time, place and manner of such service and file it with the clerk of the court. In executing the warrant of detention, the officer has all the powers provided by [*ORS 133.290*] **sections 89 to 109 of this 1973 Act** and **ORS** 161.235 to 161.245 and may require the assistance of any peace officer or other person.

Section 606. ORS 426.530 is amended to read:

426.530. **Compelling appearance of patient.** Upon the filing of a complaint under ORS 426.520, the judge of any circuit court in this state shall cause the patient to be brought before him at such time and place as the judge may direct, by the issuance of a citation to the patient stating the nature of the information filed concerning him. If necessary for good cause shown, the judge may issue a warrant of detention to the sheriff of the county, directing the officer to take such patient into custody and produce him at the time and place stated in the warrant. In executing the warrant of detention, the sheriff has all the powers provided by [*ORS 133.290*] **sections 89 to 109 of this 1973 Act** and **ORS** 161.235 to 161.245 and may require the assistance of any peace officer or other person.

Section 607. ORS 426.570 is amended to read:

426.570. **Release pending hearing.** Any patient taken into custody by the issuance of a warrant of detention pursuant to ORS 426.530 or 426.540, shall be entitled to release pending the proceedings under ORS 426.510 to 426.650 upon his own recognizance at the discretion of the judge issuing the warrant **as provided in sections 236 to 248 of this 1973 Act.** [*, or*] **Any patient** shall **also** be entitled to [*post bond*] **deposit security** to secure his appearance at the time and place specified in the warrant in the same manner as a person [*admitted to bail*] **released** under the provisions of [*ORS 140.010 to 140.200*] **sections 236 to 248 of this 1973 Act.**

Section 608. ORS 471.660 is amended to read:

471.660. **Seizure of conveyance transporting liquor. (1)** When any [*sheriff, constable, police officer or any*] **peace** officer [*of the*

law] discovers any person in the act of transporting alcoholic liquors in violation of law, or in or upon any [*wagon, buggy, automobile, water or aircraft, or other*] **vehicle, boat or aircraft,** or conveyance of any kind, he shall seize any [*and all*] alcoholic liquor found therein, take possession of the vehicle or conveyance and arrest any person in charge thereof.

(2) [*Such*] **The** officer shall at once proceed against the person arrested, under the Liquor Control Act, in any court having competent jurisdiction, and shall deliver the vehicle or conveyance to the sheriff of the county in which such seizure was made.

(3) **If the person arrested is the owner of** the vehicle or conveyance **seized, it** shall be returned to [*the owner*] **him** upon execution by him of a good and valid bond, with sufficient sureties in a sum double the value of the property, approved by the [*sheriff*] **court** and conditioned to return the property to the custody of the sheriff [*on the day of trial*] **at a time to be specified by the court.**

(4) If the person arrested is not the owner of the vehicle or conveyance seized, the sheriff shall make reasonable effort to determine the name and address of the owner. If the sheriff is able to determine the name and address of the owner, he shall immediately notify the owner by registered or certified mail of the seizure and of the owner's rights and duties under ORS 471.660 and 471.665.

(5) A person notified under subsection (4) of this section, or any other person asserting a claim to rightful possession of the vehicle or conveyance seized, except the defendant, may move the court having ultimate trial jurisdiction over any crime charged in connection with the seizure, to return the vehicle or conveyance to the movant.

(6) The movant shall serve a copy of the motion upon the district attorney of the county in which the vehicle or conveyance is in custody. The court shall order the vehicle or conveyance returned to the movant, unless the court is satisfied by clear and convincing evidence that the movant knowingly consented to the unlawful use that resulted in the seizure. If the court does not order the return of the vehicle or conveyance, the movant shall obtain the return only as provided in subsection (3) of this section.

(7) If the court orders the return of the vehicle or conveyance to the movant, the movant shall not be liable for any towing or storage costs incurred as a result of the seizure.

(8) If the court does not order the return of the vehicle or conveyance under subsection (6) of this section, and the arrested person is convicted for any offense in connection with the seizure, the vehicle or conveyance shall be subject to forfeiture as provided in ORS 471.665.

