Tape 28 - Side 1 - 65 to end
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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 2

March 22, 1972

Minutes

Members Present: Senator Wallace P. Carson, Jr., Chairman
Representative Robert Stults

Excused: Attorney General Lee Johnson
Representative Leigh Johnson

Staff Present: Mr. Donald L. Paillette, Project Director
Professor George M. Platt, Reporter

Others Present: Mr. Chapin Milbank, Chairman, Oregon State Bar Committee on Criminal Law and Procedure
Mr. William Snouffer, Chairman, American Civil Liberties Union
Mr. J. Pat Horton, Board on Police Standards and Training
Mr. Douglas Dennett, Lane County District Attorney's Office
Mr. Al Hansen, Lane County District Attorney's Office
Janet Davies, Oregon Statesman
Mr. Charles F. Wuergler, Roseburg Police Department
Mr. John Truitt, Roseburg
Mr. Charles M. Kokes, Multnomah County District Attorney's Office

Agenda: SEARCH AND SEIZURE, PRELIMINARY DRAFT No. 2; November 1971

Senator Wallace P. Carson, Jr., Chairman, called the meeting to order at 10:45 a.m. in Room 315 State Capitol.

As there was not a quorum present at the meeting, the subcommittee members present agreed to tentatively adopt or reject each section under discussion, subject to the approval of at least one other member.

Search and Seizure; Preliminary Draft No. 2; November 1971

Section 24. Motions to suppress evidence. Professor Platt explained that the motions to suppress evidence should be viewed in light of the recent case of State v. Stahley, 93 Adv Sh 1616, _____ Or App _____,

_____ P2d ____, (1971), wherein the district court had quashed the warrant and affidavit. No record was made of the district court's action. No appeal is provided in the statute with respect to the hearing in district court and review must be done by writ of review.

The Court of Appeals, Professor Platt reported, wrote the legislation itself in holding that the circuit court does, in fact, have the authority to review de novo the evidence on the motion to suppress and any problems of the affidavit that existed, and which raises a procedural point that section 24 does not respond to.

The general policy adopted in subsection (1) anticipates that a motion to suppress will be filed in the court where the trial will be held and in the normal course of events, where there is no preliminary hearing there isn't any definite reason to hear the motion to suppress until the defendant has been charged with the crime and the court where the trial is held is identified. This does not mean, however, that the defendant cannot move to have a return of the items seized, Professor Platt pointed out. This motion to return evidence can be made at any time and any place, such as before the arraigning magistrate, before the magistrate who issues the warrant or before the court where the case will be tried.

Professor Platt spoke of the situation where the preliminary hearing is requested and stated that it would be appropriate at that time for the motion to suppress to be filed by the defendant and this section covers that.

The remainder of the section, Professor Platt explained, provides the procedure and requires the state to give notice to the defendant within 30 days after arraignment of its intent to use evidence it has seized and giving the defendant 15 days to respond by filing his motion in the court in which he will be tried. A safety provision is included, however, in that if neither gives the notice nor responds in time, the court itself may decide that the notice provisions may be waived and could admit evidence even during the trial, he said.

Professor Platt referred to the grand jury draft and what impact it may eventually have, as it may affect whether or not preliminary hearings are held to a greater degree. The position the Commission has taken, Mr. Paillette said, is that there would be a probable cause hearing required in those cases in which the district attorney proceeded on a circuit court information and that this draft should anticipate that requirement.

Professor Platt advised that the subcommittee had already touched on the matter of record keeping in the district court with respect to the affidavit in support of a search warrant. Presently the district court may engage in questions and answers with the officer who appears and there is some type of oral testimony taken by the district judge, but

none of this would be of record except the warrant and affidavit. It would now be required that where there is any exchange of colloquy, a fair summary must be made by the judge. There could be required a similar situation in this instance, he said, in dealing with this particular problem as there will be instances where there will be motions to suppress in addition to motions to return in the courts where they will not be courts of record.

Mr. Snouffer questioned the reference to section 21 in subsection (2). Section 21 now reads, as amended by the subcommittee, that if any seizure is made and any search conducted, whether or not it is legal, it shall be made in accordance with the provisions of the Code. Mr. Snouffer recommended the phrase be reworded in the final draft.

Mr. Kokes asked if the subcommittee was concerned with retaining the motion to suppress at the district court level even though it might be a circuit court case. If the draft is left as is, it will exclude the possibility of filing a motion in that court on a felony matter, he said. Professor Platt said this was the policy of the section and will have to be made responsive to this problem.

Mr. Kokes next inquired if there is a motion filed in the lower court, and it is allowed, can the district attorney still go to the grand jury and indict and whether the impact of the lower court's action will have no effect upon whether the district attorney can proceed to trial with the same evidence. Mr. Paillette remarked that the Commission had discussed that the district attorney should be allowed to proceed by indictment if the defendant has not been bound over, but this policy was not adopted.

The situation is complicated, Professor Platt commented, because when the preliminary hearing is held it is often not yet determined what the felony charge is going to be. The defendant has neither been arraigned nor indicted, but ultimately, he was confident, he will be indicted on a serious charge and the case put in circuit court. It seemed to him that if the motion to suppress is before the district judge in a preliminary hearing where the charge is only a misdemeanor, that the district attorney ought not to be precluded from raising the issue before the judge who will actually try the felony in circuit court. This will not eliminate trying the issue again, which he felt was desirable whenever possible, but he did not favor the district attorney being placed in a position of having his motion suppressed by a court not of record and on a minor offense charge and precluded in the circuit court after he gets the grand jury indictment on a felony.

Mr. Kokes said that the motion for the return of the evidence, according to the draft, would have to be made in circuit court on a felony matter. His interpretation of section 8, subsection (4) of the draft was that anything obtained on a search warrant had to be referred

to the court having jurisdiction over the possible crime. If the motion were allowed in the district court, he said, that judge would have the authority to order disposition of the evidence, and the result of this would be that the court which does not have jurisdiction over the crime would be deciding the issue.

There is a different policy reason behind the return of the things seized, Professor Platt replied, in the sense that the person who is seeking the return may not be the defendant. It could be the person from whom the goods are stolen. The thrust of the motion to return is not quite the same as the motion to suppress, he said.

Chairman Carson reported that the consensus of the Commission members at its last meeting was to give the district attorney an option. If this will be the case, he believed it wise to re-examine the section, because if the district court fails to grant the motion to suppress, fails to bind over and then grants the motion to return the evidence, then when the district attorney gets the indictment, the evidence is gone. The draft, he asserted, would then be going against what the Commission tentatively agreed upon, which result would be a double hearing. There are three things to consider, he said, the right to indict after failure to bind over; the motion to suppress and where it will be heard; and the motion to return of the items seized. These should work together and not against each other.

