Tape 29 - Side 1 - 652 to 690
Tape 30 - Side 1 - 1 to end (Tape begins p. 3)
Side 2 - 1 to 136 (Tape begins p. 15)

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 2

June 5, 1972

Minutes

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

Excused: Representative Robert Stults

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. Jackson L. Frost, Oregon District Attorneys' Association Liaison Committee
Captain Walter S. Hershey, Oregon State Police
Lt. Harold R. Berg, Oregon State Police
Helen Kalil, Multnomah County District Attorney's Office
Mr. John Osburn, Solicitor General, Dept. of Justice
Deputy William R. Probstfield, Dept. of Public Safety, Washington County Sheriff's Office
Captain George W. McCloud, Dept. of Public Safety, Washington County Sheriff's Office

Agenda: SEARCH AND SEIZURE
Preliminary Draft No. 3; May 1972

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

Chairman Carson explained to those present that Preliminary Draft No. 3 is a combination of Preliminary Drafts 1 and 2 and incorporates amendments, additions and deletions proposed by the subcommittee at its recent meetings. The purpose of today's meeting is to discuss all the sections, concur on the provisions and recommend the draft to the Commission at its meeting on June 15 and 16.

Section 1. Definitions. This section, Professor Platt explained, contains material not in the previous drafts. The definitions of "judge" and "police officer" reflect the decision of the subcommittee to limit the authority with respect to the issuance and execution of the search. The definition of judge will therefore eliminate the

power of the justices of the peace, as it concerns only district court and above and the police officer definition will eliminate special deputies, such as railroad detectives, etc.

Chairman Carson asked if the subcommittee was satisfied in defining judge in the draft and that by going back and forth between the various articles if there would be any conflict. Mr. Paillette responded that he did not believe there would be any conflict with respect to either definition. Peace officer, he said, will continue to be a general definition which goes beyond the definition in the section.

Section 2. Prohibition of unauthorized searches and seizures. There have been no changes made in this section, Professor Platt reported.

Mr. Johnson moved the adoption of sections 1 and 2. The motion carried.

Section 3. Permissible objects of search and seizure. The subcommittee had previously not approved subsection (2) of the section but desired it to remain in the draft and contain a negative recommendation for the purposes of review by the Commission. This is reflected in the commentary, Professor Platt reported.

Mr. Johnson moved the adoption of section 3, as previously amended. The motion carried.

Section 4. Issuance of search warrant. No changes are reflected in this section, Professor Platt reported.

Mr. Johnson referred to the term "prosecuting attorney" and asked if this would include a deputy. Mr. Paillette answered affirmatively.

Ms. Kalil inquired if "a police officer" as used in subsection (2) would be confining him to his area of jurisdiction. She wondered if a visiting police officer from Ontario could apply for the warrant under this section if it were in furtherance of an investigation he was conducting in another county. Professor Platt did not recall this point raised in earlier discussions of the draft. He remarked that if the officer from out of the county could convince the prosecutor that he ought to get the warrant, this is ample control by the prosecuting office, although the interpretation would leave open the ambiguity.

Mr. Johnson asked if "prosecuting attorney" should perhaps be defined in section 1. Mr. Paillette replied that "district attorney" would be defined and that it had been discussed in a previous meeting relating to Pretrial Discovery.

Mr. Johnson moved the deletion of "a" in subsection (2), line 4, and the insertion of "any" in place thereof. There were no objections.

Mr. Johnson moved the adoption of section 4 as amended. The motion carried.

Tape 30-Side 1

Mr. Johnson referred to earlier discussions relating to the telephone warrant and asked if any action had been taken by the subcommittee concerning this concept. Professor Platt replied that because of practical difficulties, the subcommittee had decided it would be unwise to introduce this in the draft. Mr. Johnson asked why a statute could not be drafted to delegate power to the Supreme Court to adopt rules in this area. Mr. Paillette said the district attorneys had been invited to submit a draft and had not done so.

Mr. Johnson was of the opinion a statute could be drafted providing a procedure whereby an agency can draft a set of standards for this type of warrant, and suggested members of his staff attempt to draft a provision in this area. Because of the lack of equipment in this area, Mr. Osburn pointed out, an appropriation procedure might be required to get it into effect.

Professor Platt referred to objections made at the time of this discussion by Mr. Snouffer regarding the difficulty the defendant might have when being faced with this type of procedure and spoke of Mr. Snouffer's reference to section 1526 of the California Penal Code. Although it may not be a major stumbling block, he said, it is one the subcommittee should keep in mind.

Mr. Paillette inquired of Mr. Frost as to whether the district attorneys had discussed the telephonic procedure concept. Mr. Frost replied it had been discussed and they believed it would all depend on whether the judges would be receptive. He remarked that he had not been aware the District Attorneys' Association had been expected to try to draft anything in this area, but that he believed they would be interested in making the attempt.

It was the consensus of the subcommittee that an attempt, through the offices of the Attorney General,should be made to draft such a statute. Chairman Carson stated that inasmuch as the Commission will examine the search and seizure draft on June 15 and 16, he felt this matter should come before it at the same time.