Section 609. ORS 471.665 is amended to read:

471.665. **Disposal of conveyance transporting liquor.** (1) The court, upon conviction of the person arrested under ORS 471.660,

shall order the alcoholic liquor delivered to the commission, and [*, unless good cause to the contrary is shown by the owner,*] shall, subject to the provisions of subsection (3) of this section, **and the ownership rights of innocent third parties,** order a sale at public auction by the sheriff of the county of the property seized. The sheriff, after deducting the expense of keeping the property and the cost of sale, shall pay all the liens, according to their priorities, which are established by intervention or otherwise at such hearing or in other proceedings brought for that purpose, and shall pay the balance of the proceeds into the general fund of the county. No claim of ownership or of any right, title or interest in or to such vehicle **that is otherwise valid** shall be held [*valid*] **invalid** unless the [*claimant*] **state** shows to the satisfaction of the court **, by clear and convincing evidence,** that [*he is in good faith the owner of the claim and*] **the claimant** had [*no*] knowledge that the vehicle was used or to be used in violation of law. All liens against property sold under this section shall be transferred from the property to the proceeds of the sale.

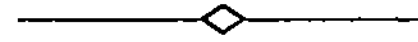
(2) If no person claims the vehicle or conveyance, the taking of the same and the description thereof shall be advertised in some daily newspaper published in the city or county where taken, or if no daily newspaper is published in such city or county, in a newspaper having weekly circulation in the city or county, once a week for two weeks and by handbills posted in three public places near the place of seizure, and shall likewise notify by mail the legal owner, in the case of an automobile, if licensed by the State of Oregon, as shown by his name and address in the records of the Motor Vehicles Division of the Department of Transportation. If no claimant appears within 10 days after the last publication of the advertisement, the property shall be sold and the proceeds, after deducting the expenses and costs, shall be paid into the general fund of the county.

(3) In the case of any boat, vehicle or other conveyance seized pursuant to ORS 167.247 for violation of a narcotic or dangerous drug criminal statute, the boat, vehicle or other conveyance may, in the discretion of the seizing law enforcement agency, following conviction of the person arrested but prior to public auction, be claimed by the seizing law enforcement agency by giving timely notice to the sheriff of the county in which the seizure was made, that the seizing law enforcement agency intends to retain the boat, vehicle or other conveyance for official use. On receipt of notice of such claim, the sheriff shall determine the expense of keeping the boat, vehicle or other conveyance, and all the liens. The seizing agency may then pay the total of the expenses and liens to the sheriff of the county in which the seizure was made. The sheriff shall pay all the liens, according to their priorities, and all other expenses incurred in the seizing and keeping of the boat, vehicle or other conveyance. Upon payment of the liens and expenses, the boat, vehicle or other conveyance shall be delivered to the possession of, and title to the conveyance shall rest in, the seizing agency. The seizing agency

then shall put the boat, vehicle or other conveyance to official law enforcement use.

COMMENTARY TO SECTIONS 608 and 609

See commentary to ORS 142.080 to 142.100 regarding the purpose and effect of the proposed amendments.



Section 610. ORS 484.010 is amended to read:

484.010. **Definitions.** As used in ORS 1.510 to 1.530 [, *131.365*] and 484.010 to 484.320, unless the context otherwise requires:

(1) "Bail" means money or its equivalent deposited by a defendant to secure his appearance for a traffic offense.

(2) "City court" means a municipal court, whether or not it is exercising authority under the charter or ordinances of a city or as a justice court under the laws of this state.

(3) "City policeman" includes a city marshal or a member of the police of a city, municipal or quasi-municipal corporation.

(4) "City traffic offense" means any violation of a traffic ordinance of a city, municipal or quasi-municipal corporation, except ordinances governing parking of vehicles.

(5) "Major traffic offense" means a violation of any of the following provisions of law or a city ordinance conforming thereto:

(a) Reckless driving, as defined in subsection (1) of ORS 483.992.

(b) Driving while under the influence of intoxicating liquor, dangerous drugs or narcotic drugs, as defined in subsection (2) of ORS 483.992.

(c) Failure to perform the duties of a driver involved in an accident or collision, as defined in subsections (1) and (2) of ORS 483.602 and ORS 483.604, which would be punishable under subsection (1) of ORS 483.990.

(d) Operating a motor vehicle while the operator's or chauffeur's license is suspended or revoked, as defined in ORS 482.650.

(e) Fleeing or attempting to elude a traffic or police officer, as defined in subsection (1) of ORS 483.049.

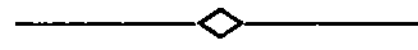
(6) "Owner" means the person having all the incidents of ownership in a vehicle or where the incidents of ownership are in different persons, the person, other than a security interest holder or lessor, entitled to the possession of a vehicle under a security agreement, or a lease for a term of 10 or more successive days.