Mr. Milbank stated that the essence of the discussion at the meeting was that the district attorney would not be precluded, except that a new point is injected in the draft because if the district court has the power to suppress, from a defense standpoint he would believe that the grand jury would have no right to examine any evidence or testimony relating thereto, so this ties the grant jury's hands. It could still consider the evidence but if the district court has suppressed it, it cannot be examined.

Mr. Snouffer reported that the Stahley case was based on the fact that there was not a record in district court. If the amendment goes through that the district court becomes a court of record then, as a policy reason, why shouldn't the district judge make the preliminary determination immediately after the seizure and decide whether there is probable cause to hold the defendant for further prosecution and decide all the issues at that time. This way there is a record and if the prosecutor or defendant objects to the finding, it could be appealed to the circuit court on the record.

Professor Platt spoke of a later section concerning what are grounds to suppress. If this section is adopted it will enact a new rule so that motions to suppress will not always be determined on a Fourth Amendment exclusionary right basis and a harmless error rule may be applied. One of the things which would have an impact on the court, under this policy, would be the type of crime charged. The district

court judge may not be faced with the serious crime that the indictment will show and his reaction could be that he may exclude the evidence because the defendant may be appearing before him on a misdemeanor and there is no reason for applying the harmless error rule. He might have an entirely different viewpoint if he knew of the much more serious crime that will be charged. This was purely speculation on his part, Professor Platt reported.

Mr. Snouffer said that his experience has not been as Professor Platt indicated. He might be, he said, arrested and the initial determination by the district attorney might be second degree burglary. The man is bound over on that charge and the grand jury may indict for first degree burglary, but it was Mr. Snouffer's experience that the defendant is arrested for the most serious felony the district attorney can conceive of under the facts he has to work with and when the preliminary hearing is held the magistrate will know there is a serious offense involved.

In this case, Professor Platt said, he would believe the motion to suppress ought to be held in circuit court and this would avoid the double hearing.

Mr. Paillette remarked that the subcommittee considering the grand juries would be examining the question as to whether the probable cause hearing should be held in circuit court rather than district court. If the probable cause hearing was held in circuit court there would not be the problem of the double hearing. He pointed out that it was not necessary to assume that probable cause hearings necessarily have to be held in district court. This would be a way to solve the three problems indicated, Chairman Carson observed, that of suppression, return and appeal, by placing it all in one court.

The supposition of the section, Professor Platt reported, is that the suppression motion will be heard by the judge who will try the case.

Chairman Carson asked those present at the meeting to present their views on the concept that there be made a requirement that all probable cause hearings on felonies be heard in the circuit court.

This would be agreeable to Mr. Milbank, so long as he did not have to wait for an indictment. As soon as his client is arrested, he said, he can file his appropriate motions in circuit court and because the grand jury does not meet for weeks at a time, or because of the caseload, they may not get around to it, but he will have the circuit court doing work on his pending case. There may be a 25 to 30 day delay for the defendant from the time of arrest to arraignment and if there could be filed a motion to suppress, which may dispose of the case, he may be out within five to ten days.

Mr. Snouffer believed this was the key issue and that the question of which court the hearing is to be held is secondary to the fact that the defendant is entitled to a speedy hearing so his rights are protected and this must be worked in.

Professor Platt's impression was that if this were shifted to the circuit court there would not be too many preliminary hearings held and would not be a burden to them as the district attorney dismisses where he doesn't want to allow discovery. Chairman Carson said this would have to be compared against the appeal if the district court becomes a court of record - what time is taken by the circuit court in rehearing, reviewing the evidence, etc. It would be much simpler to start there, he said.

Mr. Dennett pointed out that in Lane County there were very few hearings in circuit court. The problem is that the circuit courts are busy all the time and are overburdened as it is with the grand jury working every day. They are now having trouble making the 60-day requirement from arraignment to trial, he reported.

Mr. Paillette asked Mr. Dennett if the Commission proposed a constitutional amendment which would allow the district attorney to proceed on an information after there has been a bind over, if this would cause a change in policy and Lane County would then have more preliminary hearings. Mr. Dennett could not answer.

Mr. Paillette remarked that it may be advantageous to use the concept of the draft so that all felony cases would not have to go to the grand jury. The state could proceed to have the hearings, or the waiver, depending on what kind of discovery it allows. If there were more discovery, he said, the chances are better that there would be a waiver of the preliminary hearing and the case could go directly to circuit court, assuming the constitutional amendment is approved.

Mr. Kokes indicated that Multnomah County tried to speed up the procedure and the grand jury was one of the stumbling blocks as far as the time element was concerned. Multnomah County, he said, attempted to encourage the Bar to waive indictments and go to trial on a not guilty plea in circuit court, but most attorneys will not do this. If an opportunity arose, by a constitutional amendment, where the state could go to trial on information, Multnomah County would follow this, he said.

Chairman Carson spoke of the Commission's recent meeting in which the policy decision was reached that the subcommittee considering grand juries should proceed to draft constitutional and statutory changes to accomplish the intent of HJR 12 and require: (1) if the defendant has the probable cause hearing before the magistrate or he waives it and is bound over, he may be proceeded against by way of district attorney's information filed in the circuit court; (2) where there is probable cause and the defendant is bound over or waives the right to the grand jury, the district attorney may not take the case before the grand jury; (3) if the defendant is not bound over by the magistrate, the district attorney at his option may take the case to the grand jury and (4) the district attorney may continue as he presently can to take cases directly to the grand jury.

Mr. Paillette referred to a letter directed to him from Mr. Richard L. Barron, Assistant District Attorney for Coos County, under date of February 3, 1972, which is directly in point on section 24 and wherein he states his reasons for all motions seeking the suppression of evidence to be filed only in circuit court. Mr. Barron's letter is attached, marked Appendix A.

The context of the letter is broader than what the draft suggests, Professor Platt reported, as the draft talks about the motion to suppress being filed in circuit court only where a felony is charged. Mr. Milbank asked if it was intended to have the circuit court rule on suppression in misdemeanor cases, to which Professor Platt replied it was not. The intent is that if the state loses on a misdemeanor in district court on suppression, it can't start over on a felony and expect to use that evidence at the trial, although it could perhaps be used at the grand jury level. The state's one recourse would be the right to appeal from a suppression ruling.

There should be an appeal provided on district court rulings regarding misdemeanors, Mr. Paillette said, and assuming Senate Bill 450 is adopted, there would be a record to take it up on. Professor Platt responded that the section would have to make provision to cover the misdemeanor and district court situation.