Mr. Milbank was asked to express his feelings on the telephonic request concept. He replied that he was completely opposed to this idea.

Mr. Osburn, referring to subsection (1), asked what was anticipated with the use of an application. It was his understanding that the officer or district attorney applies for the search warrant through the affidavit and proposed order and wondered if the application would be a lengthy document which would set out everying that would be in the affidavit or whether it would state only that it is an application that is made and which is based on the attached affidavit. Professor Platt responded that it was not his intention to make the procedure more complicated and that the intent was that the application would also be the affidavit.

Mr. Johnson suggested that the draft state that the application may be made either in writing or orally, although Professor Platt believed it would eventually have to be reduced to writing for the purposes of the court record. Mr. Johnson stated that at the present time all that is presented is the form of the order together with the supporting affidavit and under this draft an application would have to be written also. Mr. Osburn was of the opinion this was not the intent of the draft but it does give this interpretation.

Chairman Carson asked if the approval of the application could constitute the order. There are two ways to do this, Mr. Osburn commented, one as is the practice in federal court where the application is submitted with the words at the bottom of the application saying "It is so ordered" and the other is the process of submitting an order and saying at the bottom "It is so moved." The application, he said, does not necessarily refer to a separate document but refers to the process of submitting the affidavit and the proposed warrant to the court.

Ms. Kalil reported that all things that are being required in the application in subsection (3) of the section are always contained in the affidavit.

Mr. Osburn suggested changing the word "application" to "proposed warrant" which, he said, does describe with particularity the individuals or places to be searched and the things to be seized and follows the requirements of the subsection.

Mr. Paillette then referred to section 6 which sets forth the contents of the warrant and suggested the incorporation of the proposed language into that section, or else insert a reference to section 6 in this section.

After further discussion, Mr. Johnson moved subsection (3) of section 4 be amended to read:

> "The application shall consist of a proposed warrant [shall describe with particularity the individuals or places to be searched and the things to be seized,] in conformance with section 6 of this Article and shall be supported...."

The motion carried.

Mr. Johnson next moved the adoption of section 4 as further amended. The motion carried.

Professor Platt next referred to deleted subsection (2) of section 3 of the draft and advised the members that after this section had been discussed at an earlier meeting, the 7th Circuit has come down in favor of this bracketed material.

Section 5. The hearing. Professor Platt reported the section contains no substantial changes. The word "judge" has been inserted in lieu of "magistrate" and cross-reference changes made. Chairman Carson referred to line 4 of subsection (2) and asked if the word "application" should be changed to "proposed warrant." This would include both the application and the warrant and should remain in the draft, Mr. Paillette said.

Mr. Osburn referred to subsection (1) of the section and asked if this contemplates re-examination of the affiants or whether the consideration of their affidavits is sufficient. Professor Platt replied that he did not wish to require the judge to re-examine the affiants and Mr. Johnson moved to amend the subsection in line 1 to delete "shall" and insert "may." The motion carried.

Mr. Johnson moved the adoption of section 5 as amended. The motion carried.

Section 6. Contents of search warrant. The section contains no major changes, Professor Platt reported.

Mr. Osburn spoke of substantial opposition expressed by the district attorneys and law enforcement officials with respect to paragraph (e) of subsection (2) and also the requirement in section 3 that the search warrant be executed during the daytime, absent a showing of particular circumstances. It was their feeling, he said, that the imposition of an additional restriction of the execution of the search warrant was unnecessary and unwarranted. Professor Platt referred to the margin for error which is built into the draft in section 41 and believed the magistrate should decide whether the warrant would be frustrated if it isn't served until the daytime. The section is authorizing by statute that which is clearly authorized by the Constitution and if the police officer serves the warrant at night he is not violating any constitutional provisions, he said.

In reply to Representative Johnson's question, Professor Platt said that if the warrant had been issued for daytime execution but for some good reason the officer could not execute it at that time, he could perhaps be excused from seeking further permission to serve the warrant at night because of the exigency of the circumstances. Section 41 would then allow the evidence to be introduced.

Mr. Johnson moved the deletion of paragraph (e), subsection (2) and also any reference to daytime-nighttime execution in subsection (3). Voting for the motion, Rep. Johnson, Mr. Johnson. Voting no, Chairman Carson.

Mr. Johnson moved the adoption of section 6 as amended. The motion carried.

Section 7. Execution of warrant. The section contains no substantial change, Professor Platt reported.

In conformance with the amendment made in section 6, Mr. Johnson moved the deletion of "and at the times" in lines 3 and 4 of subsection (1). The motion carried.

Mr. Osburn referred to the second sentence of subsection (1). He was of the opinion that wording of a more general nature might be more satisfactory and asked the reason for making the language more limited. If enacted, he said, the provision would undoubtedly stand for a number of years and it ought to contemplate as many situations as possible.

Mr. Johnson moved the amendment to lines 5 and 6 of subsection (1) as follows:

> "[officers, or] persons [having knowledge of the premises to be searched or the location of the things to be seized,]...."

The motion carried.

Mr. Milbank referred to subsection (4) of the section, and suggested the word "Upon" in line 1 be changed to "Before". This would contemplate after entry and before undertaking the search, he said. The subsection was amended to conform with this suggestion.