(7) "Police officer" includes a member of the Oregon State Police, a sheriff or deputy sheriff and a city policeman.

(8) "State court" means a circuit, district or justice court or magistrate.

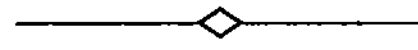
(9) "State traffic offense" means a violation of any provision of law for which a misdemeanor penalty is provided in ORS chapter 481, 482, 483, 485, 486 or 767.

(10) "Traffic offense" includes an offense mentioned in subsections (4), (5) and (9) of this section.



Section 611. ORS 484.020 is amended to read:

484.020. **Traffic offense proceedings to conform to ORS 484.010 to 484.320.** All proceedings concerning traffic offenses shall conform to the provisions of ORS 1.510 to 1.530 [*, 131.365*] and 484.010 to 484.320.



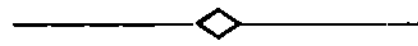
Section 612. ORS 484.040 is amended to read:

484.040. **Venue for state traffic offense.** (1) An action for a state traffic offense may be commenced in any of the following counties:

(a) The county in which the offense was committed.

(b) Any other county whose county seat is a shorter distance by road from the place where the offense was committed than the county seat of the county in which the crime was committed, if the action is commenced in the circuit or district court.

(2) If the action is commenced in a county other than that in which the offense was committed, at the request of the defendant the place of trial may be changed to the county in which the offense was committed. A request for a change of the place of trial shall be made prior to the date set for the trial and shall, if the action is commenced in a circuit or district court, be governed by the provisions of [*ORS 131.410 to 131.470*] **sections 14 to 25 of this 1973 Act**. If the action is commenced in a justice court a request for change of the place of trial shall be governed by the provisions of ORS 156.100.



Section 613. ORS 506.526 is amended to read:

506.526. **Peace officer powers of director, inspectors and deputies; reporting arrests.** (1) The director or any inspector, deputy fish warden or special deputy fish warden may arrest [*, without writ, rule, order or process,*] any person [*detected by such officer in the act of*] **the officer has reasonable cause to believe is** in the act of committing a violation of the commercial fishing laws. Such officers are peace officers of the state for this purpose and may execute all criminal process issued for the arrest or detention of any person complained against for violation of the commercial fishing laws. It

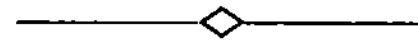
is unlawful knowingly or wilfully to resist or oppose such officers in the discharge of their duties.

(2) Any officer described in subsection (1) of this section who makes an arrest must report it, together with the disposition of the case, to the director within 30 days after the date of the arrest. Failure so to report subjects the officer to removal from office by the authority that appointed him.

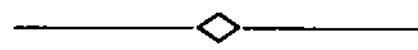
(3) The officers described in subsection (1) of this section have all the powers and authority of a peace officer in serving warrants, subpenas and other legal process in the enforcement of the commercial fishing laws.

COMMENTARY

The amendment provides the same "reasonable cause" basis for arrests under this section as apply generally under Article 4.



Section 614. Captions and headings. The part, article and section headings or captions used in this Act are used only for convenience in locating or explaining provisions of this Act and are not intended to be part of the statutory law of the State of Oregon.



Section 615. Repealed sections. ORS 10.120, 131.010, 131.020, 131.030, 131.110, 131.120, 131.130, 131.210, 131.220, 131.230, 131.240, 131.250, 131.310, 131.320, 131.330, 131.340, 131.350, 131.360, 131.365, 131.370, 131.380, 131.390, 131.400, 131.410, 131.420, 131.430, 131.440, 131.450, 131.460, 131.470, 132.040, 132.130, 132.520, 132.530, 132.650, 133.010, 133.130, 133.170, 133.210, 133.240, 133.250, 133.260, 133.270, 133.290, 133.300, 133.320, 133.330, 133.350, 133.550, 133.650, 133.755, 135.120, 135.130, 135.150, 135.160, 135.170, 135.180, 135.190, 135.200, 135.210, 135.410, 135.420, 135.440, 135.460, 135.550, 135.620, 135.810, 135.820, 135.870, 135.890, 135.900, 136.020, 136.340, 136.350, 136.630, 136.640, 137.072, 137.075, 137.110, 137.990, 140.010, 140.020, 140.030, 140.040, 140.050, 140.060, 140.070, 140.080, 140.090, 140.100, 140.110, 140.120, 140.130, 140.140, 140.150, 140.160, 140.170, 140.180, 140.190, 140.200, 140.310, 140.320, 140.330, 140.340, 140.410, 140.420, 140.430, 140.440, 140.510, 140.520, 140.530, 140.540, 140.550, 140.560, 140.570, 140.580, 140.610, 140.620, 140.630, 140.640, 140.650, 140.660, 140.670, 140.710, 140.720, 140.730, 140.740, 140.750, 140.990, 141.010, 141.020, 141.030, 141.040, 141.050, 141.060, 141.070, 141.080, 141.090, 141.100, 141.110, 141.120, 141.130, 141.140, 141.150, 141.160, 141.170, 141.180, 141.190, 141.200, 142.990, 145.010, 145.040, 145.050, 145.120, 145.130, 145.140, 145.150, 145.160, 145.170, 145.180, 145.190, 145.200, 145.210, 145.220, 145.230, 145.240, 145.250, 145.260, 145.270, 145.280, 145.290, 145.300, 145.310, 148.210, 148.220, 149.040, 156.320, 156.420 and 156.430 are repealed.