Mr. Kokes remarked that present law allows the state to appeal any pre-trial order by the court disposing of the case and it is very awkward to appeal something when there is no record. Mr. Paillette asked if a writ of review could be used from district court to circuit court on such a motion and Professor Platt replied that this would restrict the state's rights on what can be reviewed and would not be desirable. If the district attorney, in a misdemeanor case, loses on a motion to suppress in district court and if no provision was made in the draft, the Stahley case would govern and would mean that the trial would be heard de novo in the circuit court. It could be provided, he said, that a record be kept in the district court of a motion to suppress so it could be reviewed rather than having the hearing again. If Senate Bill 450 comes about, this will happen automatically, and if not, Mr. Paillette said, there will have to be a reporter provided in district court.

Mr. Snouffer expressed concern about the time element and asked if it were clear that the defendant would be entitled to file his motion to suppress and have it heard at the time of the probable cause hearing. If a person is arrested and charged with a crime of possessing stolen property and that property was taken from him by an illegal search and seizure, if he is precluded from raising the legality of the search at the probable cause hearing he would have to wait another 60 days or more until he got to trial to contest the seizure. This is not proper, he said. If there is an illegal search and seizure which is the basis of his being held, he ought to have the right to bring this to an issue as promptly as possible so he can be released if it turns out to be illegal.

Mr. Kokes said there was a practical problem involved in a defense attorney raising the motion to suppress at the preliminary hearing because he has to anticipate what evidence the state intends to offer in the trial. It has been his observation the evidence is not offered during preliminary hearings and the motions to suppress are filed before the preliminary hearing. The defense is just anticipating and it seems to conflict with the 30 days that the district attorney would have to inform the defendant what evidence he will use, which requirement is contained in subsection (2). How the defense can raise the point, he could not visualize, unless it attacks all evidence seized, which would be more in the nature of a motion to return.

Mr. Horton concurred with this observation and said that one has to examine the functions of a district court in a preliminary hearing and he believed it should limit itself to whether or not there is sufficient evidence to bind the suspect over for further proceedings. He did not feel it should be a consideration of a preliminary hearing to discuss exclusionary type evidence. This should fall directly on the purview of the court having jurisdiction rather than the lower court.

Chairman Carson asked Mr. Horton his opinion if both were raised to the same level. The problem does not then exist, Mr. Horton replied, because the state finds itself under the jurisdiction of the trial court.

The problem does exist, Mr. Snouffer contended, because under subsection (2) (a) (b) time limits are set out. This is fine, he said, with respect to the motion to suppress being held prior to trial but his concern is that the draft will eliminate the right that has existed all along to have a suppression hearing along with the preliminary hearing which is not done too often but has arisen at certain times and Mr. Snouffer desired this be preserved.

Chairman Carson observed that the problem is at what time does the defendant have the right to stand on his constitutional rights to an illegal seizure.

Mr. Horton stated that if the direction the subcommittee is going is to have both preliminary hearings and motions to suppress hearings filed in the circuit court, then he did not have any argument.

Mr. Kokes said that the motion filed within five days within which the preliminary hearing will be held will have the effect of having the state commit itself as to what evidence it is going to use and thereby reduces the 30-day period granted by subsection (2) to a five day period.

The 30-day period is not responsive to the immediate problem, Professor Platt said. It relates only to where there has been an arraignment and the draft will have to provide otherwise if there is going to be a preliminary hearing on the district court level and it will have to provide that the 30-day limit is not applicable to that situation. If the concept is followed that has now been suggested, there will have to be a provision to allow the defendant to move immediately without notice of any kind.

Chairman Carson asked if there would be any objection requiring the district attorney to bring this up to five days for evidence he desires to present at the probable cause hearing and then allow the motion to suppress at that point.

Mr. Dennett remarked that problems would arise if this happened. If it involved a murder case, for example, the state could not be expected in five days to know what it will introduce. The preliminary hearing would be held within a week or two, depending on the investigation and this would be hard to determine. If new evidence would come up and the state would wish to present it, the draft would seemingly preclude the state from offering it.

Mr. Snouffer said he did not mean to suggest that the notice at the preliminary level would commit the state to trial evidence. If there would be a complicated case, with ongoing investigations, the defendant still should be entitled to raise that as of the time he is arrested and have his probable cause hearing. If the investigation continues and the defendant comes to trial 60 or 90 days later, and more evidence has been developed, then a provision in the draft for additional notice of the items, over and above those discussed at the probable cause hearing, would allow proper preparation by both sides to discuss the entire scope prior to trial of the evidence that is going to be admitted.

It was Chairman Carson's thought that the defendant be allowed to move to suppress at the preliminary hearing and to be tried at the very earliest time. The question in his mind was whether there was a notice requirement. Presumably there is substantial evidence on probable cause hearings to bind him over which would allow him to move to suppress at that time.

Mr. Paillette reported that the discussion of the subcommittee on pre-trial discovery indicated that it was told that the policy in Multnomah County is an open file policy and with respect to this type policy, from the standpoint of notice to the defendant of evidence that has been seized, either through an informal discovery or a broadened statutory discovery procedure, the defendant is going to be put on notice as to what evidence the state has and how it was obtained, he said.

Mr. Kokes pointed out that to say there is an open file policy in Multnomah County is exaggerated. As far as any evidence seized, that aspect is open and this will be made known to the defendant. There is ample opportunity for the defendant to know what has been taken and to make his motion, but with so many preliminary hearings in Multnomah County, this is an awkward time to do it, either in district or circuit court because it is impractical to make that discovery, collect the return search warrants and affidavits within the period of time in which the preliminary hearing is held. Mr. Kokes stated that he was in favor of having one motion by having the preliminary hearing at the circuit court level.

Mr. Paillette asked, for the purposes of section 24, if there was any need for a requirement with respect to notice from the state to the defendant or any time element written into the statute. Chairman Carson's inclination was that no notice requirement would be needed, but the draft should clearly state that the defendant has the right to move to suppress evidence at the time of the probable cause hearing.

Mr. Snouffer agreed that the notice requirement set out in the section in such detail is perhaps unnecessary.

Mr. Paillette expressed the view that subsection (2) should be redrafted to eliminate any reference to any arbitrary period of time and also delete the requirement that the prosecution give notice. He believed the notice will come to the defendant through other channels.

Section 24 was tentatively adopted along the lines discussed.

Section 25. Appellate review of motions to suppress evidence. Professor Platt explained the section provides in subsections (1) and (3) procedures which are standard and followed in Oregon. An additional requirement to subsection (1) is that the state must show that the appeal is not taken for the purpose of delay and that the evidence is substantial proof of the pending charge. Subsection (2), he said, is a controversial subject and not present in the ALI draft but was inserted in this draft as a policy issue question.