Mr. Frost referred to subsection (1), line 3, wherein it states "The police officer charged...." He asked if the draft indicates that it is a particular police officer who would be charged with the execution. This discussion had arisen at an earlier meeting, Mr. Paillette said, and at which time Professor Platt had commented that it was not his intention to single out a particular officer. Mr. Frost then suggested that by using the words "A police officer" rather than "The police officer" it would dispel the question of who is the executing officer.

Mr. Johnson moved the deletion of "The" in line 3 of subsection (1) and the insertion of "A" in place thereof. The motion carried.

Mr. Johnson moved the adoption of section 7, amended as follows:

Subsection (1): delete "and at the times" in lines 2 and 3;
delete "officers, or" in line 5;
delete "having knowledge of the premises to be searched or the location of the things to be seized," in lines 5 and 6.

Subsection (4): delete "Upon" and insert "Before" in line 1.

The motion carried.

Section 8. Scope of the search. Professor Platt referred to the last sentence of the section and the language "which he did not and could not have expected to find" which, he said, reflects the Coolidge rule.

Ms.Kalil presented a hypothetical situation where the officer, on a narcotics raid, finds a dead body. She asked if the officer is still authorized under the section to go ahead and conduct a further search to find a gun. Professor Platt replied that he is not limited by the Coolidge rule because he did not expect to find the dead body, and he would fall back into the probable cause rules with respect to search and seizure.

Mr. Frost was bothered by the words "and could not have expected to find" and was told by Professor Platt that this is the crux of the Coolidge opinion and puts upon the police the duty to anticipate, as well as know, what they can find. The area of narcotics cases will be seriously hampered by this rule, Ms. Kalil reported, as frequently stolen property is found. She did not believe any police officer, after a raid, is going to be able to say that he "could not have expected to find" stolen property.

Mr. Frost expressed concern in that the courts in the future may back off the Coolidge stand and the state would be tied down by a statute. Professor Platt replied that it would only be tied down to the statute until the legislature could be convinced the law should be changed.

Chairman Carson asked those present at the meeting if they believed the interpretation of Coolidge in the draft is the law. Ms. Kalil agreed this was the position of Coolidge but was of the opinion the section should be deleted and let the judges be guided by their own interpretation. If the last sentence is deleted, Mr. Osburn stated, the section would be more restrictive as it would state the officer could search no further. Ms. Kalil suggested this sentence be restated to say that if the officer discovers what is clearly contraband or has reasonable grounds to believe it is contraband, he may take possession of the things discovered and she believed the draft could circumvent the Coolidge issue. Professor Platt responded that Coolidge does not say contraband can't be seized, only that it can't be used in evidence.

Mr. Johnson moved section 8 be amended by deleting in line 9 the words "and could not have expected" and insert "reasonably expect" in lieu thereof.

Mr. Johnson indicated that the commentary should definitely state that the courts may interpret this to mean "could not have expected" but that the subcommittee believes this is the sounder policy decision, and that there is a general concurrence that the draft goes beyond what the Supreme Court would hold today. Mr. Johnson believed there were some circumstances where this rule would be appropriate but did not see any reason to codify it.

Chairman Carson remarked that the legislature and law enforcement officers should be told what the law is and that a law enforcement officer who went this route without a Supreme Court change would be in trouble.

A vote was taken on Mr. Johnson's motion to amend section 8 as discussed. The motion carried.

Mr. Johnson next moved the adoption of section 8 as amended. The motion carried.

Section 9. List of things seized. Preliminary Draft No. 1 had contained a requirement that one or more persons must witness the preparation of the list and this was deleted by the subcommittee at an earlier meeting, Professor Platt reported.

Mr. Milbank asked if the intent of the section would be to require that the list be given at the time of seizure. His interpretation of the section would be that it could be done several hours or days later. The policy of the section, Professor Platt reported, is not necessarily that the list is prepared in the presence of the defendant, only that he gets the list for informational purposes without any unnecessary delay.

Mr. Milbank asked about the multiple suspect arrest. He related a situation whereby the officers, under a search warrant, discover marijuana in a home and all those present are immediately arrested for possession and taken to jail. With the search continuing in absentia the list would have to be prepared and either mailed to the defendant or defendants or taken to the station, he said. The defense would be hampered by this delay.

Professor Platt stated that although he recognized the problem he was not sure that language could be drafted to avoid it, except perhaps to add in the commentary that the policy behind the section is that the defendants are to be apprised with the list promptly.

It was agreed by the subcommittee to insert the word "Promptly" before "Upon" in line 1 of the section, thereby reading: "Promptly upon completion of the search...."

Representative Johnson moved the adoption of the section as amended. The motion carried.

Section 10. Use of force in executing warrant. The section contains no substantial policy change, Professor Platt reported. Mr. Paillette reported that throughout the draft a change was made using the word "person" in place of "individual."

Mr. Osburn asked if there was any difference between the use of force by an officer in executing a warrant and that which is provided in section 33 in executing an inspectorial search. It was his feeling that there was greater latitude for the use of deadly force by an inspector than by a police officer. This was not intended, Professor Platt replied, as the use of deadly force would be the same.