Section 616. Effective date. This Act takes effect on January 1, 1974.

COMMENTARY

If the proposed Criminal Procedure Code is enacted, the effective date would be set, of course, by the Legislature. The date suggested would afford the courts, lawyers and law enforcement agencies a reasonable period of time in which to become familiar with and prepare for the changes in the law.

APPENDIX

Grand Jury; Proposed Constitutional Amendment

Be It Resolved by the Legislative Assembly of the State of Oregon:

Paragraph 1. Section 5, Article VII (Amended), Oregon Constitution, is repealed, and the following section is adopted in lieu thereof:

Section 5. (1) The Legislative Assembly shall provide by law for:

(a) Selecting juries and the qualifications of jurors;

(b) Drawing and summoning grand jurors from the regular jury list at any time, separate from the panel of petit jurors;

(c) Empaneling more than one grand jury in a county; and

(d) The sitting of a grand jury during vacation as well as session of the court.

(2) A grand jury shall consist of seven jurors chosen by lot from the whole number of jurors in attendance at the court, five of whom must concur to find an indictment.

(3) Except as provided in subsections (4) and (5) of this section, a person shall be charged in a circuit court with the commission of any crime punishable as a felony only on indictment by a grand jury.

(4) The district attorney may charge a person on information filed in circuit court of a crime punishable as a felony if the person appears before the judge of the circuit court and knowingly waives indictment.

(5) The district attorney may charge a person on an information filed in circuit court if, after a preliminary hearing before a magistrate, the person has been held to answer upon a showing of probable cause that a crime punishable as a felony has been committed and that the person has committed it, or if the person knowingly waives preliminary hearing.

(6) An information shall be substantially in the form provided by law for an indictment. The district attorney may file an amended indictment or information whenever, by a ruling of the court, it is held to be defective in form.

(7) In civil cases three-fourths of the jury may render a verdict.

Paragraph 2. The amendment proposed by this resolution shall be submitted to the people for their approval or rejection at the next regular general election held throughout the state.

COMMENTARY

The proposed constitutional amendment regarding grand juries will be submitted to the Legislature in the form of a joint resolution separate from the criminal procedure bill.

As drafted, the proposal completely restructures section 5 of Article VII of the Oregon Constitution to make it easier to read and understand.

Subsections (1) and (2) do not make any substantive changes in the section.

Subsection (3) deletes the reference to misdemeanors and substitutes the language, "crime punishable as a felony." An indictment would continue to be necessary (except under subsections (4) and (5)) to charge a person in circuit court if the crime were punishable by imprisonment in the penitentiary. However, a misdemeanor would be chargeable in circuit court under the statutory information procedures.

Subsection (4) makes no change in the indictment waiver provision, except to specifically require that a waiver be made "knowingly."

Subsection (5) is a major change, and would allow the district attorney the option of either seeking a grand jury indictment or filing an information in circuit court if the defendant has been held to answer upon a showing of probable cause after a preliminary hearing or if the defendant knowingly waives preliminary hearing. This provision is similar to HJR 12 which was introduced at the 1971 Legislature by the Judiciary Committee at the request of the Oregon State Bar Committee on Criminal Law and Procedure. That measure passed in the House of Representatives 45 to 11, but narrowly failed in the Senate 14 to 16. The Commission proposal, however, spells out the requirement of a "showing of probable cause that a crime punishable as a felony has been committed and that the person has committed it."