Subsection (3) gives the defendant the right to appeal a denial of a motion to suppress even if he has pleaded guilty to the charge and this is a departure from present practice, which is that if the defendant pleads guilty he waives the issue of motion to suppress. The reason for the change in the subsection is that the defendant may not have any case whatsoever other than the case of suppression of evidence. If he has lost on the motion to suppress, it would seem desirable from the standpoint of the state not to have a trial if it can be avoided. If the only way the defendant could get a review of the motion is to plead not guilty and force the state through the trial, this would create more burden on the courts.

Subsection (2) would allow the defendant to take an appeal on an adverse motion to suppress prior to trial. The policy is that if the defendant has only the case based on the suppression of the evidence, then in the interests of disposing of the trial of the issue, he would be allowed to litigate the suppression of the evidence before trial. If the defendant loses also on appeal before trial, he could then plead guilty and not go to court. This is the concept behind this provision. It may, however, delay the proceedings, but was brought to the attention of the subcommittee for the purposes of discussion, Professor Platt explained.

Mr. Snouffer stated that his interpretation of subsection (1) would be that the order shall be reviewable upon certificate by the prosecuting

attorney, and did not see any provision as to a hearing as to whether or not it is taken only for delay and that the evidence is substantial. His opinion would be that it is merely additional paperwork. If the district attorney wants to appeal it, under present practice he files the notice of appeal.

Professor Platt reported that in talking to the district attorneys, the direct appeal route isn't being used too often because of fear of delaying the trial beyond the reasonable delay situation and it may not toll the 60 days.

Mr. Snouffer questioned whether there should be appellate judges reaching down into the trial docket and certifying that there is an important question and bring it to their court to discuss it. Professor Platt responded that this proceeding is a departure from regular proceedings and did not defend it. He agreed with Mr. Snouffer in that there is nothing to be served by requiring the certificate.

Referring to subsection (2), Mr. Horton asked if there would be a tolling of the 60-day requirement if there is an appeal prior to trial but after the motion to suppress. It was Mr. Kokes' contention that the 60 days would pass before the matter goes up on appeal and the decision is made. Professor Platt felt it desirable to have this proceeding for the state to appeal and pointed out that perhaps it should be provided that when the state appeals it should be given a reasonable time for this provision even though it may exceed the 60 days.

This would be agreeable, Mr. Milbank said, as long as the defendant could be out of jail during this appeal. He said he was not convinced that it would advance the law to have the order affirmed or reversed by the Court of Appeals.

It was Mr. Horton's opinion that subsection (3) would be opening the door to the defendant who is dissatisfied with the sentence to come back later and claim some exclusionary type of hearing and appeal on that. This could be the result, Professor Platt replied, as it does expand his rights to appeal, as currently he can only appeal his sentence.

Chairman Carson posed the situation where the defendant loses on the motion to suppress and pleads guilty, thereby protecting his right to appeal the motion to suppress. The Court of Appeals reverses the finding of the court and suppresses the evidence. What situation does the defendant find himself in at that time with the guilty plea pending, he asked.

Professor Platt was of the opinion the Court of Appeals at this stage would have to order a withdrawal of the plea of guilty and order a new trial and this would then be putting the legislature in a position of telling the Court what its procedural direction should be. Professor Platt was uncertain as to whether this would be desirable.

Chairman Carson recommended that subsection (1) be deleted in light of the discussion that the process is automatic. Professor Platt contended that the draft should still reflect the current ORS provision for allowing for hearings and this was an appropriate place to incorporate ORS 138.060. Mr. Paillette disagreed that the appeals provision should be retained in the subsection because appeals will be handled in a separate part of the Code, and the subsection was deleted in its entirety.

Chairman Carson suggested that the provisions of subsection (2) be kept within the trial court and lines 2 and 3 of the section were amended to delete "or a judge of the Oregon Court of Appeals,". With respect to the question of ORS 136.290, Chairman Carson favored a recommendation to the Commission that an amendment to this statute be made, as there is an indication that the district attorneys would not appeal adverse orders for fear of releasing the defendant while it was pending in the Court of Appeals.

Subsection (3), Chairman Carson stated, reflects the question as to whether this should be done by a statute encouraging plea negotiations. The subsection needs substantial work, he said, and it was the decision of the members to delete the subsection.

Section 26. Standing to file motion to suppress. Professor Platt explained that the section is a compromise between the California rule on standing which is that anyone who wishes to object to seizure of evidence may do so and the present law which is that unless the defendant's personal Fourth Amendment rights have been invaded there is no standing to object. The section expands the right of standing, but is not completely unlimited.

Mr. Paillette remarked that the policy reflected by the section is contrary to the position taken by the Commission in Article 27 with respect to standing to challenge a wiretapping warrant, wherein the Jones and Alderman rulings were followed.

Mr. Snouffer expressed doubt regarding subsection (2). Bumper v. North Carolina, he said, involved the case where the court held that the defendant did not have standing when the officers went to his grandmother's home where he resided. Mr. Snouffer advocated the draft merely state "any member of the defendant's household" and not restrict it to the immediate family. The draft, he said, speaks to searching premises and anyone who is related to those premises and who is the object of the search ought to have standing.

Chairman Carson asked if the parents lived in another state if the defendant would have the right to object to the evidence. Professor Platt replied that this is probably one of the ideas - the brother or sister may not necessarily be one of the household and the police may go to their home and seize the evidence. Under the old rule of standing there is no possessory right that the defendant would have, and

the scope of the section is to give standing to that kind of situation based strictly on the relationship and not related to the residence. It was his assumption the word "household" would cover domestic servants as well. Chairman Carson inquired if case law reflects the definition of "household." Professor Platt was unaware if it does and the commentary does not address itself to this subject.

Mr. Dennett asked if the section was giving the defendant the right to litigate violations of other's constitutional rights. Professor Platt replied that this would give the defendant the standing to challenge the legality of the search no matter where it happens as long as he can establish some relationship but Mr. Dennett contended that the search may not be in violation of any of his rights as far as the actual search and seizure is concerned, although it may be a violation of someone else's rights and he believed the section is giving the defendant standing to do this.

Mr. Paillette expressed disapproval of the section as it was too broad. He would subscribe to subsection (4), he said, where it is being narrowed down to persons who have been suspected to be involved in the same criminal activity to which the defendant has been charged.

Professor Platt remarked that he did not want to be viewed as supporting the exclusionary rule, but if there is to be one, it is inconsistent to allow the police to conduct themselves illegally and still get the benefit of the fruits of their labor and this is exactly what the old standing rule does.

Mr. Wuergler asked if the person from whom the property is being taken is not the defendant, and the person is not advised of his rights, how is this going to stand on recovery.