Mr. Paillette was of the opinion that section 10 allows force on less showing than does section 33 because it states it is "justifiable only if the executing officer reasonably believes that there is a substantial risk that the things to be seized will be used to cause death....", whereas in subsection (2) of section 33 it states "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...." Because of this wording in the draft, he believed a stronger showing would be necessary.

Mr. Milbank referred to the phrase "the successful execution of the search warrant with all practicable safety" in line 5. He was concerned that the officer could read this to mean he could use extra pressure in order to make this execution succesful.

After further discussion, the subcommittee deleted "successful" in line 5.

Mr. Osburn expressed concern over the restriction in the second sentence of the section where it states "other than in self-defense." ORS 161.239 (1) (c), in describing the circumstances in which a police officer may use deadly force in effecting an arrest, states:

> "Regardless of the particular offense which is the subject of the arrest or attempted escape, the use of deadly physical force is necessary to defend the peace officer or another person from the use or threatened imminent use of deadly physical force."

Mr. Osburn questioned whether the language pertaining to self-defense should be broadened to the type of language used on the section on arrests, which would permit the peace officer to use deadly force under the same circumstances that he would in effecting an arrest.

With respect to the officer there is no problem, Mr. Paillette said, but there may be some question as to the defense of the third person because of the use of the term "self-defense" and for this reason he believed it advisable to use the same language as was used in the justification section and suggested the sentence be amended to read:

> "The use of deadly physical force in the execution of a search warrant, other than in <u>defense of himself or other persons</u> [self-defense], is justifiable only...."

Chairman Carson questioned having the same protection for the officer in serving a warrant as in making an arrest, and asked if this is the wish of the subcommittee. Mr. Osburn responded that even with this language it would be clear that the statute would not authorize the use of deadly force solely for the purpose of executing the warrant. He believed this policy was understood, and suggested the section contain two separate paragraphs incorporating all the language and stating that force is justifiably only "(a) if the executing officer reasonably believes that there is a substantial risk...." and "(b) if the officer reasonably believes that the use of deadly force is necessary to defend himself or another person...." (ORS 161.239 (1) (c)). Mr. Paillette stated that in the commentary to the tentative draft, it will be pointed out that this is not meant to change the privilege of use of force under ORS chapter 161.

Representative Johnson moved the adoption of section 10 as amended. The motion carried.

Section 11. Return of the warrant. Ms. Kalil asked if an unexecuted warrant, upon return, remains secret or if it becomes a public record. The court has the authority to keep this warrant secret, Professor Platt replied, and is so stated in the commentary to section 5. The draft does not mean to imply that it becomes public knowledge when the police have a definite reason for keeping it secret.

Ms. Kalil referred to the motions which would be made by the defense to see the document, especially when the second one has been executed successfully. Mr. Frost could also see a problem with the press. Professor Platt said that if the warrant was not executed he could see no reason for giving the defendant any kind of notice and could see no reason for any interest in it being expressed by the press. He therefore did not see the necessity for making it clear in the draft that they should be made secret.

Ms. Kalil was concerned about leaving it open and asked that a provision be made that such unexecuted warrant be either destroyed or sealed by the judge. If there were a subsequent warrant, the defense counsel could claim that the statements in that warrant disagree with the earlier statements and make a motion to see such unexecuted warrant, she said. In this case it should be permissible for the defendant to see the other warrant, Professor Platt said, and for this reason they should be sealed rather than destroyed.

Chairman Carson agreed this stipulation should be contained in the draft but questioned whether every unexecuted warrant which is received should be sealed. Professor Platt was of the opinion that all should be sealed and that if this creates a record problem, the legislature could change the requirement.

It was the consensus of the subcommittee that the right of secrecy should be extended to the unexecuted return up to such time as the

subsequent execution is satisfied and that the defendant shall then be given the right to examine the unexecuted return.

Chairman Carson was not satisfied that the secrecy proceedings in section 5 (3) would carry through even though the commentary does describe it on through to the executed return and thought the statutory language should be broadened.

Mr. Paillette remarked that the commentary already indicates that there may be reason for continued secrecy and can be left to the judge's discretion and believed subsection (3) could be continued to show that the secrecy is imposed until the warrant is executed.

The problem could be resolved, Mr. Frost said, by an addition to subsection (1) of section 11 which would state:

> "The judge shall seal and retain the unexecuted warrant and supporting affidavit and it shall remain sealed unless upon good cause shown the judge orders the warrant unsealed."

After further discussion, the subcommittee agreed to amend subsection (3) of section 5 as follows:

> "(3). Secrecy. The proceedings upon application for a search warrant shall be conducted with secrecy appropriate to the circumstances until the warrant is executed."

Chairman Carson stated that the problem relating to the unexecuted warrants should be brought to the Commission's attention at its next meeting.

The subcommittee then returned to the discussion of section 11 and Mr. Osburn asked if there was a need for the police officer's report in subsection (2) to be verified. Mr. Osburn said that earlier he had expressed little enthusiasm about the report of the fact and circumstances of the execution and now wondered if the necessity exists for obtaining a notary public. Professor Platt believed this may serve the function of making an officer more careful and did not believe the verification would encumber the process, but yet that it may not be of any advantage. Mr. Osburn contended that the officer had already done the act and the report serves no direct purpose in executing the warrant. He referred to the requirement that states the officer has five days in which to execute the warrant. By returning the warrant on the fifth day, it would mean he could not make service of the warrant after 5 p.m. on that day. If the warrant is served in the afternoon of that day, there would still be the necessity of the report being verified and would cut down on the time element.

Mr. Frost did not believe this was a useful procedure and said that all that is needed to know is that this is what the officer claims,

and whether he is under oath would not seem to him to make much difference as the officer is already aware that he can be later impeached if he changes his story.

Chairman Carson was of the opinion the verified report should be eliminated in the subsection and the subcommittee agreed to delete the word "verified" and insert "signed."

Mr. Osburn moved the adoption of section 11 as amended. The motion carried.

The subcommittee recessed for lunch at 12 noon and reconvened at 1 p.m.

Because of the shortage of time in reviewing the entire draft, Professor Platt called attention to those sections only where major policy changes or change of language had occurred.

Section 13. Permissible purposes. In State v. Murphy, Mr. Osburn said, the police officers had the defendant at the station and observed the material under the fingernails. The police did not arrest him and the Oregon court held it was not necessary to make an arrest for the purpose of making the search. Mr. Osburn asked whether or not the ability to effect this kind of search would still be possible notwithstanding the defendant wasn't arrested. Although the 9th Circuit reversed State v. Murphy, he said that a petition for rehearing was expected to be granted.

Professor Platt referred to section 27 which, he said, was based on the Murphy case and which allowed the police to follow the Murphy rule where there were emergency circumstances. The section had, at an earlier date, been deleted by the subcommittee but with directions that it remain in the draft in order for it to be reviewed by the Commission.

Section 16. Search incidental to arrest for minor offense. This section, Professor Platt reported, reflects the decision of the subcommittee wherein the exception was made allowing the officers to search incident to an arrest in cases of major traffic offenses specified under paragraphs (a), (b) and (c).

Section 17. Custodial search. Representative Johnson asked for an explanation regarding the special note contained on page 41 of the draft. This was a major policy decision, Professor Platt explained, and that the subcommittee did not believe that the officers should have any right to search a person's car where the search is not related to the arrest.

Representative Johnson was of the belief it was more detrimental to the officer in not inventorying the car. This device has been used by some officers, Professor Platt responded, to seize evidence which they had no idea was there, which practice is unacceptable under the Fourth Amendment. The subcommittee did not wish to leave the officer

open to an accusation of theft but believed this should be the object of a separate piece of legislation elsewhere in the Code and not related to the search and seizure section. The officers, he said, still have the Carroll authority to search where they reasonably believe there is contraband in the car. A procedure, he believed, could be adopted whereby the police would be allowed to take an inventory of the car but not allowed to use the evidence.

Mr. Osburn disagreed with this statement. He said that the police feel that if the Commission wishes to decide as a matter of policy that there will not be inventory searches, they will not occur. But he felt it intolerable for them to be placed in a position where they were civilly obligated to conduct an inventory of the car and then not allowed to use the evidence.

Section 18. Search of the person incident to arrest. There was substantial redrafting of the section, Professor Platt explained, but which was only for the purposes of reflecting Schmerber language. The section was originally drafted with a reference to taking of blood samples and subsection (4) now deals in detail with the taking of the samples, making it subject to medical practices in a hospital environment and is the same language used in the Schmerber case.

Mr. Osburn expressed concern over all the sections and stated that he believed that to a large extent they represent retreat with respect to the prosecution. One of particular concern to him is subsection (6) of the section which states that documents taken from a person cannot be read and contended this provision which forbids the officer to read the documents in the defendant's possession unwise. Ms. Kalil pointed out that in many cases it is the only way to establish the identity of the defendant.

Professor Platt responded that the Oregon Supreme Court does not go as far as what Mr. Osburn suggests and does not reflect present law. The invasion of the privacy does not mean that everything is subject to examination.

Mr. Osburn stated he could see the policy distinction between the person and the automobile but related instances where stolen credit cards were found on the defendant at the time of arrest. If the officer finds something which looks like a credit card and turns out to be incriminating, Professor Platt believed it would be within the scope of police authority to seize it, but if while looking for the credit cards the officer finds a slip of paper which clearly is not a credit card and he reads it, even though it turns out to be incriminating and unrelated to the arrest, this is a violation of the privacy beyond the purpose of the arrest.

Professor Platt contended that the purpose of the custodial search is not to find evidence of a crime; that has already transpired when

he was arrested. The purpose is to keep weapons and contraband out of the jail. If taken beyond that, it would be conducting a general type search and which is banned by the Fourth Amendment. Mr. Osburn stated that the courts have not held this to be banned and therefore the subcommittee is making a policy decision in saying it is banned.

Section 23. Required warning preceding consent search. Ms. Kalil asked if this section reflects the Williams case. Professor Platt replied that subsection (2) reflects the Williams case with respect to the person in custody but also extends a warning of a limited nature to persons not in custody in subsection (1).