Professor Platt replied that there is another provision in the draft, previously reviewed by the subcommittee, which imposes more requirements on the police for asking for consent of people who are not defendants. It is a minimal warning that evidence they give may be used in court and if they consent with this minimal warning, the defendant has no recourse. It is where it is illegally obtained that the defendant has the recourse, he said.

Professor Platt referred to section 28 of the draft which liberalizes all motions to suppress in favor of the district attorney. The motion to suppress can still be upheld by the court even though the police illegally seized the evidence.

Professor Platt recalled Mr. Snouffer's earlier statement concerning the grandmother situation. The draft does not cover this and observed that subsection (2) could continue to read "...or any other relative." There was not a general definition of relative in the Code, Mr. Paillette said.

Mr.Dennett referred to subsection (5) and asked the definition of "business." This would undoubtedly be up to decisional law, Professor Platt replied.

Mr. Kokes was of the opinion the subsections seem to cover everything conceivable wherein it is reasonable to expect evidence to be generated which would be used against the defendant. It seemed to him that the section is stating that if there is an unreasonable search involved wherein evidence is obtained, then the defendant will have standing.

Professor Platt explained that although it does not cover everyone, its intent is to cover the majority. It is highly due process oriented and he agreed that it will make the prosecution's job harder.

Mr. Kokes was of the opinion the reason the draft stops short of strangers is that it is too far to go by saying "unlimited standing." This tones it down by including almost everyone.

Mr. Snouffer reported that the federal court is going to some type of minimal possessory interest and this seems to be the coming trend. Chairman Carson said his concern was that once the draft steps into the family situation and tries to define what is family, then to him this would be where minimal possessory interest sounds concrete in contrast as to who is a parent, spouse, child, etc.

The section, Mr. Paillette said, goes too far and will be difficult to apply and understand. Beyond the defendant, the draft goes a considerable way to giving him standing in those cases in which it seems he has a legitimate interest by extending to co-conspirators and co-defendants, where there can be built in some narrow definitions that clearly spell out who is being covered.

From a law enforcement standpoint, Mr. Horton said, the draft is creating practical problems for the police. Heretofore, there were some guidelines for them and they were just now becoming educated about what they should do in a search and seizure situation wherein it regarded the defendant. Mr. Horton spoke of a pawn shop situation where the police officer asks to see all guns which were pawned during the last 60 days and the owner produces a weapon which was stolen. He asked if the defendant will be able to raise an issue here as it is not a consent search, it was not a probable cause search, but merely a request to view. This is the type of litigation which will be fostered by this situation, he said.

Mr. Kokes remarked that Mr. Horton's hypothetical shows that it will limit a great many of the investigative methods the police now use because they won't qualify as consent searches under the new draft, and he did not feel the procedures now being used were necessarily offensive.

Professor Platt responded that if the proprietor was given the minimal warning, then there would be the consent search and did not understand the problem as to where the police investigatory technique was being cut off. The defendant would be cut off on the suppression aspect as it would be a legal search.

Mr. Kokes pointed out that there were areas in which technically the police conduct would not qualify as consent or would be cumbersome. If it was a technical violation only, Professor Platt replied, the motion to suppress would be deniable under the provisions of section 28. It will still allow the defendant to raise the issue, which is the thrust of the section, but does not necessarily mean that the motion will be granted.

The subcommittee agreed to discuss section 28 in light of the discussion regarding section 26.

Section 28. Determination of substantiality on motion to suppress. As any floor requirement of the Fourth Amendment would have to take precedence over any of the substantial deviations, Professor Platt said, the section should state at the outset "Except as otherwise required by the Constitution of the United States or the State of Oregon...."

Section 28, it was explained, places the evidence on the substantial requirements rather than the Constitutional floor requirements and, in essence, gives the court the authority to determine whether or not evidence should be excluded where the police have created a harmless error or merely a technical violation with no intent or wilful purposes involved.

Mr. Paillette remarked that the difficulty is that if section 26 is enacted with the feeling that section 28 will soften its impact, there is no constitutional floor which will write out of the statutes section 26 but there is a good probability that section 28 would not withstand a constitutional attack because it goes beyond the exclusionary rules applied in constitutional decisions.

Professor Platt gave two examples where section 28 would not violate any constitutional principles: (1) section 26 extends rights to the defendant not now granted by the U. S. Supreme Court and (2) the knock and announce statutory grant creates rights beyond the minimum required in Kerr v. California. Section 28, he said, would then go to the amount between the minimum required by the Fourth Amendment and the amount actually granted in the statutes and could operate without any constitutional challenge.

Section 28 is a good idea, Mr. Paillette said, but that section 26 should not be passed under the belief that section 28 will also pass. Professor Platt replied that section 26 should still stand on its own.

Mr. Horton said it was his understanding that section 28 would act as a cushion to some of the requirements in section 26 and if the draft is saying that standing can be enlarged in gross cases of police interference with Fourth Amendment type rights, why is it not done affirmatively and merely state this in one section.

This is not done because section 28 may have impact in many other kinds of searches, Professor Platt replied, such as knock and announce and consent requirements and has implications throughout the entire Code.

Mr. Snouffer questioned how some of the things in section 28 can be proved and who has the burden of proof. To determine the importance of the interest violated, for example, is testimony introduced, does the judge take judicial notice, or is a sociologist brought in to show that the right of privacy is highly valued in society. Mr. Snouffer wondered about the extent to which the scope of the preliminary hearing is expanded. There is no commentary to that point in the ALI draft, Professor Platt replied.

Mr. Dennett referred to a search warrant case where the defense has the burden of proof after the warrant has been introduced. This has been dealt with in prior meetings, Professor Platt replied, and if those present have doubts or questions relating to those sections, it would be advisable for them to return when the draft will be reviewed by the Commission.

Professor Platt related that he was not wedded to the language in the section but felt the concept was important because existing law is dominated by the exclusionary rule and the rule has many faults. He believed the legislature should start taking steps away from reliance on the exclusionary rule.

Chairman Carson expressed concern about the burden and the importance of the particular interest in subsection (1) as Mr. Snouffer had pointed out. The courts are not limited in the section and are to consider all the circumstances including those contained in the subsections, Professor Platt replied.

Mr. Paillette remarked that the subsections are similar to the type of comments which the Commission inserted in the Code under Attempts, and rather than placing in the statute the MPC language about what constitutes a substantial step, it was added to the commentary.

It was the decision of the subcommittee members to delete all of section 28 following the word "substantial." in line 3 and carry in the commentary the rest of the language.

The subcommittee then returned to section 26 and it was Chairman Carson's suggestion that it be taken to the full Commission with the

recommendation the section be wide open. What the draft would then attempt to do, he said, would be to encourage legal searches and not relate it to whether they are relatives or household members.