Section 26. Vehicular searches. Professor Platt reported the section reflects the Carroll doctrine search and existing law. Subsection (2) gives the officer the authority to search the occupants and this may violate the case of U. S. v. Di Re, he said, but it is believed that the Supreme Court would no longer hold that the occupants of the car ought not to be searched.

Section 27. Emergency search of the person. Professor Platt explained the section reflects the Murphy rule and which had been deleted by the subcommittee but with the recommendation it be reviewed by the Commission.

Section 28. Search of open lands. Mr. Osburn asked if this section represents Hester or Katz, or both. Professor Platt replied that it represents the Stanton case which, along with Katz led to the rewording of the section. It was an attempt to reflect the existing rule, Katz.

Section 31. Inspectorial search by consent. At the direction of the subcommittee at an earlier meeting, Professor Platt reported, an addition is contained in subsection (2) with the requirement that the officer shall advise the person his right to refuse to give his consent to search. Sections 31, 32 and 33 deal only with inspectorial searches of which are a police regulation but not pursuant to a business license. Licensed searches are treated differently and are contained in section 34. To make it easier for the inspection, the subcommittee had deleted the prior notice requirement and a comment regarding that change is noted in the last paragraph of the commentary to section 31.

Section 34. Miscellaneous special searches and seizures. Inasmuch as section 34 deals directly with the problems related by Captain Hershey at a previous meeting, he was asked to present any comments he may have with respect to the section.

Captain Hershey expressed approval of the section and stated that his interpretation of it takes care of his problems relating to the game division of the Oregon State Police.

Professor Platt reported the section to be unique - he did not believe another one existed in the United States which handles the

situation in such a way. Rather than imposing rules on the division by someone who does not understand the specific problems, the draft provides for an administrative set of rules which are adopted pursuant to the general standards of the statute. The state agency involved who has search authority under licensed activity works out the administrative rules for the search, submits them to the Attorney General and which must be approved by him.

Tape 30 - Side 2

Section 36. Notice of seized items; disposition of stolen goods. Ms. Kalil referred to subsection (3) where it is stated the stolen things seized shall be promptly returned to the rightful possessor. She asked if this meant after trial and after it had been used as evidence. The provision for postponement of return is contained in subsection (3) of section 37, Professor Platt replied.

Section 38. Motions to suppress evidence. Subsection (2) of the section is responsive to the State v. Stahley case, Professor Platt reported.

Mr. Milbank asked if the district attorney's notice to the defendant will remove the current problem of standing on the motion to suppress. Mr. Osburn remarked that if the state says it will use certain evidence, it does not necessarily mean the defendant will have standing to object to it. Professor Platt referred to the subcommittee's decision to remove any restriction on standing and which is reflected in section 40.

Professor Platt next referred to the last paragraph in the commentary to section 38 which states that if the defendant successfully moves to suppress evidence in the district court, the district attorney cannot use the suppressed evidence if he later charges the defendant with a felony.

Section 39. Appellate review of order denying motion to suppress evidence. There is a substantial revision from the original draft, Professor Platt reported. The reference to the state's right to appeal was deleted from the section but it will exist elsewhere. Also deleted was the provision that the order denying the motion to suppress was reviewable by the defendant, irrespective of his plea.

The concept in section 39 had previously been approved by the subcommittee, Professor Platt said.

Mr. Osburn expressed disapproval of section 39. He spoke of numerous appeals from orders suppressing evidence. Professor Platt said this would allow the defendant to litigate the matter before trial; there is no 60-day problem which exists as the defendant, by his own motion, is delaying the 60 days. The object to be served is that where the only issue is where the evidence can be used against the defendant, which happens in many cases, the trial will be eliminated if the defendant is successful. If he loses on his appeal he would undoubtedly not go to trial.

Mr. Osburn referred to the word "substantial" in line 4 of the section and believed this wording could create two or three appeals by the defendant. Professor Platt contended this word would avoid frivolous appeals. The problem Mr. Osburn could see is that if the motion to suppress is denied, the defense then files a notice of appeal to the Court of Appeals; there is then the petition for rehearing filed followed by a petition for review in the Supreme Court and ends with the 90 days in which to seek certiorari. He would have no objection to it if the motion to suppress would actually be dispositive of the case. This is the purpose of the section, Professor Platt responded.

Section 40. Standing to file motion to suppress. This section reflects the open standing rule recently adopted in California. If the evidence is going to be used against the defendant, he has standing to move to suppress, regardless of from where or from whom seized.

Section 41. Determination of substantiality of motion to suppress. This section is a safety valve, Professor Platt said, and operates in favor of the police. As to what constitutes a "substantial violation" the subcommittee had directed that the commentary speak to what constitutes legislative history on the point, which is contained on page 108 of the draft, and which is in the nature of a harmless error rule.

Mr. Osburn asked how this correlates with the federal rule about "harmless beyond a reasonable doubt." That rule would apply, Professor Platt explained, because it is a constitutional requirement and would have to be considered by the court. Where the violation of the police is not of a constitutional, but of a statutory precept, such as violation of a knock and announce statute, the court would have the draft to review as to what is substantial; if the violation by the police is viewed as a constitutional minimum then he believed the Oregon courts would say it could not be applied. Professor Platt hoped that the tendency would be that the Oregon Supreme Court would move in favor of the police because it is something the legislature believes reasonable.

Mr. Osburn asked if the substantial violation concept goes to violations of the Fourth Amendment to which Professor Platt replied it did not. What the draft states then, Mr. Osburn observed, is that if there is a violation of the Fourth Amendment which the federal courts would find, there is still the rule that harmless error must be established beyond a reasonable doubt, as this section only applies to statutory violations.

Chairman Carson said that although the entire draft would be presented to the Commission, only sections 1 through 11 will be presented as being fully adopted because the same subcommittee members were not present at each meeting. He told those present that if there were suggestions or comments they wished to make regarding the draft, it would be most helpful to the Commission to receive these in draft form.

The meeting adjourned at 3:15 p.m.

Respectfully submitted,

Norma Schnider, Clerk
Criminal Law Revision Commission

June 16, 1972

Members Present: Senator Anthony Yturri, Chairman
Senator John D. Burns, Vice Chairman
Mr. Donald R. Blensly
Senator Wallace P. Carson, Jr.
Mr. Donald E. Clark
Representative George F. Cole
Representative Leigh T. Johnson
Mr. John W. Osburn representing Attorney General Lee Johnson
Representative Norma Paulus
Mr. Bruce Spaulding

Excused: Judge James M. Burns
Mr. Robert W. Chandler
Representative Robert M. Stults

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

Also Present: Mr. Rick Barron, Assistant District Attorney, Coos County
Lt. Harold R. Berg, Oregon State Police
Mr. Jack Frost, District Attorney, Linn County, representing District Attorneys' Association
Lt. Roger Herendeen, Oregon State Police
Mr. M. Chapin Milbank, Chairman, Oregon State Bar Committee on Criminal Law and Procedure
Mr. Don L. Newell, Chief of Police, Beaverton
Mr. Phil Roberts, District Attorney, Crook County
Mr. Ron Sherk, Americans for Effective Law Enforcement, Oregon City
Mr. Howard Weese, Americans for Effective Law Enforcement, Portland

Chairman Yturri called the meeting to order at 9:30 a.m. in Room 309 State Capitol.

Search and Seizure; Preliminary Draft No. 3; May 1972

SEARCH AND SEIZURE BY CONSENT

Section 21. General authorization to search and seize pursuant to consent. Professor Platt explained that section 21 was the general authorization to search pursuant to a consent.

Mr. Barron noted that the definition of consent defined the term as a statement to the officer. He suggested that affirmative conduct

a weapon by definition, but he could nonetheless seize it even under a stop and frisk. In other words, the problem was that Article 5 referred to both search and seizure whereas Article 2 related only to seizure and not the search.

Mr. Gustafson concurred and suggested that subsection (1) be amended to read:

> "The following are subject to search and seizure under Article 5 and seizure under Article 2."

Professor Platt commented that as he recalled the opinion in Terry v. Ohio, the United States Supreme Court held that a frisk was a search. In light of that opinion, a distinction could not be made between the frisk and the seizure.

Mr. Blensly stated that inasmuch as section 2 had been eliminated, the stopping of persons in and of itself would cover what should be covered and reference to Article 2 need not be included in this Article at all.

After further discussion, Mr. Blensly moved to delete the following language from subsection (1) of section 3: "and Article 2 [Stopping of Persons]". Motion carried.

Mr. Osburn said he would feel more comfortable with the language of paragraph (c) of subsection (1) if it read:

> "Evidence of or information concerning the commission of a criminal offense;"

His proposal was designed to make it more clear that the provision included evidence as well as information.

Mr. Osburn then moved to revise section 3 (1) (c) as set forth above. Motion carried.

Senator Carson moved to adopt section 3 as amended and, as recommended by the subcommittee, to exclude subsection (2). Motion carried unanimously. Voting: Blensly, Burns, Carson, Clark, Cole, Johnson, Osburn, Paulus, Spaulding, Mr. Chairman.

At this point the Commission recessed for lunch, reconvening at 1:30 p.m. with the same members present as attended the morning session. Also present were Mr. Barron, Mr. Frost, Chief Newell and Mr. Roberts.

SEARCH AND SEIZURE PURSUANT TO WARRANTS

Section 4. Issuance of search warrant. Mr. Paillette indicated that section 4 was the section to which the district attorneys and Mr. Osburn had proposed to add the telephonic warrant provisions. The

two proposals, he said, did not differ in substance. He also called attention to the penciled changes in section 4 which reflected the revisions approved by the subcommittee at its last meeting. Mr. Paillette explained that the telephonic warrants were designed to take care of those counties which had one or more justices of the peace and a circuit judge whose territory included two or three counties but no district judge.

With respect to subsection (2) of section 4, Mr. Blensly said he was concerned over two situations that could arise. The first was one where a search warrant was to be obtained in another county. For example, he, as district attorney of Yamhill County, could telephone the district attorney of Umatilla County and give him the necessary information to request a search warrant. That district attorney then should be able to make application for a warrant even though he was not the district attorney who had jurisdiction over the offense. The second situation was where the city attorney began the investigation and then decided he did not want jurisdiction but would rather it be taken to state court. Mr. Blensly's point was that he did not see a need to restrict the prosecuting attorney to the one having jurisdiction over the offense.