Professor Platt stated that a specific reference should be made in the section that the Fourth Amendment right doctrine is being abrogated. If this reference is not made, the courts may construe it as in the past, and suggested the introductory section be rewritten in the following or similar context:

> "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."

Rather than trying to spell out each circumstance, Representative Stults stated that he was in agreement to see the wording in this context and report it to the full Commission on the basis of omitting the particular restrictions.

Section 27. Determination of motions to suppress evidence; grounds. This is an unnecessary section, Professor Platt said, as it is a cataloging of all the motion to suppress instances which have accumulated throughout the draft. Besides the unnecessary language, it may also lead to a problem when the Code is amended and the new basis for the motion to suppress is not put into this section. Professor Platt suggested the sentence conclude on line 2 after "Code". This would accomplish all that is necessary, he said.

Mr. Paillette recommended that the two lines be written into section 26 as a separate subsection to which the members of the subcommittee agreed.

Section 29. Fruits of prior unlawful search. Line 3 of the section refers to section 27 which has now been stricken and this reference should be deleted, Professor Platt reported. The section does not make any substantial change in existing law.

Chairman Carson referred to the words "motion to suppress" contained in line 3 of the section. The subcommittee agreed to delete "a motion to suppress" and insert "subject to suppression".

Section 30. Evidence of probable cause unlawfully obtained. Professor Platt reported the section involves extending the exclusionary rule from the trial itself to the hearing on probable cause on approved "fruit of the poisonous tree" principles. This has not been squarely decided by the U. S. Supreme Court, he said. If the officer comes by information illegally and it is used as a basis of obtaining a warrant based on probable cause, a motion to suppress the evidence subsequently obtained will be allowed.

Chairman Carson referred to the pawn shop hypothetical discussed earlier and asked if the officer fails to give the proper warning but sees the gun in the shop and obtains the warrant, if this would be subject to a motion to suppress. Professor Platt replied that it would not as probable cause is not based on information unlawfully obtained from the defendant.

Section 30 was adopted as written.

Section 31. Challenge to truth of the evidence. This section permits the defendant to challenge the good faith, but not the objective truth of testimony offered in support of probable cause, Professor Platt explained, and touches on the points raised in the letter written by Mr. Barron.

Chairman Carson expressed the view that if the full Commission specifies "probable cause" hearings rather than "preliminary" hearings, line 5 should be expanded in order that there be no ambiguity because of the use of the term, and the sentence should continue to read "...probable cause for the search or seizure."

Mr. Dennett questioned the last line of subsection (2) "setting forth substantial basis for questioning such truthfulness." and asked if the defendant could go behind the affidavit and search warrant. He can with respect to the good faith, not necessarily the objective truth, Professor Platt replied.

Professor Platt referred to the last sentence in subsection (1). If the officer, in good faith, accepts what is told to him by the informant, even though the information is not true, the defendant would not succeed in overturning the warrant. The section is definitely more favorable to the prosecution, he said. If the defendant were permitted to go behind the corners of the document, if anything was untrue it would overturn the search. This does not go that far, he said.

Regarding the last line in subsection (2), Mr. Dennett asked if this is saying that the defendant must set forth actual things in the affidavit which he feels are untrue. Professor Platt did not believe this would be true. What would be required, he said, would be if the police would be doing something wilfully or had reason to know it wasn't true. Mr. Dennett asked what a defendant would set forth to establish this. What the draft does, he believed, is open the door at any time to assail the affidavit but Professor Platt disagreed as he said the court does not have to grant the defendant the right to go behind the affidavit.

The affidavit has to set forth certain facts, Mr. Snouffer commented, and subsection (2) states "substantial basis" and by merely asserting he thinks that the statements in the affidavit are untrue would not be sufficient.

The section is with respect to the limitation and is not going to be of too much use to the defendant, Professor Platt said, and should not be of too great a concern.

Mr. Paillette asked if the subsection should state on the last line of subsection (2) "setting forth the reasons" rather than "substantial basis". By setting forth the reasons, Professor Platt believed the court would have to accept it as it would not refer to substantial and if he sets forth his reasons, he would then be entitled to attack the affidavit.

Chairman Carson asked if this could be resolved by adding to subsection (3) that there was substantial basis for questioning such truthfulness. The court does not have to go as far as subsection (3) if it finds there is no substantial basis for the defendant's claim, Professor Platt replied, and that as far as setting forth reasons as Mr. Paillette suggested, he said there still must be a substantial basis and reasons alone would seem to allow more than is anticipated.

Mr. Dennett commented that the intention of the draft would seem to allow the defense to go behind the affidavit which he believed is against the current trend on case authority in Oregon. It will be opened up as soon as the word "truthfulness" is used, he said, even though truth is defined as "good faith" and not "objective truth."

Mr. Horton believed that the wording allows an inquiry merely on a conclusionary type statement because of the inability of the defense to actually determine what the facts are. This would seem to him to allow a carte blanche inquiry.

Chairman Carson asked if the draft could be restated to state that the defendant must prove there was bad faith on the part of the officer. A case could arise, Mr. Snouffer said, where the officer is reporting what information he has from someone who was a reliable informant in the past but who is now lying to the officer and this information was placed in the affidavit and the warrant issued. Section 31 would prevent the defendant from contesting the truthfulness, he said.

The question arose as to the officer himself lying when trying to obtain the affidavit, but Professor Platt responded that this was not a serious problem in the draft because it is too risky and the officer has the advice of the district attorney's office before he tries to secure the warrant in the first instance.

Mr. Snouffer said he has witnessed this type situation and that even though it will rarely happen, the section is necessary for that one case.

Mr. Paillette spoke of Mr. Dennett's contention that this would be changing existing law by allowing the truthfulness to be questioned

in the statements and affidavits. He asked if ORS 141.150 allows this at the present time. Mr. Dennett replied that case law was that the defendant could not go behind the affidavit on the motion to suppress.

Mr. Kokes referred to the Oregon Criminal Law Handbook, ch 20, which states that going back to the magistrate who issued the warrant is on a motion to controvert rather than a motion to suppress. The point is, Mr. Snouffer said, that there is currently the right to controvert and that section 31 still preserves this right.

If the policy is that the motions will only be allowed in the court in which the case is going to be tried, Mr. Paillette said, there would not be any other forum in which to challenge on this basis because the issuing magistrate would be out under this draft.

Mr. Dennett stated that under the good faith argument he would believe this would necessarily involve revealing the identity of the informant which to him is confidential in existing case law.

Section 32 contains protection to the identity of the informants, Mr. Paillette said, but Mr. Dennett argued that if good faith is going to be made a provision, the state would have to reveal the identity to litigate the question. It may have to be revealed to the court, Mr. Paillette said, but that section 32 provides that it can be done in camera.