Mr. Paillette pointed out that the Bar committee also recommended deletion of the language, "having jurisdiction over the prosecution of the offense or offenses with which the warrant is sought," for the reasons given by Mr. Blensly.

Mr. Blensly then moved that subsection (2) of section 4 be amended to read:

> "Application for a search warrant may be made only by a prosecuting attorney or by any police officer."

Motion carried.

Representative Cole asked if the draft would prevent the municipal judge from issuing a search warrant at the request of the city attorney. Chairman Yturri replied that a municipal judge was not included in the definition of "judge." Representative Cole then asked if it would be necessary for the city attorney to obtain search warrants for violation of city ordinances from the district judge. Senator Carson indicated that the subcommittee had not discussed that question.

Mr. Paillette asked if a municipal judge could issue search warrants under present law and was told by Professor Platt that he could if he had the powers of a justice of the peace but not because he was a municipal judge.

Mr. Clark commented that the draft contained a policy decision curtailing those who could issue search warrants and by that decision was saying that search warrants should be used sparingly and in matters of some consequence. It would therefore be inconsistent to allow

Section 7. Execution of warrant. Professor Platt explained that section 7 contained the "no-knock" provision and permitted police officers to serve a warrant without announcing their presence under any one of the circumstances set out in subsection (3). It reflected the present law in Oregon, he said.

Mr. Paillette noted that the Bar committee suggested including "peril to the safety of others" in subsection (3) which he believed to be consistent with existing law and with the rationale of the provision. It would apply to anyone assisting the officer in the execution of the warrant. Chairman Yturri expressed approval of the proposal.

Mr. Spaulding moved that the staff make the appropriate amendment to subsection (3) to include peril to third parties as well as to the officer. Motion carried.

Representative Paulus noted that subsection (1) of section 7 should be revised to make it consistent with section 6 as amended.

Mr. Spaulding moved to amend the first sentence of subsection (1) to read:

> "A search warrant may be executed only within the period and at the times authorized, and only by a police officer."

Motion carried.

Mr. Paillette pointed out that the Bar committee recommended that subsection (4) include a provision for postponing reading of the warrant under exigent circumstances. He said the proposal would be consistent with the arrest warrant law. Senator Burns asked if it was contemplated that a copy of the warrant would be given to the accused.

Professor Platt indicated that the subcommittee had taken action contrary to the proposed amendment and read from the minutes of Subcommittee No. 2, 6/5/72, p. 6:

> "Mr. Milbank referred to subsection (4) of the section, and suggested the word 'Upon' in line 1 be changed to 'Before'. This would contemplate after entry and before undertaking the search. . . . "

Inasmuch as the subcommittee had approved Mr. Milbank's proposal, it would indicate that their preference was to have the warrant read to the accused before any search or seizure was undertaken.

Chairman Yturri commented that there would be circumstances where it would be more prudent not to read or serve the warrant prior to the search. Mr. Blensly agreed and added that it was somewhat ludicrous to give the police authority to break down the door and then require them to stand and read the warrant.

Professor Platt explained that subsection (3) contained the knock and announce provision and under that subsection it would not be necessary for the officer to stand and read the warrant. He also noted that the district attorneys had proposed to insert at the beginning of subsection (4), "Except as provided in subsection (3),". The members agreed that adoption of that suggestion would resolve the problem under discussion.

Mr. Spaulding moved to amend subsection (4) of section 7 to read:

> "Except as provided in subsection (3) of this section, before undertaking . . . . "

Motion carried.

Mr. Spaulding then moved to adopt section 7 as amended. Motion carried unanimously. Voting: Blensly, Burns, Carson, Clark, Cole, Johnson, Osburn, Paulus, Spaulding, Mr. Chairman.

Section 8. Scope of the search. Professor Platt explained that section 8 limited the scope of the search to that authorized by the warrant and also permitted the seizure of things in plain sight subject to the *Coolidge* rule.

Mr. Paillette noted that the Bar committee recommended deletion of section 8.

Following a brief discussion, Mr. Spaulding moved the adoption of section 8. Motion carried unanimously with the same members voting as had voted on the adoption of section 7.

Section 9. List of things seized. Section 9 was previously amended by the Commission in connection with the discussion of section 25. See page 27 of these minutes.

Mr. Spaulding suggested the second sentence of seciton 9 might cause some trouble if, for example, the accused should escape and the list could not be prepared in his presence.

Mr. Paillette read from the minutes of the Bar committee's meeting their recommendation with respect to section 9:

> "Members of the committee pointed out numerous difficulties that could arise from the requirement that the list be prepared in the presence of the person to whom the receipt is to be delivered. It was argued that ORS 141.120 accomplishes the same purpose as this section without the problem just mentioned. However, the present statute is limited to searches made under a warrant. It was moved, seconded and passed to recommend that section 9 be deleted and replaced with an amended ORS 141.120 from which the language 'under a search warrant' is deleted."