Professor Platt said that if the court has to decide if the officer was acting in good faith and the only way it can is by the identity being revealed, the court will seal the information from the defendant in the appropriate circumstance. The informant may have to testify before the court and the section could preclude the defendant from being present.

Chairman Carson asked if the section could be put on the affirmative and challenge the good faith of the affiant which he believed was the intent of the draft. Rather than challenge the truthful testimony of the officer, the defendant would be challenging his good faith at a hearing wherein only the officer would be questioned and the informant's identity would not be revealed.

Mr. Kokes stated that one of the problems is that there would be a situation where the police obtain search warrants based upon probable cause which itself is based upon hearsay from the informant. The way the law has been, the informant is insulated against disclosure and they can continue to utilize him. By allowing an attack by merely challenging the truthfulness of what goes into the affidavit, it then puts the burden on the state of going to trial on the search warrant affidavit and disclosing the informant's identity. He felt that as a practical matter the court could never get to the bottom of whether or not there is a truthful affiant unless there could be a complete hearing wherein the defendant could cross-examine the informant.

Chairman Carson was of the opinion the risk is now run when the officer requests a warrant and his grounds are his confidential informant. The court, he said, could choose not to believe the officer and refuse the warrant although in most cases the informant has been relied on in the past and this is shown in the affidavit which gives the court reason to issue the warrant. This is the same point that will be tried under this section and in most cases that would be enough to block the challenge, he believed.

Mr. Kokes thought it logical that the defendant would utilize this section to produce his own witness and take the fact situation right out of the affidavit by having the witness state that it did not happen that way. Chairman Carson responded that the defendant would have to prove the officer knew that it did not happen that way and that he was in bad faith. This is why he felt the section should get away from truthful testimony because then it would be bringing in the question of whether it was factually true.

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Mr. Kokes observed that the defendant may allege that the officer was not in good faith or that he lied and he could then proceed to attack the instrument and have a hearing on whether or not the state's evidence was good. On the other hand, if the defendant attacks the source of information and says that the informant lied to the officer, who in good faith believed him, would this constitute a basis under this section to attack, he asked. It would not be the case, Professor Platt replied.

Mr. Horton did not believe section 31 changed existing law because the Ronniger case indicates by dicta that if it is set out specifically in the affidavit, the defendant may attack and go beyond the corners of the search warrant affidavit. Generally it is not permissible as a practice where it is not explicitly controvert and subsection (2) indicates this procedure will be followed. Mr. Dennett could see a difference in existing law because it is dicta and has never really been determined.

Chairman Carson suggested the section be written in terms that the moving party could contest the bad faith of the officer making the affidavit. Mr. Paillette agreed with this approach and Professor Platt was asked to rewrite the section using this concept.

Mr. Snouffer asked what the defendant would do if the informant purposely misuses the legal process in order to get the defendant into trouble and state certain things to the officer who then proceeds to get the warrant. There should be some regress to that kind of abuse, he said. Under the present statute, Mr. Snouffer thought the defendant could contest the truthfulness of the information that went into securing the warrant.

Professor Platt asked if Mr. Snouffer meant that instead of stopping at the good faith of the officer, the draft should go further and

look at the objective truth of the evidence that is produced, with the limitations in section 32.

If this is done, Mr. Paillette said he would agree with Mr. Dennett's earlier statement that existing law would then be changed. Mr. Snouffer believed the draft retreats from the existing statute. It talks in terms of a hearing before the magistrate who issues the warrant, Mr. Paillette replied.

Mr. Dennett said that as far as the truthfulness of what was said is concerned, there are cases which held that it cannot go that far. There have been determinations made in his county that it is just to the issuing magistrate and this is what existing law states. Even what is being done in the section to the good faith provision is going beyond existing law, he said.

Mr. Kokes asked if Mr. Dennett's position was that if the motion to controvert level was before the magistrate, he would feel it would be a proper proceeding to attack the truthfulness of the statement.

ORS 141.150, Mr. Dennett replied, refers to the magistrate level, where the district court judge who issues the warrant shall review the affidavit. It does not speak to the motion to suppress level which the draft does.

Mr. Kokes asked if the draft is eliminating the motion to controvert at the magistrate level and incorporating it into the circuit court level in the motion to suppress to which Chairman Carson asked if it is the feeling that the motion to controvert is a right which should be protected.

ORS 141.150 provides:

> "If the person from whose possession the property was taken controverts the grounds of issuing the warrant the magistrate shall proceed to examine the matter by taking testimony in relation thereto."

ORS 141.160:

> "If it appears the property is not the same as described in the warrant or that there is no probable cause for believing that the grounds on which the warrant was issued exist, the magistrate shall cause the property to be restored to the person from whom it was taken."

Chairman Carson indicated this was really a return of property question and not a suppression question. It talks about possession and now that the standards are broadened, he did not feel this would fit unless the defendant owned the property. Chairman Carson suggested it be written into the return section and not the section on suppression.

The subcommittee decided that section 31 contains substantial problems of which the greatest is ORS 141.150. It was the members' recommendation to repeal the statute as it does not fit the new procedure on the circuit court level for felonies, the result being that it must be re-enacted elsewhere and that section 31 be rewritten to relate directly to the false affidavit and stop short of what the motion to controvert seems to touch, which is going one step beyond.

Representative Stults expressed concern as to what happens to the person who, under the motion to controvert, can have his property restored to him when it does not belong to the person who is accused of the crime. He wondered if there was some remedy for that once the statute is repealed. Chairman Carson responded that section 23 covers this phase although it does not cover Mr. Snouffer's problem in that it does not state the seizure was illegal.

Section 32. Identity of informants. The provision of the section is, Professor Platt explained, that where the truthfulness of the testimony presented to establish probable cause is contested, the identity of the informant will be disclosed unless those provisions contained in subsections (1) and (2) are allowed. He reported that the section could not be represented as reflecting present law but did not believe there was any substantial departure from the concepts of McCray v. Illinois.

Mr. Paillette remarked that the section places the burden on the state to show the reason for non disclosure and asked if this is present practice or is it that the person attacking the search warrant has to show a reason for the disclosure of the identity. Professor Platt was of the belief the burden would be on the state.

Mr. Dennett asked if McCray v. Illinois states that the identity of the informant does not have to be produced on an issue of probable cause but merely on guilt or innocence. The problem he could see is that there is no reason to have the confidential informant if he has to testify before the issuing authority. This would not necessarily be done in the court, Professor Platt replied. Mr. Dennett believed that if this format is followed, the main issue is probable cause for a search warrant and anytime this issue is raised, the identity of the informant will be revealed and this is not existing law, he contended.

Chairman Carson remarked that the question would be that the only time the identity would be revealed is when it relates to the good faith of the one making the affidavit but this would not mean that in every case the identity is revealed.

If the reliability of the informant can be established under the standard tests, his identity does not have to be revealed, Professor Platt said, but Mr. Dennett wondered why there is the departure from existing case authority with the draft going one step further to probable cause rather than guilt or innocence.

Chairman Carson remarked that if section 32 was deleted and the affidavit was challenged that the officer does not have good faith and the court agrees with the defendant, there would be no in camera provision and the state would have to produce the informant. He was aware of the danger, he said, but questioned how this would change the law.

It would be changed because at no time now does the state have to reveal the name of the informant and this seems to leave an opening for the courts to order the identity, Mr. Dennett replied.

Professor Platt believed that at the magistrate level, if the court did not believe the officer it could insist on the identity. Although this is true, Mr. Dennett said, the magistrates at the issuing level are open-minded enough to know that if the state complies with the case authority it will not ask for it to be revealed.

Professor Platt pointed out that the law is not changed that much. The trial court where the issue was raised could insist for its own satisfaction that the informant be produced. Mr. Dennett disagreed with this statement and said it was not the law. The issue at the motion to suppress level is not guilt or innocence but probable cause.

Mr. Kokes remarked that the mere identity to the court could not possibly add anything more to the knowledge of the court in deciding any issue in the case.

Chairman Carson suggested deleting the identity of the informant in section 32. This would then leave the court substantially where it now is. The only thing section 31 would say is that the defendant can challenge the truthfulness. It does not talk about the informant, he said.

Mr. Horton disagreed and said the section talks about probable cause. He believed that there are enough safeguards dealing with the informant type situation but the issue becomes at the time of trial whether or not disclosure of the identity is important for guilt or innocence. What the draft does, he said, is revert that standard back to a pre-trial motion which concerns itself with probable cause for the issuing of the warrant, not guilt or innocence.

Mr. Dennett remarked that if section 32 were to remain and require the revealing of the identity at some point in the proceeding at the motion to suppress level, the state might just as well go the third alternate route under State v. Rutherford and take the fact situation where there is a named person in the affidavit, even though it is hearsay, and just forget about confidential informants and name them. This is exactly what the sole result will be, he said.

Chairman Carson was concerned that by keeping section 32, it would seem to encourage the court to go a step beyond and ask for the disclosure. Leaving it out, however, leaves the state where it is now and he would believe the court could require the identity which is then the state's

decision whether it would want to disclose the identity or lose on the motion.

Representative Stults was concerned about the possibility of blowing the informant's cover. He said he knew the difficulty for the state to develop an informant and identification would eliminate his effectiveness.

Mr. Dennett referred to section 31 and asked if the recommendation should be given to the Commission that the judge should see the informant, if it becomes necessary, only in camera.

Mr. Kokes commented that there is a great danger in that area. From a practical standpoint, having the judge see the informant in a secret proceeding is unworkable. He believed it will cause the police to drop the case and make a new one, as they will not want to run the risk of disclosing the informant.

Section 32 was deleted by the subcommittee with the recommendation that the commentary to section 31 reflect the previous discussions and encourage the court to use an in camera proceeding.

Chairman Carson advised those present that this was the sixth and last meeting of the subcommittee covering the two drafts on search and seizure. He explained that when interpreting Preliminary Drafts 1 and 2 they must be read together. These will now be rewritten reflecting the changes requested by the subcommittee, subsequently becoming Preliminary Draft No. 3. Chairman Carson said it would not be his purpose, without a quorum, for the subcommittee to adopt Preliminary Draft No. 3, and proposed to those present that if they had strong objections or re-direction on any sections of the draft they should make their feelings known and it would be advisable to contact Mr. Paillette before the meeting of the Commission at the time the draft will be reviewed.

The meeting adjourned at 3:30 p.m.

Respectfully submitted,

Norma Schnider, Clerk
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February 3, 1972

Criminal Law Revision Committee
Mr. Donald L. Paillette
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Dear Mr. Paillette:

I am writing to you concerning ORS 141.150 and 141.160. Both statutes deal with search warrants and present problems that should be resolved. In essence, both statutes provide for a hearing on a motion to quash or motion to return property in front of the magistrate who issued the search warrant. The magistrate is generally a district judge. For the reasons discussed below, I feel that all motions seeking the suppression of evidence should be filed only in circuit court and that no such motion should ever be filed in district court.

The motion filed under ORS 141.150 is a mo tion to quash which challenges the grounds of issuing the warrant. In effect, this procedure allows the defendant to go behind the affidavit for the search warrant and contest the truthfulness of the statements contained in the affidavit. The motion to quash can only be filed before the issuing magistrate (district judge). ORS 141.150; See State v. Marcus, 2 Or. App. 269, 467 P2d 121 (1970). In other words, if an indictment were returned prior to the filing of a motion to quash or before a hearing was held pursuant to a motion to quash, the issuing magistrate would have lost jurisdiction in the matter, and even if he proceeded to hear the matter, his decision would have no effect. See State v. Stahley, 93 Adv. Sh. 1616, __ Or. App.__, __P2d__ (1971). In addition, since district court proceedings are generally not recorded, a magistrate who was able to hold a hearing on a motion to quash before an indictment was returned, would be making a decision which would become a nullity as soon as the circuit court obtained jurisdiction over the matter. State v. Stahley, supra. It can, therefore, be seen that such a procedure is nothing more than a judicial waste of time.

It should also be pointed out that if the defendant fails to file a motion to quash in the district court, he cannot do so in circuit court. See ORS 141.150. This, then, prevents the defendant from going behind the affidavit in order to test the truthfulness of the statements in the affidavit.

ORS 141.160 provides for a motion for return of property, but again it only allows such a motion to be filed before the magistrate who issued the search warrant. For the same reasons stated above in relation to ORS 141.150, any proceeding under a motion for return of property in district court would be a judicial waste of time.

There is another reason why each of the procedures allowed for under ORS 141.150 and 141.160 should not be in the district court. The reason is that if the State receives an adverse ruling, it has no right of appeal, State v. Stahley, supra, as it would if the proceedings were held in circuit court. ORS 138.060(4).

In order to correct this situation, it would be advisable for legislation to be drafted which states that any motion seeking the suppression of evidence can only be filed in circuit court. See 7 Will. L. J. 450, 465, 466. This would not only solve the problems discussed above, but would also prevent a defendant from turning a preliminary hearing into a suppression of evidence hearing.

Sincerely,

Richard L. Barron

RICHARD L. BARRON
Assistant District Attorney

RLB:rp